

## Book Review\*

*Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases.* Richard C. Cortner. Lawrence, Kan.: University Press of Kansas, 2001. 225p. \$29.95.

Reviewed by Brannon P. Denning\*\*

¶1 Title II of the Civil Rights Act of 1964, which guaranteed the access of all persons to places of public accommodation, was one of the most significant pieces of legislation in our nation's history. The story of the Act's passage is a thrilling one, and one that has been well told.<sup>1</sup> In *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*,<sup>2</sup> Richard C. Cortner bookends histories of the Act with a rich account of the two Supreme Court cases that upheld Title II—an event scarcely less important than the passage of the Act itself. Drawing upon court transcripts, interviews with participants, and the internal papers of the Supreme Court justices themselves, Cortner has successfully wrought what will likely be regarded as the definitive analysis of these historic cases.

### The Civil Rights Act of 1964: An Idea Whose Time Had Come—Again

¶2 The first civil rights act dealing with public accommodations was passed by Congress in 1875, pursuant to its power to enforce the provisions of the Fourteenth Amendment.<sup>3</sup> The 1875 Act prohibited certain forms of private race discrimination and guaranteed all persons “the full and equal enjoyment of the accommodations of . . . inns, public conveyances on land and water, theaters, and other places of public amusement. . . .”<sup>4</sup> In 1883, however, in a group of cases known collectively as *The Civil Rights Cases*,<sup>5</sup> the Act was struck down by the Supreme Court on the ground that the Fourteenth Amendment empowered Congress to reach only discrimination involving “state action,”<sup>6</sup> and not private discrimination. In a curious aside—one that would prove important more than eighty years later—the Court noted that its holding had no application to “cases in which Congress is clothed

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1. See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); see also WILLIAM N. ESKRIDGE JR., ET. AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2–23 (3d ed. 2001).

2. RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND McCLUNG CASES* (2001).

3. U.S. CONST. amend. XIV, § 5.

4. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, 336.

5. 109 U.S. 3 (1883).

6. CORTNER, *supra* note 2, at 2–3.

with direct and plenary powers of legislation over the whole subject, accompanied by an express or implied denial of such powers to the States, as in the regulation of commerce . . . among the several States. . . .”<sup>7</sup>

¶3 During the sit-in cases of the early 1960s, “the Supreme Court was urged to construe the state action doctrine . . . to include the enforcement of state and local trespass laws against those seeking equal access to facilities of public accommodation.”<sup>8</sup> Despite an occasional feint in that direction,<sup>9</sup> the state action doctrine and the *Civil Rights Cases* remained firmly in place. Both were so entrenched that the Kennedy administration declined to invite the Court to reconsider them in the sit-in cases,<sup>10</sup> a move that angered many civil rights activists.

¶4 About the same time, supporters of what became the Civil Rights Act of 1964 were girding for the long debate during the spring and summer of 1964. Among the most important issues facing Congress was deciding on what provision of the Constitution to rely for the prohibition on discrimination in places of public accommodation, Title II, the heart of the civil rights bill.<sup>11</sup> Though legal experts like Gerald Gunther urged Congress to rely upon the Fourteenth Amendment for Title II’s passage,<sup>12</sup> others, like Paul Freund<sup>13</sup> and Alexander Bickel,<sup>14</sup> argued that the safer course would be to rely upon the Commerce Clause, which had been interpreted in the years after 1937 to grant tremendous regulatory power to Congress.<sup>15</sup> Few in Congress were willing to risk an unfavorable Supreme Court decision on the Fourteenth Amendment issue, especially in light of the Court’s decided lack of enthusiasm for overturning the *Civil Rights Cases* apparent in the

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7. 109 U.S. at 18.

8. CORTNER, *supra* note 2, at 4–5.

9. *See, e.g., Shelley v. Kraemer*, 234 U.S. 1 (1948) (relying on the Fourteenth Amendment to strike down racially restrictive covenants in private real estate transactions).

10. CORTNER, *supra* note 2, at 5–7. Though many in the Kennedy Justice Department, including Attorney General Robert Kennedy himself, wanted to urge the Court to reconsider the *Civil Rights Cases*, Solicitor General Archibald Cox counseled a more conservative course, much to the irritation of the activist members of the administration. *Id.* at 5–6. Cox’s counsel proved to be prudent. As the Court’s fractured opinion in one of the sit-in cases, *Bell v. Maryland*, 378 U.S. 226 (1964), showed, there was little support on the Court for discarding the state action doctrine. *See* CORTNER, *supra* note 2, at 11–13. Only three members of the Court, Justices Douglas and Goldberg and Chief Justice Warren, “would have held that the Fourteenth Amendment required the desegregation of public accommodations. . . .” *Id.* at 13.

11. CORTNER, *supra* note 2, at 17.

12. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 201–02 (13th ed. 1997) (quoting Gunther).

13. CORTNER, *supra* note 2, at 25–26.

14. *See* Alexander M. Bickel, *Civil Rights: Civil Rights Act of 1963*, *NEW REPUBLIC*, Mar. 16, 1963, at 9.

15. “In numerous decisions . . . [during the 1930s and 1940s], the Supreme Court repeatedly reaffirmed that the modern scope of congressional power under the Commerce and the Necessary and Proper Clauses included the power to regulate not only interstate commerce itself but also local activities that substantially affected, burdened, or obstructed interstate commerce.” CORTNER, *supra* note 2, at 24. Cortner provides an elegant and succinct summary of the Court’s Commerce Clause jurisprudence from the late nineteenth century and the passage of the Sherman Anti-Trust Act to the Court’s broad construction of the commerce power in *Wickard v. Filburn*, 317 U.S. 111 (1942), that would be very helpful to the lay reader, or anyone else who may have nodded when those cases were covered in their

recent sit-in cases. Ultimately, Congress relied on both provisions, but Title II was “primarily based on the power of Congress under the Commerce Clause. . . .”<sup>16</sup>

¶5 When the Civil Rights Act finally passed on June 19, 1964, President Johnson remarked that “[o]ur troubles are just beginning . . . .”<sup>17</sup> Johnson was fearful of massive, perhaps violent resistance in the South; he also knew that the onus of enforcing the Act was going to be placed on the fifty-five attorneys of the Department of Justice’s Civil Rights Division.<sup>18</sup> Because of the division’s limited resources and the need to carefully pick and choose which enforcement actions to bring, Johnson asked civil rights leaders to call off planned sit-ins and to work with the Justice Department in selecting the cases that would eventually test the validity of the Civil Rights Act. Their cooperation was needed “in order to avoid decisions in the lower federal courts ruling the act unconstitutional and encouraging resistance to the act’s enforcement,” even though the government might ultimately win in the Supreme Court.<sup>19</sup>

¶6 Ultimately, the government’s strategy was for naught. “[B]oth of the cases that ultimately tested the validity of the public accommodations provisions in the Supreme Court were not initiated by the Justice Department but rather by owners of facilities of public accommodations.”<sup>20</sup> Civil rights groups, too, ignored the administration’s request and vowed to test compliance with the Act; they decided to begin in Atlanta, which billed itself as “the city too busy to hate.” Many of its restaurants, however, seemed to find plenty of time to discriminate against Atlanta’s black citizens.

### Oh, Atlanta

¶7 At first, compliance in Atlanta was quick and uneventful; national chains, like the Toddle House restaurants, were among the first to desegregate.<sup>21</sup> But there were holdouts, like “the forty-nine-year-old owner of the downtown Atlanta

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constitutional law class. *Id.* at 20–24. Interestingly, Cortner points out that a number of Republican supporters of the Civil Rights Act, for whom the expansive interpretations of the Commerce Clause under the New Deal were anathema, were quite resistant to relying on the clause to pass the Act. In addition, Republicans were eager to reclaim their mantle as the party of Lincoln. *Id.* at 24 (“The Republicans regarded the Fourteenth Amendment as one of the great Republican achievements of the Civil War and Reconstruction era and its addition to the Constitution in 1868 as the high-water mark of Republican efforts to protect civil rights and to guarantee racial equality.”).

16. CORTNER, *supra* note 2, at 17.

17. *Id.* at 27 (quoting President Johnson’s remark to Roy Wilkins, executive director, NAACP).

18. *Id.* at 27–28.

19. *Id.* at 30. The threat from the lower federal courts was a real one, and possibly an unfortunate legacy of the man in whose memory the Civil Rights Act was passed, John Kennedy. Bickel wrote a series of articles for *The New Republic* excoriating some of Kennedy’s choices for the federal bench, arguing that some were unrepentant racists who sought to frustrate the implementation of *Brown v. Board of Education* at every possible opportunity. *E.g.*, Alexander M. Bickel, *Civil Rights: The Kennedy Record*, NEW REPUBLIC, Dec. 15, 1962, at 11.

20. CORTNER, *supra* note 2, at 30.

21. *Id.* at 32.

Pickrick Restaurant” named Lester Maddox, who pledged defiance.<sup>22</sup> Others, like the owners of another Atlanta establishment, the Heart of Atlanta Motel, decided to test the validity of the law in court.

¶8 One of the Heart of Atlanta Motel’s principal investors was a lawyer named Moreton Rolleston, who had begun planning a legal challenge to the Act as soon as it became law. Two hours after President Johnson signed the act into law, Rolleston tracked down a federal court clerk at home and filed the first challenge in the country.<sup>23</sup>

¶9 If Rolleston was a bumptious, opinionated figure and a segregationist, he was at least a law-abiding one. The FBI was satisfied that Rolleston would remain within the bounds of the law and while “very opinionated [was] . . . fair and forthright. . . .”<sup>24</sup> By contrast, Lester Maddox, the owner of the Pickrick Restaurant (and the future governor of Georgia), was a racist demagogue. Not only did he “vociferously vow that he would never comply with the act,”<sup>25</sup> he threatened black patrons who attempted to be served in the Pickrick with a revolver.<sup>26</sup> The students Maddox ran off at gunpoint filed suit against him, and on July 9 a federal judge “ordered Maddox to show cause why an injunction should not be issued” barring him or his restaurant from engaging in discrimination.<sup>27</sup> Both the Pickrick and Heart of Atlanta cases were scheduled for hearings on July 17. In the meantime, the Department of Justice became involved in both cases—filing a counterclaim in Rolleston’s suit and intervening in the Pickrick case.<sup>28</sup>

¶10 Under the Act, the cases would be heard by special three-judge panels made up of one court of appeals judge and two district court judges. Rolleston’s and Maddox’s cases would be heard by Judge Elbert P. Tuttle of the Fifth Circuit and district court judges Lewis R. Morgan and Frank Hooper. The Justice Department had reason to be optimistic: Tuttle and Hooper were strong supporters of civil rights.<sup>29</sup>

¶11 At the July 17 hearing, Moreton Rolleston set forth the argument to which

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22. *Id.*

23. *Id.* at 35. Interestingly, the restaurant in the Heart of Atlanta Motel, which was leased separately, was already desegregated.

24. *Id.* at 36.

25. *Id.* at 34–35.

26. *Id.* at 37. Maddox was acquitted on state weapons charges arising from the incident with the revolver. *Id.* at 39. Maddox also spoke at a rally whose headliners included the Grand Dragon of the Ku Klux Klan. *Id.* at 38–39. Later in his life, Maddox wrote a self-serving autobiography in which he played down the virulent racism of his Pickrick days. LESTER G. MADDUX, *SPEAKING OUT: THE AUTOBIOGRAPHY OF LESTER GARFIELD MADDUX* (1975). He later claimed simply to be defending private enterprise from the insatiable regulatory appetite of the State. Cortner’s quotations from Maddox’s speeches should go far to dismantle any attempts to rehabilitate Maddox as a populist-libertarian. *Cf.* RANDY NEWMAN, *Rednecks, on GOOD OLD BOYS* (Reprise Records 1974) (Maddox “may be a fool, but he’s our fool/If they think they’re better than him, they’re wrong.”). Newman’s song was an ironic commentary on the North’s self-righteous criticism of race relations in the South, while ignoring segregation in northern cities.

27. CORTNER, *supra* note 2, at 39.

28. *Id.* at 40.

29. *See id.* at 40–41.

he would tenaciously cling throughout the *Heart of Atlanta* litigation: that the *Civil Rights Cases* dictated that the Act was unconstitutional under the Fourteenth Amendment.<sup>30</sup> When Judge Tuttle pointed out that the Commerce Clause was the basis for Title II of the Act and pressed Rolleston to square his position with the expansion of congressional power since 1875, Rolleston conceded nothing. The Supreme Court had “distorted” the Commerce Clause; its decisions over the years “had the effect of gradually wiping out the powers of the state and local governments.”<sup>31</sup> Then, Rolleston “made it plain,” Cortner tells us, “that his challenge to the Civil Rights Act was essentially an ideological protest against the expansion of the power of the federal government.”<sup>32</sup> Having gone to the trouble of filing the first constitutional challenge to the Act, Rolleston did everything but make a serious constitutional argument. Rolleston would adopt the same quixotic position before the Supreme Court.

¶12 Burke Marshall, by contrast, made a smooth presentation defending the Civil Rights Act as requiring nothing more than an application of recent Commerce Clause cases, which made clear that intrastate conduct could be reached if it impacted interstate commerce. Such conduct could be regulated as “necessary and proper” to the interstate commerce power.<sup>33</sup> Marshall argued that Congress could have rationally concluded that discrimination in places like the Heart of Atlanta Motel affected interstate commerce in any of four ways: (1) by inhibiting African Americans from travelling across state lines; (2) by imposing artificial restrictions on the market for interstate products, which might expand if racial restrictions were removed; (3) protests and demonstrations precipitated by segregationist policies interfered with interstate commerce; and finally (4) the pervasiveness of racial discrimination in the South “retarded that region’s economic growth to the detriment of the national economy as a whole and of interstate commerce.”<sup>34</sup> These determinations, while reviewable by a court, should be given “great weight,” Marshall said.<sup>35</sup> In rebuttal, Rolleston could only argue that upholding the Act would mean that, as a practical matter, there was no limit on Congress’s power under the Commerce Clause.<sup>36</sup>

¶13 That afternoon, the judges heard the Pickrick case. The tone was decidedly different from that of the morning’s case, as is evident from the unusually colorful metaphor employed by Maddox’s lawyer. Food coming into the Pickrick to be

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30. *Id.* at 44.

31. *Id.* at 44, 45.

32. *Id.* at 45.

33. *Id.* at 46–47. For support, Marshall cited *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”).

34. CORTNER, *supra* note 2, at 50–51.

35. *Id.* at 48.

36. *Id.* at 52.

served, the lawyer remarked, was no more “commerce” than the food being discharged as waste into the Chattahoochee River after it was “evacuated” from a Pickrick patron.<sup>37</sup> It failed to persuade: less than a week later, the court ordered both the Heart of Atlanta Motel and the Pickrick to comply with Title II of the Civil Rights Act.<sup>38</sup>

¶14 In the *Heart of Atlanta* case, the court accepted Burke Marshall’s argument that Congress had the power to regulate those activities that affected interstate commerce, though they might not themselves *be* interstate commerce.<sup>39</sup> Moreover, the court was unwilling to second-guess congressional determinations of the effects of segregation on interstate commerce; it was enough that Congress’s conclusions had not been manifestly unreasonable.<sup>40</sup> The judges conceded that the Pickrick case was a closer call, but that the restaurant had advertised in interstate commerce and that a “substantial portion” of the food served there had moved in interstate commerce.<sup>41</sup> Immediately following the court’s verdict, Morton Rolleston stated that he would abide by the court’s decision even as he pursued his appeal.<sup>42</sup> Maddox, however, vowed resistance. When Maddox again refused to serve black patrons, Judge Hooper ordered Maddox to show cause why he shouldn’t be held in contempt. On August 13, Maddox in essence gave up the fight and began to lay the foundation for his eventual election as governor of Georgia.<sup>43</sup> With the departure of Maddox and the Pickrick, “[t]he constitutional test of the public accommodations provisions of the Civil Rights Act as they applied to restaurants serving interstate food would come . . . from a hitherto unheard of restaurant serving barbecue in Birmingham, Alabama.”<sup>44</sup>

### Sweet Home Alabama

¶15 The widespread compliance with the Civil Rights Act in Alabama surprised many in the civil rights movement. According to Cortner, “the Birmingham Hotel

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37. *Id.* at 53.

38. *Id.* at 53–54.

39. *Id.* at 54 (footnote omitted) (“It was . . . unnecessary to hold that racial discrimination by hotels and motels was itself interstate commerce . . . but rather it was sufficient to find that such discrimination was a local activity that adversely affected or burdened interstate commerce and that the prohibition of the discrimination was an appropriate means by which Congress could implement its power to regulate and protect commerce.”).

40. *Id.*

41. *Id.* at 55.

42. Rolleston attempted to get Justice Hugo Black to stay the court’s injunction, as did Maddox. Black refused, but wrote that he hoped the Supreme Court would take the cases quickly. *Id.* at 57.

43. “Maddox had vowed to fight the suit against Pickrick ‘all the way to the U.S. Supreme Court to see if Lester Maddox is right or the Constitution is dead.’ While the publicity he had received as a result of his resistance . . . had successfully launched him on the path to the governor’s office in Georgia, he had nevertheless in fact abandoned his constitutional challenge of the act after Justice Black had refused the application for a stay of the injunction requiring him to cease discrimination in his operation of the Pickrick restaurant.” *Id.* at 62.

44. *Id.* (footnote omitted).

Association and Motel Association . . . pledged to comply with the Civil Rights Act, as most public accommodations in the city followed the lead of restaurants and desegregated.”<sup>45</sup> While there was some resistance, the alacrity with which Alabamans seemed to be complying left civil rights activist Constance Baker Motley to remark that she would have “lost every penny I’ve got if I had made a bet.”<sup>46</sup>

¶16 But compliance did not mean acquiescence. “While the act was still being debated in Congress, the Birmingham Restaurant Association retained [a] Birmingham law firm . . . to explore the question of whether the public accommodations provisions applicable to restaurants could be successfully attacked on constitutional grounds if the act became law.”<sup>47</sup> After some research, a lawyer with the firm, Robert McDavid Smith, concluded that it would be futile to challenge the law as applied to “restaurants serving or offering to serve interstate travelers”; however, Smith thought the Act was vulnerable inasmuch as it also applied to restaurants that serve food, “a substantial portion of which had moved in interstate commerce.”<sup>48</sup> If that was a restaurant’s only connection with interstate commerce, Smith thought, a court might be convinced that the connection was too tenuous to be sustained.<sup>49</sup> Smith’s approach was the exact opposite of Morton Rolleston’s scattershot assault on the Act. Instead of challenging the constitutionality of the Act on its face, Smith had in mind a narrow, “as applied” challenge that would be quite fact specific. All that was needed was a suitable candidate to mount the challenge.

¶17 Enter Ollie’s Barbecue. As Smith’s legal style was the opposite of Rolleston’s, so Ollie McClung was the opposite of Lester Maddox. Though McClung’s restaurant did not offer eat-in services for its black patrons, McClung at least offered carryout.<sup>50</sup> Moreover, twenty-six of McClung’s thirty-six employees were black; all shared in the profits of the business since “employees were not paid wages but rather . . . [received] a percentage of the restaurant’s profits.”<sup>51</sup> A deeply religious man, McClung served no alcohol on his premises and made it a policy to refuse service to anyone who had been drinking; profanity was also off limits at Ollie’s.<sup>52</sup> The day after the Act’s passage, McClung’s son, Ollie McClung Jr., turned away a group of blacks who sought eat-in service. The decision to remain segregated, though, pained Ollie senior, who “became concerned that the . . . restaurant would be publicly perceived as . . . blatant[ly] flouting . . . the law.”<sup>53</sup> When the Restaurant Association contacted him about being a plaintiff in a suit

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45. *Id.* at 63.

46. *Id.* at 64 (quoting Constance Baker Motley, an NAACP attorney).

47. *Id.*

48. *Id.* at 64, 65.

49. *Id.* at 65.

50. Apparently Ollie’s Barbecue was in a part of town that was predominately black. McClung feared that if he desegregated, black patrons would prevent nervous whites from frequenting Ollie’s. *Id.* at 66.

51. *Id.*

52. *Id.* at 65.

53. *Id.* at 66.

challenging the law, McClung agreed—but only after meeting with his employees and securing their blessing.<sup>54</sup>

¶18 The Restaurant Association had chosen Ollie's because, although not a member of the association, it seemed to fit Robert Smith's criteria. It was "remote from any state or interstate highways, railway or bus stations, or airports and was therefore likely to have virtually no interstate customers. In addition, Ollie's engaged in no advertising and could thus not be said to be offering to serve interstate travelers."<sup>55</sup> Smith filed suit on July 31 seeking an injunction to prevent the Civil Rights Act from being enforced against Ollie's.<sup>56</sup>

¶19 If Ollie's Barbecue presented the government with a more challenging set of facts than did Maddox's Pickrick, which advertised in interstate commerce and was near an interstate highway, the judges chosen to hear the McClung case posed an even bigger challenge. The two district court judges selected for the three-judge panel were, at best, hostile to civil rights claimants. The appeals court judge, a Kennedy appointee, was a cipher, "but given the prevailing racial attitudes in Alabama" where Judge Walter Gerwin was raised and schooled, "he could be expected to be comfortable with the civil rights view of his colleagues, Judges Lynne and Grooms."<sup>57</sup> Cortner dryly adds: "The composition of the three-judge court in the *McClung* case consequently did not augur well for the Civil Rights Act."<sup>58</sup>

¶20 It certainly did not: a little more than two weeks after the hearing, the judges enjoined the application of the Civil Rights Act to McClung's restaurant.<sup>59</sup>

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54. *Id.*

55. *Id.* at 65.

56. *Id.* at 68. It was precisely for all of the reasons Ollie's was attractive to the Birmingham Restaurant Association that the Department of Justice would strenuously raise procedural objections to a court's entertaining McClung's suit. Smith had anticipated these objections. He was seeking an injunction against the Act in the district court, but "[t]he Department of Justice had not investigated the operations of the McClungs' restaurant, nor had there been any threat of any enforcement action against the McClungs by the department under the Civil Rights Act." *Id.* at 71. Because the Justice Department did not even know that Ollie's Barbecue existed at the time the suit was filed, it could argue that the passage of the Act did not harm McClung in any significant way sufficient to allow him to maintain a suit in federal court. (Title II did not prescribe civil or criminal penalties for refusing to desegregate, but authorized courts to grant injunctions that, if disobeyed, could result in contumacy proceedings, which may involve fines and even imprisonment.) So why hurry to file? One reason was McClung's desire to test the validity of the Act, lest he be seen as a scofflaw for refusing to desegregate. Second, Cortner tells us that Title II permitted one to seek injunctive relief wherever a "pattern or practice" of segregation existed. *Id.* at 67. The Justice Department had commenced one such action in Tuscaloosa; "the suit included twenty-one individual defendants and five corporate defendants. The defendants ranged from the Admiral Benbow Inn and the Holiday Inn Hotel Restaurant to four drug stores that operated lunch counters. Only two of the principal eating establishments in Tuscaloosa were not included because they had voluntarily desegregated." *Id.* Smith was concerned that if the Justice Department commenced a similar action in Birmingham, "it would be difficult or impossible for the McClungs . . . to demonstrate the uniquely local nature of their business, which . . . differentiated it from the much larger restaurants associated with the hotels and motels operated by national chains and catering to interstate customers." *Id.* at 67-68. The Justice Department sought to have the suit thrown out on procedural grounds both at the district court level, *id.* at 74-77, and before the U.S. Supreme Court; it was clear, however, that the Court wished to hear the merits of the arguments. *Id.* at 124.

57. *Id.* at 72.

58. *Id.* (footnote omitted).

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

While acknowledging that “a substantial portion of the food the McClungs served at Ollie’s Barbecue had moved in interstate commerce”<sup>60</sup> and that Congress had extremely broad latitude to regulate even local activities when those activities affected interstate commerce, the court maintained that a line had to be drawn somewhere. Only when local activities “bore such a close and substantial relation to interstate commerce that their regulation was essential to protect interstate commerce from burdens that obstruct the flow of commerce” did they fall within Congress’s regulatory ambit.<sup>61</sup>

¶21 Congress intended to end racial discrimination in restaurants regardless of segregation’s actual effect on interstate commerce, the judges concluded. To do this, it designed the Act so that restaurants whose operations “affected” interstate commerce were covered, then “by legislating what is tantamount to a conclusive presumption that the operations do affect commerce” if they either serve interstate travelers or if a substantial portion of the food they serve has, itself, moved in interstate commerce.<sup>62</sup> But the court could find no rational relationship between the presumption and interstate commerce, and it refused to be satisfied “by mere legislative *ipse dixit*.”<sup>63</sup> While, as Cortner implies, the lack of sympathy for the civil rights movement may have been decisive, even the friendly panel of the *Heart of Atlanta Motel* case would likely have found the facts of the *McClung* case challenging. At the very least, the three-judge panel in Birmingham, while expressing a willingness to uphold the power of Congress to the very limit of its constitutional authority, said it was *unwilling* to authorize what amounted to a federal police power. Whatever its motivation, the court’s decision was a vindication of Robert McDavid Smith’s legal strategy.

¶22 Celebrations were short-lived, however. On September 23, 1964—less than a week after the opinion—Justice Hugo Black stayed the injunction pending resolution of the expected appeal.<sup>64</sup> The Supreme Court granted the appeal, and Chief Justice Warren set the oral arguments for October 5, 1964. *Heart of Atlanta Motel v. United States* would be argued first; followed by *Katzenbach v. McClung*.<sup>65</sup>

### Argument, Deliberation, and Decision

¶23 In his brief and at oral argument, Rolleston insisted that the *Civil Rights Cases* stood foursquare in his favor.<sup>66</sup> The problem with his theory was (1) it was clear that Congress had passed Title II on the strength of its commerce power; (2) the Court in the *Civil Rights Cases* expressly put to one side the question whether

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60. *Id.* at 81.

61. *Id.* at 83.

62. *McClung*, 233 F. Supp. at 825, *quoted in* CORTNER, *supra* note 2, at 83.

63. *McClung*, 233 F. Supp. at 825, *quoted in* CORTNER, *supra* note 2, at 84.

64. *Id.* at 86.

65. *Id.* at 88–89.

66. *Id.* at 90, 100.

Congress could have enacted the 1875 Act under one of its other enumerated powers; and (3) that the commerce power had been interpreted subsequently to encompass all manner of local activities, if the regulation of those activities were necessary and proper to the regulation of interstate commerce.<sup>67</sup>

¶24 The Court rather patiently pointed these things out to Rolleston; Chief Justice Warren at one point urged Rolleston to discuss the Commerce Clause, to little avail.<sup>68</sup> The best that Rolleston could do in dealing with the Commerce Clause was invoke what Dave Kopel and Glenn Reynolds have termed the “non-infinity principle”: that if the concept of enumerated powers is to retain any force, then the power of Congress to regulate interstate commerce has to have a terminus.<sup>69</sup> Rolleston’s inability to deal effectively with questions on the issue from the bench suggests, as Cortner nicely puts it, that Rolleston lost his case “in the spring of 1937, and during the decades of Commerce Clause decisions by the Court that had followed.”<sup>70</sup>

¶25 By contrast, Solicitor General Cox’s argument was almost bland. No new law need be made, Cox stressed. The tools for upholding Title II were ones that the Court had employed many times before, he argued; in fact, the principle involved in the case “is virtually as old as the Constitution itself.”<sup>71</sup> Cox made clear that the United States was relying on the Commerce Clause and did not intend to ask the Court to revisit its holding in the *Civil Rights Cases*.<sup>72</sup> In response to a question from Justice Goldberg asking whether the Court should consider the Fourteenth Amendment at all, Cox replied that “if we were to lose on that [Commerce Clause] ground I might despair of persuading on the other ground, because I think that is so much stronger.”<sup>73</sup>

¶26 The “major premise” of Cox’s argument was that the Necessary and Proper Clause authorized Congress, in the exercise of its commerce power, “to regulate local activities . . . even though they are not themselves interstate commerce, if they have such a close and substantial relation to interstate commerce” that their regulation could either promote that commerce or eliminate burdens and obstructions to it.<sup>74</sup> The government’s “minor premise” was that Congress had before it ample evidence from which to conclude that segregation of motels and restaurants “in fact constitute[s] a source of burden or obstruction to interstate commerce” and

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67. See *supra* note 15 and accompanying text.

68. See CORTNER, *supra* note 2, at 101–02, 103.

69. See *id.* at 104–05; David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban*, 30 CONN. L. REV. 59, 69 (1997); see also Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 376 (discussing the non-infinity principle).

70. CORTNER, *supra* note 2, at 118.

71. *Id.* at 114 (quoting Solicitor General Archibald Cox).

72. *Id.* at 108.

73. *Id.* (alteration in original) (quoting Solicitor General Archibald Cox). Cox conceded, though, that the Court was probably free to consider other possibilities. *Id.*

74. *Id.* at 109 (quoting Solicitor General Archibald Cox).

thus could act to remedy it under its commerce power.<sup>75</sup> Congress's implicit conclusion to that effect, while not preventing the Court from taking a second look, should be sustained as long as there was a rational basis for that conclusion.<sup>76</sup> These principles, he assured the Court, dated from *Gibbons v. Ogden*<sup>77</sup> and *McCulloch v. Maryland*,<sup>78</sup> and had been recently endorsed by the Court in the late 1930s and early 1940s.<sup>79</sup>

¶27 Cox's argument in *McClung* was very much the same as that in *Heart of Atlanta Motel*.<sup>80</sup> Congress had the power to regulate local commerce in the service of regulating interstate commerce, if the local commerce, taken together with other similar instances nationwide, bore a close and substantial relationship to the regulation of interstate commerce Congress was trying to effect. Moreover, there was ample evidence, as there was in *Heart of Atlanta Motel*, for Congress to have determined that "racial discrimination in restaurants that served food received from interstate commerce . . . produce[d] substantial burdens on interstate commerce that Congress had the power to remove."<sup>81</sup>

¶28 First, discrimination produced demonstrations and disturbances, which "tended to interrupt the operations of those restaurants with a resulting reduction in the use by them of food or other goods they would otherwise have obtained in interstate commerce."<sup>82</sup> Second, discrimination in restaurants serving "interstate food . . . artificially narrowed the market for interstate food and other products, since absent this practice the patronage of such restaurants would increase. . . ."<sup>83</sup> Finally, since eliminating discrimination would have the effect of increasing business in restaurants like Ollie's, they would presumably have to buy more food in interstate commerce to satisfy the increased demand.<sup>84</sup>

¶29 It is clear from oral argument that *McClung* troubled some of the justices more than did *Heart of Atlanta Motel*. Cox sensed this and was careful not to signal

75. *Id.* (quoting Solicitor General Archibald Cox).

76. *Id.*

77. 22 U.S. (9 Wheat.) 1 (1824).

78. 17 U.S. (4 Wheat.) 316 (1819).

79. CORTNER, *supra* note 2, at 110–12. Moreton Rolleston would not go quietly. In his rebuttal, he called Cox's arguments about segregation's effect on interstate commerce "hogwash," and returned to his familiar theme that Congress was really out to achieve integration. *Id.* at 115. Then Rolleston admitted what must have been clear to everyone: "I didn't come here to talk about commerce. I didn't come here to argue the question of whether or not this motel has an effect on commerce. Certainly everything that happens in this country has an effect on commerce. . . . [C]ommerce has got to stop somewhere, . . . and . . . the power of the Commerce Clause under the Constitution does not go to people. If you don't accept that fundamental, I'm lost." *Id.* at 115–16 (quoting Moreton Rolleston).

80. See *supra* ¶ 26. Cox continued—both in the United States' brief and at oral argument—vigorously to contest standing of the plaintiffs to bring the case and the propriety of the district court's issuance of the injunction. CORTNER, *supra* note 2, at 119. It became clear at oral argument, however, that the justices were not interested in avoiding a decision on the merits in this case. *Id.* at 127–29.

81. *Id.* at 120 (citation omitted).

82. *Id.*

83. *Id.*

84. *Id.* at 121.

a desire that the Court extend congressional power over commerce, nor did he think that applying Title II to Ollie's required it to do so. In response to Justice Stewart's question whether Congress could prohibit domestic violence as long as the instrument used had traveled in interstate commerce, Cox conceded that there was Supreme Court precedent to support that, but then "he immediately disavowed any intention of asking the Court to adopt such an extreme interpretation of the Commerce Clause."<sup>85</sup> Cox repeated that well-established principles would sustain the Act as applied to McClung's restaurant.<sup>86</sup>

¶30 He concluded his argument by alluding to the Court's decision in *Wickard v. Filburn*, which had held that a farmer's growing of wheat for consumption on his own farm was within the scope of congressional power because of the overall effect on the national economy of such actions taken in the aggregate.<sup>87</sup> "[T]his trickle," said Cox, referring to Ollie's restaurant, "is representative of thousands, hundreds of thousands, of similar trickles, and . . . together they are a great stream, a national economic problem" and thus within Congress's reach.<sup>88</sup>

¶31 In his brief, Robert McDavid Smith, McClung's lawyer, provided a stark contrast to the "blunderbuss nature" of Moreton Rolleston's attack. Smith

made clear . . . that he was attacking the validity of the public accommodations provisions only as they applied to Ollie's Barbecue . . . . Smith therefore did not deny the breadth of congressional power under the Commerce Clause, nor did he deny that under the commerce power Congress could prohibit racial discrimination in some restaurants, particularly those serving interstate travelers. Ollie's Barbecue, however, was not included in the latter category of restaurants . . . given its remoteness from interstate highways, bus stations, or airports and its lack of advertising for the purpose of attracting interstate travelers.<sup>89</sup>

The only reason Ollie's was covered under the Act was the fact that it practiced racial discrimination and served food that had moved in interstate commerce.<sup>90</sup>

¶32 The legislative record, Smith noted, was bereft of actual evidence that discrimination by restaurants that served "interstate food" actually adversely affected interstate commerce. And unlike other legislation such as the National Labor Relations Act, there was no "administrative machinery by which it could be determined whether the local activity . . . in fact adversely affected or burdened inter-

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85. *Id.* at 130–31. The case to which Cox referred was *United States v. Sullivan*, 332 U.S. 68 (1948), in which the Court, over a dissent by Justice Frankfurter, sustained a regulation as applied to a local druggist who had received drugs in interstate commerce. *But see* *United States v. Scarborough*, 431 U.S. 563 (1977) (upholding criminalization of possession of firearm by convicted felon; government need only demonstrate that the firearm had moved in interstate commerce at some point).

86. *See* CORTNER, *supra* note 2, at 131. In his rebuttal, Cox stressed that the Act "did not apply to every restaurant that had ever received food in commerce" and assured the Court that upholding the Act would not "swallow up the distinction between the nation and the states." *Id.* at 141,142.

87. 317 U.S. 111 (1942).

88. CORTNER, *supra* note 2, at 131 (quoting Solicitor General Archibald Cox).

89. *Id.* at 121–22.

90. *Id.* at 122.

state commerce . . . .”<sup>91</sup> In effect, Congress had presumptively declared that local restaurants serving interstate food affected interstate commerce and are subject to regulation, without having cited facts to back up its conclusion.<sup>92</sup> This, argued Smith, went too far.

¶33 But during his argument, questions from the bench were generally skeptical; as his argument ended, Justice Black stated his view that precedent “has settled your basic point against you, which is that the mere ending of commerce . . . doesn’t take away congressional power to regulate in that field in order to prevent burdens on commerce.”<sup>93</sup> However, Justice John Marshall Harlan II, whose grandfather had dissented in the *Civil Rights Cases*, must have given Smith some hope when he described the argument that mere movement of goods in interstate commerce was not sufficient to justify congressional regulation of local activities as “very persuasive.”<sup>94</sup>

¶34 Even before oral arguments, the justices’ clerks had weighed in with initial assessments of both cases.<sup>95</sup> Some of the clerks—the *Civil Rights Cases* notwithstanding—urged their justices to sustain the Act under section 5 of the Fourteenth Amendment.<sup>96</sup> At their initial vote in conference, however, it became clear that most of the justices preferred to rely on the Commerce Clause, or at least would rely on it because that seemed to them the power on which Congress had relied.<sup>97</sup> In any event, there was never any question that Title II would be upheld, the question was whether the Court’s decision would be unanimous.

¶35 The only hint of trouble came with Justice Harlan’s very tentative vote for reversal in *Katzenbach v. McClung*. He explained that “he was uncertain regarding what effects on interstate commerce the government was relying on to justify the application of the act to Ollie’s Barbecue.”<sup>98</sup> If its main contention was that Ollie’s Barbecue could be reached because the food it served had moved in interstate commerce, he had his doubts “since he could not discern any substantial effect on interstate food sales resulting from the racial discrimination practiced by

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91. *Id.*

92. *Id.*

93. *Id.* at 141 (quoting Justice Black).

94. *Id.* at 139 (quoting Justice Harlan).

95. *Id.* at 94–99, 124–26.

96. *See id.* at 95 (quoting memo to Chief Justice Warren), 98 (quoting memo to Justice Harlan), 125 (quoting memo to Chief Justice Warren).

97. *See id.* at 144–49. Chief Justice Warren and Justices Black, Clark, Harlan, Brennan, Stewart, and White indicated at the initial vote that they would affirm the lower court decision in *Heart of Atlanta Motel*, and sustain the Act under the Commerce Clause. Justices Goldberg and Douglas, on the other hand, indicated an intent to rely on the Fourteenth Amendment. Goldberg argued that by relying on the Commerce Clause, the Court would “subsequently get a lot of messy cases testing the validity of the act’s applicability to a variety of businesses.” *Id.* at 149. Of course, it is difficult to imagine a restaurant with fewer interstate ties than Ollie’s Barbecue; if the Act covered McClung’s operation, it would seem to cover nearly every other type of operation imaginable.

98. *Id.* at 148.

[Ollie's].”<sup>99</sup> If, however, the government was arguing that interstate discrimination had a broader effect on interstate commerce in general, then he could vote to reverse the lower court.<sup>100</sup>

¶36 Following the initial conference on October 5, Chief Justice Warren assigned the opinion to Justice Tom Clark, a moderately conservative Texan, in hopes that Clark could write an opinion that wouldn't inflame Southerners. (Alabama's Hugo Black might have been a logical choice, but Warren correctly perceived that Black had become *persona non grata* in his region because of his liberal views on race.<sup>101</sup>) Both of Clark's draft opinions were circulated among his brethren in late November.

¶37 While Justice Clark's opinions would ultimately obtain a majority of the Court<sup>102</sup>—Justices Douglas and Goldberg insisting on relying on section 5 of the Fourteenth Amendment—Cortner relates a very interesting interlude in which Justice Harlan drafted and circulated a dissenting opinion in *Katzenbach v. McClung*.

¶38 While praising its motives, Harlan criticized Congress for “rummag[ing] in the closet of constitutional powers to find a constitutional peg on which to hang” the Civil Rights Act. Harlan noted that if the commerce power had been there all along to prohibit various forms of public and private discrimination, “the people of the United States went to a great deal of unnecessary trouble in passing an amendment to prohibit states from discriminating. . . .”<sup>103</sup> Further, if Congress may reach all activities that “affect” commerce, it may reach everything since “in this modern world, it must be conceded that nearly every phase of daily life has an effect on commerce.” It followed, wrote Harlan, that if “we are to accept a proposition that Congress may, if it chooses, regulate all things which have any effect on commerce, then it should be clearly recognized that the federal structure, as originally conceived, is a dead letter. . . . I . . . am not anxious to accept an interpretation of the commerce clause which leads to such conclusions, and will not do so unless cases decided by this Court compel me.”<sup>104</sup>

¶39 Harlan then proceeded to examine the New Deal cases in which the commerce power had been recently, and dramatically, expanded. As Chief Justice Rehnquist would do thirty years later in the *Lopez* case, Harlan pointed out that *Wickard v. Filburn*, popular perceptions to the contrary, did not authorize a limitless commerce power. “While Filburn grew wheat on his farm for home con-

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99. *Id.*

100. *Id.*

101. *Id.* at 152. For examples of other instances in which opinions were assigned in order to make the outcomes more palatable to the public, see DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 245–46 (1986).

102. Cortner has artfully drawn on the papers of the justices in portraying the sort of give and take that occurs in the opinion-writing process. See CORTNER, *supra* note 2, at 155–59, 166–70.

103. *Id.* at 160 (quoting draft opinion of Justice Harlan).

104. *Id.* at 161 (quoting draft opinion of Justice Harlan).

sumption as food, feed and seed, Harlan pointed out that the total production of wheat for home consumption nationally constituted . . . 20 percent of the average wheat production.”<sup>105</sup> Thus, Congress could not have effectively stabilized the price of wheat nationwide if all locally grown and consumed wheat was beyond its control. From the New Deal cases, Harlan deduced the following limiting principle: the effect of local activities on interstate commerce must be a substantial one.<sup>106</sup>

¶40 Harlan’s question was whether that degree of substantiality was present in restaurants that chose to discriminate. It was not apparent to Harlan; further compounding the problem, the Civil Rights Act contained no specific findings that would explain the connection or offer evidence on which Congress had based its conclusion.<sup>107</sup> It was no answer for Harlan that the Court should presume that a sufficient effect was perceived since Congress passed the Act. “Our system of government,” he wrote, “was meant to be more sophisticated than simple majority rule. The duty rests upon the Court to determine if the facts exist necessary to bring the commerce power to bear. It would be an abdication of the judicial function to do otherwise.”<sup>108</sup> Examining the record, Harlan concluded that Congress had not shown that serving food that had traveled in interstate commerce in restaurants that discriminated, but which otherwise had no connection with interstate commerce, “substantially affect[ed]” interstate commerce.<sup>109</sup>

¶41 Anxious to keep Harlan in the fold, Clark made several changes to his *McClung* opinion. In particular, Clark deleted a portion of his opinion suggesting that Congress could regulate local restaurants, like Ollie’s Barbecue, where allowing them to escape congressional regulation would put those that were reachable by Congress at a competitive disadvantage.<sup>110</sup> Harlan also requested the addition of statements to Clark’s opinion stressing the disruptive impact of discrimination on businesses and the depressing effect that discrimination had on the region as a whole.<sup>111</sup> Clark agreed, and on December 4, Harlan agreed to join Clark’s opinion. In both *Heart of Atlanta Motel* and *McClung*, Clark would speak for a six-person

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105. *Id.* at 162.

106. *Id.*

107. *Id.* at 162–63.

108. *Id.* at 163 (quoting draft opinion of Justice Harlan).

109. *Id.*

110. *Id.* at 167. Harlan also convinced Justice Clark to omit from the *Heart of Atlanta* opinion any discussion whether Congress could reach a hotel serving purely intrastate travelers. *Id.* at 165–66. According to Cortner, concerns about the Court signaling that the Commerce Clause was without limits were not unique to Justice Harlan. Justice Brennan first suggested changes to Clark’s *McClung* opinion. Brennan persuaded Clark not to cite two cases (one was the aforementioned *United States v. Sullivan*) lest the perception of “expanding federal power without a visible stopping place” inflame public opinion against the decisions. *Id.* at 166. In addition, Justice Brennan was anxious that the Court not rely *solely* on the fact that Ollie’s served food that had moved in interstate commerce, preferring to stress as well the impact of discrimination generally on the national economy as a whole. *Id.*

111. *Id.* at 169.

majority; including the concurring opinions from Justices Black, Douglas, and Goldberg, the public accommodations provisions had been unanimously upheld.<sup>112</sup> It was “a total victory for Solicitor General Archibald Cox and the government . . . .”<sup>113</sup>

¶42 The question that Cortner, unfortunately, does not answer is why Justice Harlan went along with Clark’s opinion with only a few minor deletions and additions, particularly when the draft dissent he circulated suggested he had decided to reason from first principles? One can only speculate. Perhaps Harlan convinced himself that the Court’s previous decisions truly did mandate the result reached. Perhaps the addition of language stressing the connection between a truly national problem and the local discrimination at least left open the possibility that regulation of truly local activities could be challenged. Perhaps Harlan felt that discretion here was the better part of valor, that to admit doubt would stiffen resistance to the Act in the South. Whatever the reason, Cortner is to be commended for rescuing Justice Harlan’s draft dissent from history’s wastebasket, particularly since Harlan captured exactly the sentiments of the Rehnquist majority just over thirty years later in *United States v. Lopez*.<sup>114</sup>

### **Looking at *Heart of Atlanta Motel and McClung* through the Lens of *Lopez***

¶43 In 1995, in *Lopez*, the U.S. Supreme Court struck down an act of Congress for the first time in nearly sixty years on the grounds that, in passing the statute, Congress had exceeded its powers under the Commerce Clause; five years later, the Court again invalidated an act of Congress as beyond Congress’s commerce power in *United States v. Morrison*.<sup>115</sup> Both cases have engendered much speculation about how far the Court will go toward restricting congressional power whose limits were thought by constitutional law specialists to be theoretical at best.<sup>116</sup> The Court’s new aggressive policing of the Commerce Clause’s boundaries has also spawned much criticism about “conservative judicial activism”; liberals accustomed to praising the Court now find themselves making common cause with conservatives, who regularly call for limits on the Court’s power of judicial review.

¶44 Cortner’s book, therefore, offers an opportunity for reflection. Cortner himself is sanguine about what *Lopez* and *Morrison* ultimately mean for congress-

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112. Justice Goldberg had agreed to join Clark’s opinions if the latter would agree to add some language about the Fourteenth Amendment. Knowing that any hint that the Court would, in the proper case, reconsider the *Civil Rights Cases* would have triggered a dissent from Justice Harlan, Clark declined Goldberg’s request. Since Goldberg would, in any event, concur, there was little to be gained from acquiescing and risking the loss of unanimity. *See id.*

113. *Id.* at 171.

114. 514 U.S. 549 (1995).

115. 529 U.S. 598 (2000).

116. *See, e.g.*, BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.04[G] (1999 & Supp. 2001) (collecting the relevant literature).

sional power. He writes that “[t]he Court’s decisions . . . do not appear to portend a wholesale uprooting of the principles governing the scope of congressional power under the Commerce Clause that have prevailed since the 1930s and that were reaffirmed in . . . 1964.”<sup>117</sup> Rather, they

reemphasize the point made by Justice Harlan in his unpublished partial concurrence and dissent[:] that there are boundaries beyond which Congress may not go in exercising the commerce power and that a holding that any activity of any kind having any effect on commerce could be reached and regulated under the Commerce Clause would render the commerce power virtually limitless. . . . So long as the Court avoids paralyzing the national commerce power in a manner similar to what occurred prior to 1937, the *Lopez*, *Morrison*, and like decisions may in the long run be viewed as healthy reminders that we live under a constitutional system that imposes limitations on the exercise of governmental power that may not be exceeded even when the power being exercised derives from the Commerce Clause.<sup>118</sup>

¶45 As one who has followed the reception of *Lopez* and *Morrison* in the lower courts,<sup>119</sup> I can attest to the truth of Cortner’s surmise. Nevertheless, there are those who viewed both *Lopez* and *Morrison* as a grave affront to Congress, if not an out-and-out power grab by the Supreme Court.<sup>120</sup> The dissenters in *Morrison* noted that the evidence put forth there was greater than that accompanying the Civil Rights Act of 1964, implying that the *Lopez* and *Morrison* majorities would have invalidated Title II.<sup>121</sup>

¶46 However effective that charge may be as a debating point, it is worth remarking on the differences between Title II on the one hand and the statutes struck down since 1995 on the other. First, the Gun-Free School Zones Act<sup>122</sup> invalidated in *Lopez* did not include an explicit connection between the gun possessed in a school zone and an effect on interstate commerce.<sup>123</sup> Despite *Lopez*, Congress similarly chose not to restrict the civil remedy included in the Violence Against Women Act<sup>124</sup> to those acts that substantially affect interstate commerce.<sup>125</sup> By contrast, Congress was careful in drafting the Civil Rights Act to

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117. CORTNER, *supra* note 2, at 198.

118. *Id.* at 198–99.

119. See BORIS I. BITTKER & BRANNON P. DENNING, 2001 SUPPLEMENT TO BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.04[E]-[G] (2001); Reynolds & Denning, *supra* note 69; Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts (Oct. 1, 2001) (unpublished manuscript, on file with author).

120. See, e.g., Larry Kramer, *The Arrogance of the Court*, WASH. POST, May 23, 2000 at A29; Jeff Rosen, *Hyperactive*, NEW REPUBLIC, Jan. 31, 2000, at 20; Peter Shane, *In Whose Best Interest? Not the States*, WASH. POST, May 21, 2000, at B5.

121. *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

122. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45.

123. *Lopez*, 514 U.S. at 561.

124. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55.

125. *Morrison*, 529 U.S. at 613.

include some sort of “jurisdictional nexus” between the discrimination in places of public accommodation and interstate commerce.

¶47 Moreover, in defending the Act, the government was extremely careful not to suggest that the Commerce Clause was limitless, or that the Court was without power to define the clause’s limits. Solicitor General Cox was explicit in his belief that the Civil Rights Act made no new law beyond what had been settled after 1937. Even Justice Brennan took care that Justice Clark’s opinion not suggest a wide-ranging commerce power that would sweep nearly all private activity within its ambit. In *Lopez*, on the other hand, the Solicitor General was not able to suggest to the Court an area that, under the government’s theory, Congress could *not* regulate.<sup>126</sup>

¶48 Another salient difference between the Civil Rights Act and the acts recently struck down by Congress concerns the nature of the activity being regulated. Title II regulated, well, *commerce*—buying a meal or renting a motel room. That it did so in the service of racial equality is of no consequence; Congress has, since the early twentieth century, had the power to achieve “social” or “moral” ends through its commerce power.<sup>127</sup> The Gun-Free School Zones Act regulated mere possession of a gun in a school zone; the civil suit remedy of the Violence Against Women Act created a federal remedy against gender-based violence. Neither of the acts attempted to regulate commercial activity or was necessary to further the regulation of commercial activity.

¶49 Finally—though this may be hard to quantify—the nature of the problems being addressed were of a different order of magnitude than national economic recovery (in the case of the decisions of the 1930s and 1940s) or remedying pervasive racial discrimination. While not minimizing the seriousness of either school violence or violence against women (or men), there appeared to the Court to be no compelling reason, no rational relationship, between the problem and federal intervention—or at least no rational relationship that wouldn’t be a tacit admission that limitation of the commerce power’s scope was a matter of legislative grace. As the Court made clear in *Lopez* and reiterated in *Morrison*, the cases of the Supreme Court did not require such an interpretation, and it, as Justice Harlan was thirty years earlier, was unwilling to countenance a construction that rendered either the federal structure or the concept of enumerated powers a “dead letter.”

¶50 That the Court itself seems unsure how far to restrict congressional power was confirmed this past Term, when it could have invoked *Lopez* to strike down an Army Corps of Engineers rule recreating isolated wetlands but instead used principles of statutory interpretation.<sup>128</sup> In two other cases, the Court denied certio-

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126. Reynolds & Denning, *supra* note 69, at 373 n.25.

127. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding law prohibiting transportation of women across state lines for “immoral” purposes).

128. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675, 684 (2001).

rari.<sup>129</sup> The Court's behavior after *Morrison* is similar to that following *Lopez*: issuance of a decision of uncertain future scope, followed by a period of quiescence while the courts of appeals wrestle with the application of the Court's opinion in a variety of contests. And, as was true following *Lopez*, post-*Morrison* lower courts have been very conservative (perhaps *too* conservative) in applying it. As of this writing, only one federal statute has been struck down, and even that decision was short-lived since the Sixth Circuit, sitting *en banc*, reversed the three-judge panel.<sup>130</sup> The point is that important economic and social legislation addressing national problems is likely to survive, but that Congress is "on notice" that the Commerce Clause is no longer the legislative blank check it was once thought to be.

### Conclusion

¶51 Richard Cortner has done an exemplary job of bringing to life an important constitutional controversy—one not without implications for today's debates over the Commerce Clause. His prose is lucid, easy to follow for the lay reader, yet fascinating for the specialist. His portraits of the litigators and the litigants are nuanced, and his evidence on the Supreme Court's decision-making process is instructive.

¶52 Most of all, Cortner is to be commended for humanizing the litigants here. Though Moreton Rolleston was committed to maintaining segregation, he was no Lester Maddox. Following the announcement of the Court's decisions on December 14, 1964, Moreton Rolleston, true to his word, immediately complied with the Court's decision, and even expressed the hope that his grandchildren would not even know that there had been such racial strife. The Heart of Atlanta Motel stood, desegregated, until 1973 when it was razed; the Atlanta Hilton and Towers now stands in its place on the same land.<sup>131</sup> And while Rolleston may have been trying to make an ideological statement, as opposed to really trying to win his case, he always did so with scrupulous regard for the bounds of lawful conduct.

¶53 The same cannot be said for Lester Maddox. Unlike Rolleston, Lester Maddox persisted in his defiance of Title II. After amateurish attempts to evade injunction by changing the name of his restaurant, he announced in February 1965 that he was going to desegregate. But when a black man showed up to eat, Maddox closed his restaurant for good. He later opened a furniture store, and was elected governor of Georgia in 1966.<sup>132</sup>

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129. *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001) (upholding portion of the Federal Access to Clinic Entrances Act); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub. nom. Gibbs v. Norton*, 121 S. Ct. 1081 (2001) (upholding Fish and Wildlife Service rule prohibiting the taking of red wolves issued under the Endangered Species Act).

130. *United States v. Faasse*, 227 F.3d 660 (6th Cir. 2000) (striking down the Child Support Recovery Act as exceeding congressional power under the Commerce Clause), *rev'd en banc*, No. 982337, 2001 WL 1058237 (6th Cir. Sept. 14, 2001).

131. CORTNER, *supra* note 2, at 182

132. *Id.* at 182–86.

¶54 Like Rolleston, the McClungs complied with the decision, which had been expected.<sup>133</sup> When black patrons showed up, they were served “without incident”; one of them commented afterwards that “[e]verything was lovely. Lovely.”<sup>134</sup> Ollie McClung Sr. would die in 1989, at the age of seventy-three, but Ollie’s Barbecue, which relocated to suburban Birmingham, is still run by his son, Ollie McClung Jr.<sup>135</sup> In contrast to Maddox, Ollie McClung Sr. comes across as a decent man, fearful of change, but committed to playing by the rules. He agreed to a legal challenge because it upset him that his resistance would be misunderstood. He never sought approbation of white supremacists and insisted when he announced that he would desegregate that race was never the issue. “Our reaction would have been the same,” he explained, “if the federal government had intruded upon our right to manage any aspect of our business, for example, what products to use, dress of customers, etc.”<sup>136</sup>

¶55 But Mr. McClung was a product of his time and his region, and their prejudices were his. At his hearing, when asked by his attorney whether he would voluntarily serve black patrons, McClung replied, “I would refuse to serve a drunken man or a profane man or a colored man or anyone I felt would damage my business and I run a good clean place there”<sup>137</sup>—as if being “colored” was the equivalent of being drunk or profane, or was somehow inherently unhygienic.

¶56 Cortner’s book is a valuable case study in constitutional litigation, as well as an informative snapshot of the legal and political struggle for racial equality in the second half of the twentieth century. *Civil Rights and Public Accommodations* would be a valuable supplement to any course that focuses on constitutional or Supreme Court decision making, or for anyone wishing to put human faces on the litigants about whom no more is often known than that their names appear on the stiles of canonical Supreme Court cases.

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133. Cortner writes that Robert McDavid Smith, the McClungs’ lawyer, “had concluded following oral argument in the *McClung* case that the case was lost. . . . Ollie McClung Sr. had been present incognito during the oral argument before the Court, and Smith had informed McClung as they left . . . that they had no chance of winning.” *Id.* at 186 (citation omitted).

134. *Id.* at 187 (citation omitted).

135. *Id.* at 188. As this review was going to press, I learned that the McClungs have decided to close Ollie’s Barbecue for good. Adam Goldman, *Closing of Ollie’s Ends 75 Years of Barbecue*, BIRMINGHAM NEWS, Sept. 11, 2001, <http://www.al.com/news/birminghamnews/index.ssf?/xml/story.ssf/>. I thank David Moore for bringing this to my attention.

136. *Id.* at 187 (citation omitted).

137. *Id.* at 78.