Vulcan Historical Review

Volume 17 Article 11

2013

A Broad and Sweeping Federal Power: Birmingham Barbecue and Southern Culture in the Crosshairs of the Commerce Clause

Nicholas C. Hosford

A Broad and Sweeping Federal Power: Birmingham Barbecue and Southern Culture in the Crosshairs of the Commerce Clause

Nicholas C. Hosford

Introduction: The Culture Targeted for Change

Ollie's Barbecue, a local, family owned restaurant in Birmingham, Alabama, experienced a year of firsts in 1964. That year marked the first time that a black person entered Ollie's Barbecue and demanded service. Before this happened, Ollie's Barbecue never had an occasion to explicitly refuse service to anyone based on their race. It did so in this case, however, and the restaurant's seemingly law-abiding owners found themselves in open violation of federal law.

Ollie McClung and his son, Ollie McClung, Jr., soon began contemplating a lawsuit that eventually led to the acceptance of desegregation as an irreversible reality in the American mind. Until the U.S. Supreme Court ended that lawsuit in December 1964 with its decision Katzenbach v. McClung, desegregation remained an uncertain struggle.[1]

Ollie's Barbecue opened in 1926, and for thirty-eight years, Ollie McClung never served blacks inside of his restaurant. Although McClung offered blacks a carry-out service, he prohibited these blacks from eating on the premises.[2] Ollie McClung never planned to change this policy, having confirmed his position with all of his employees - white and black - during a meeting in 1964, which took place in anticipation of the new, imminent civil rights law. At the meeting, none of the employees expressed any dissent.[3]

Perhaps nobody thought the matter would materialize into a larger issue. Blacks had many objections about segregation generally, but in reality these grievances never developed into a situation that involved Ollie's Barbecue. This reality changed, however, on July 3, 1964.[4] The day after President Lyndon Johnson signed the 1964 Civil Rights Act, of which Title II sought to prevent discrimination in places of public accommodation, several blacks entered Ollie's Barbecue and demanded service. Upon refusal of service, these blacks immediately recited a "spiel" about how the new civil rights law compelled the restaurant to serve them.[5]

Title II specifically targeted private businesses such as Ollie's. This section of the law provided for injunctive relief against instances of discrimination (based on race, color, religion, or national origin) in places of public accommodation that "affect commerce."[6] The commerce provision implicitly asserted that the Commerce Clause of the U.S. Constitution gave Congress the authority to regulate discrimination in the private sector. Ollie's Barbecue, a private business that participated in commerce, held its

1 Katzenbach v. McClung, 379 U.S. 294 (1964).

2 Katzenbach v. McClung, 379 U.S. 294 (1964), Transcript of Record (No. 543), Complaint, 3-4.

3 Michael Durham, "Ollie McClung's Big Decision." *Life* 57, no. 15, October 9, 1964, 31.

4 Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases* (Lawrence, KS: University Press of Kansas, 2001), 66.

5 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See page 8 of transcript.)

6 Civil Rights Act of 1964, Public Law 88-352, 88th Cong., 2d sess. (July 2, 1964), U.S. Code 42 (2012), § 2000a.

Figure 1. Ollie's Barbecue Restaurant as Located on 902 7th Avenue South, 1959.
Source: © Birmingham, Alabama Public Library Archives.

facilities open to the public, operated in the South, and discriminated based on race. Everyone understood the Civil Rights Act of 1964 to address this specific type of racial discrimination in the South.[7]

The first blacks who entered Ollie's to test Title II no doubt thought that the restaurant amounted to an appropriate target. Situated on the corner of Seventh Avenue South and Ninth Street, Ollie's maintained a patently segregated premises in a predominately black neighborhood, which featured three black schools as well as several industrial businesses that employed many blacks. Many black schoolchildren passed by Ollie's on a daily basis.[8]

These facts lend themselves to the notable irony that, when he testified in the U.S. District Court, Ollie McClung actually argued that his business would decline by "75 or 80 percent" if the court forced him to desegregate.[9]

7 Katzenbach v. McClung, 1964 WL 72713 (U.S.) (Appellate Brief), *Brief of NAACP Legal Defense and Education Fund*, Inc. as Amicus Curiae, 1-4.

8 Katzenbach v. McClung, 379 U.S. 294 (1964), Transcript of Record (No. 543), Complaint, 4.

9 Katzenbach v. McClung, 379 U.S. 294 (1964), Transcript of Record

Plain intuition could have led him to conclude that catering to the majority of potential customers in the area would be good, not bad, for business. Yet McClung, as well as his employees who seemed to assent to his reasoning when he confirmed the policy with them, assumed otherwise. McClung's testimony here provides valuable insight into the culture of Birmingham, and the South, in 1964.

The McClungs believed business could not succeed in a mixed restaurant. McClung assumed that the vast majority of his customers would avoid his barbecue if he offered blacks the same level or type of service that he offered white customers. This assumption implied that many, if not most, whites would altogether avoid eating in any desegregated restaurant than eat in the company of blacks.

History proves that McClung overestimated the adverse economic effects. In 1975, Ollie McClung, Jr. conceded that they basically lost no business after the U.S. Supreme Court ordered him and his father to desegregate the restaurant in the case Katzenbach v. McClung. Ollie's maintained the same "pattern of customers" for at least another decade.[10] The restaurant stayed open for business for another 35 years in its original location.[11] The law technically forced McClung to desegregate his restaurant, but Ollie's nevertheless remained segregated, for the most part, because of the culture, at least initially.

This critical point helps to illustrate the process, and the limits, of cultural change. Katzenbach v. McClung gave new meaning to federal power. The decision effectively brought segregation to its knees. It constrained the ebbing intellectual and cultural legitimacy of segregation. At the same time, it further bolstered and liberated the swelling assent to desegregation. In this manner, the court's interpretation of the law, as an act of government, not only strengthened the government's reach into the economy, but also constituted an effective catalyst to the transformation of culture.

> People went from having, at best, a limited faith in the Civil Rights Act of 1964 to regarding further holdouts of segregation as futile.

Katzenbach v. McClung, an often overlooked case, could not change the hearts and minds of citizens, however. People are free to believe what they want to believe. Although government may force a person's hand, it cannot control the brain. Thus the Supreme Court successfully extinguished the cultural institution of segregation, but it could not change the cultural habit of segregation. By this we mean the practice still occurred naturally, without the aid of any explicit policies. We do not mean that McClung marked the complete end of segregation, and we certainly do not mean that it marked the end of the civil rights movement.[12] President Johnson, when signing the Civil Rights Act of 1964 on July 2, explained that "the reasons [for discrimination] are deeply imbedded in history

(No. 543), Proceedings of September 1, 1964, Testimony of Ollie McClung, Sr., Direct Examination, 79.

10 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See page 15 of transcript.)

11 Don Milazzo, "Basics Remain Unchanged at the New Ollie's," *Birmingham Business Journal* (June 27, 1999), http://www.bizjournals.com/birmingham/stories/1999/06/28/story7.html (accessed September 27, 2012). Don Milazzo, "Ollie's BBQ Closes, but the Sauce Will Live On," *Birmingham Business Journal* (September 23, 2001), http://www.bizjournals.com/birmingham/stories/2001/09/24/tidbits.html (accessed September 27, 2012).

12 Many civil rights leaders continued to campaign on issues concerning "housing, job opportunity and voting and less on public accommodations." See John Herbers. "Civil Rights: South Slowly Yields," *New York Times*, December 20, 1964, Section 4.

and tradition and the nature of man."[13] These three powerful concepts identified by Johnson define a culture. Government action can only go so far to affect cultural change.

By therefore crediting McClung (along with its sister case, Heart of Atlanta Motel v. United States) with ending segregation, we mean only that the Court's decision defeated the institution of segregation.[14] Over the years, continuous government inaction had legitimized this institution. By issuing the McClung decision, the Supreme Court carried out the final action needed to destroy the institution. This culminated in the government totally vanquishing any remnants of cultural faith left in the institution, at least any rational remnants, and in this manner we recognize McClung as a moment of significant cultural change.

July 1964: Before McClung

When blacks entered the restaurant and demanded service in July of 1964, Ollie McClung's son, Ollie McClung, Jr., refused to serve them. He believed that the Civil Rights Act of 1964 constituted an unjust law that amounted to "governmental tyranny." [15] He did not stand alone in this sentiment of an oppressive federal government. In the midst of his 1964 presidential campaign, Alabama Governor George Wallace determined what he felt added up to the "best deal" for the South: "a repealed or at least modified or amended" version of the Civil Rights Act of 1964 accompanied by an initiative for the South that "pledged better treatment from the federal government" than had been experienced "in recent years." In fact, achieving these ends became the stated motivation behind Wallace's entire campaign.[16] At this point, between the Civil Rights Act of 1964 taking effect and the issuance of the McClung decision on December 14, 1964, many white Southerners did not yet believe in the permanence of the new law. For them, a legal or political opposition to the law could still bring about its demise.

These white Southerners only emphasized what many other people suspected as well. The overall response after the passing of the Civil Rights Act of 1964 indicated that Americans, and Southerners in particular, did not have much confidence that the law would affect any permanent, immediate change. This doubt spread quickly, penetrating the minds of many different Americans. The media, both Southern and national, and either intentionally or unintentionally, facilitated it.

The *Birmingham News*, the McClungs' local paper, described some provisions of the law in terms that could have easily aroused resentment among Southern whites. By describing the law as "unprecedented" and "far-reaching," the paper subtly reinforced the notion, held by Wallace and other like-minded Southerners, that the law promoted novelty or injustice.[17]

Some white leaders in the South attempted to foment doubt as to the law's legitimacy. During the Congressional debates over the bill, Senator Howard W. Smith of Virginia described the proposed law as a "heedless trampling upon the rights of citizens" and a "monstrous instrument of oppression."[18] The *Birmingham News* reported that Mississippi Governor Paul Johnson said that "operators of public accommodations should defy the law

13 "Johnson's Address on Civil Rights Bill," *New York Times*, July 3, 1964.

14 Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

15 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See pages 8-9 of transcript.)

16 Hugh Sparrow, "Wallace Says He's in Race to Aid South," *Birmingham News*, July 2, 1964.

17 Associated Press, "LBJ Decides Against Delay," *Birmingham News*, July 2, 1964.

18 E. W. Kenworthy, "President Signs Civil Rights Bill; Bids All Back It," *New York Times*, July 3, 1964.

so its constitutionality can be tested."[19] Under a headline that read "South's Leaders Hold Bill Illegal," the *New York Times* quoted Governor Johnson as saying that there would be "tremendous dangers in the enforcement" of the law.[20] When publicly addressing the federal government about the "implementation" of the law, Governor Wallace begrudgingly described it as "the so-called civil rights bill." He further remarked that it "should and will be tested in the courts on constitutional grounds."[21] Governor John J. McKeithen of Louisiana contended that the law would "hurt the racial situation."[22] These negative statements about the bill indicated that the bill had not yet fulfilled its objective to persuade the culture to accept desegregation. Furthermore, civil rights leaders had not yet accomplished their task of wearing down resistance to change.

Not all white leaders in the South made such emphatic statements, however. Mayor Albert Boutwell of Birmingham seemed more concerned with maintaining civility when he "asked Negroes testing compliance with the law to do so 'in an orderly and peaceable manner.'"[23] Mayor Ivan Allen, Jr. "urged Atlanta's Negroes 'to restrain from any overt acts, particularly in those places that have shown antagonisms to the Negro in the past, and to use these newly granted rights in the normal course of events and over a reasonable period of time."[24] Although these leaders did not share a focused, uniform message about the new law with their more acerbic colleagues such as Johnson and Wallace, all Southern white leaders anticipated there would be problems.

Revealing that opposition to the law extended beyond the confines of the South, New Hampshire Representative Louis G. Wyman also suggested that the bill stood on shaky ground and expressed his hope for the law's demise. The *New York Times* reported him as saying "he would have no fear 'if we had a Supreme Court worthy of the name,' because then the unconstitutional aspects of the bill 'would soon be struck down.'" These types of statements substantiated the sentimentality that the law could be nullified, or at least should be contested.

Other groups also recognized that the law opened the floodgates for dissent, if not outright hostilities. Only two paragraphs after a headline declared, "Long battle over rights ends today," the *Birmingham News* paradoxically predicted that prompt testing of the public accommodations provision would take place in the same spirit as the "sit-ins by Negro students in Southern lunch counters that helped launch the Negro drive for equality that contributed to passage of the bill."[25] The *New York Times* predicted this as well. It reported that Birmingham civil rights leader Fred L. Shuttlesworth's "organization would begin prompt testing of the new act."[26] The fact that they felt it necessary to test the law suggested that blacks, like whites, had a limited faith in the law's ability to end segregation. They had to see it to believe it.

Martin Luther King appeared to share in this limited faith. Black civil rights activists had more to do before they could declare victory over segregation. In the first few days after the passage of the Civil Rights Act of 1964, they had many reasons to be hopeful, having observed that "'White folks act like they intend to do right by this Civil Rights Bill.'"[27] It only took a couple of weeks, however,

19 Associated Press, "Comply, Public Is Urged," *Birmingham News*, July 3, 1964.
20 United Press International, "South's Leaders Hold Bill Illegal," *New York Times*, July 3, 1964.
21 News Rights Bureau, "Gov. Wallace Declines Bid to Rights Talks," *Birmingham News*, July 3, 1964.
22 United Press International, "South's Leaders Hold Bill Illegal," *New York Times*, July 3, 1964.
23 "Negroes Mix Restaurants, Theaters," *Birmingham News*, July 3, 1964.
24 United Press International, "South's Leaders Hold Bill Illegal," *New York Times*, July 3, 1964.
25 Ibid.
26 Ibid.
27 Andrew Young quoted in: Taylor Branch, *Pillar of Fire: America*

before King acknowledged that a "record trail of violent setbacks and mixed results" clearly, and continuously, impeded the objectives of the civil rights legislation.[28] In his *Letter from Birmingham City Jail*, King argued that just laws represented "sameness."[29] However, the most apparent similarity that resulted from the Civil Rights Act of 1964 seemed to come not from its application, but from the reaction it brought about among whites and blacks. Both communities shared a common belief that segregation had not succumbed to the new law. In their minds, the "battle" had not ended.

Contrasted with King, who surely felt somber over this shared belief, some white Southerners could have felt hopeful in light of the apparent anxious resistance to the law. Declining an offer from the Johnson administration to participate "in conferences concerning implementation of the civil rights law," Governor Wallace stated, "My position on this bill is well known." He expressed his belief that "the legislation is unconstitutional and if unchallenged will result in the destruction of individual liberty and freedom in this nation."[30] Legislators debating the bill made similar constitutional arguments.[31] Ollie McClung, Jr. actually used the term "close mindedness" to describe supporters of the civil rights law, at least in respect to the support for public accommodations.[32] Civil rights activists considered their cause a "stride towards freedom," yet at the same time opponents of the civil rights legislation asserted that they were defending constitutional freedoms.[33]

Basing their opposition on a constitutional foundation, opponents of the Civil Rights Act of 1964 felt their cause beamed of righteousness. They likewise showed no shame in their resistance, and indications of such resistance crept up immediately after its passage. This further augmented the belief that the new law's future seemed uncertain, if not in jeopardy. Apparently, the government assumed and anticipated non-compliance with the law. "Officials charged with enforcing the law are hoping for widespread voluntary compliance," the *Birmingham News* reported. The paper then acknowledged, in the very next sentence, that "the government is preparing for courtroom battles and the Justice Department soon will ask Congress for more money to add more lawyers to its civil rights division."[34] Reporting under a headline that read "Rights Law Promptly Tested; Some Resistance Remains," an Associated Press article in the *Birmingham News* reported that Mississippi Governor Paul Johnson "expected some real trouble there when Negroes seek to desegregate public accommodations." The same article described the objections of an Atlanta restaurant operator who "said he would go to jail before he would serve Negro customers."[35] It seemed that everyone believed the country had not yet settled the issue. Both sides prepared to fight for their "rights" in the courts and on the streets.

One need not dig deep to find signs of anticipated resistance, however. The headlines said enough. "Rights law reaction ranges from praise to misgiving," claimed

in the King Years 1963-65 (New York: Simon & Schuster, 1998), 389.

28 Ibid., 389-395.

29 Martin Luther King, Jr., "Letter from Birmingham Jail," found in Robert Diyanni, ed., *Twenty-Five Great Essays* (New York: Penguin Academics, 2002), 116.

30 United Press International, "South's Leaders Hold Bill Illegal," *New York Times*, July 3, 1964.

31 E. W. Kenworthy, "President Signs Civil Rights Bill; Bids All Back It," *New York Times*, July 3, 1964.

32 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See pages 12-13 of transcript.)

33 Martin Luther King, Jr., "Letter from Birmingham Jail," found in Robert Diyanni, ed., *Twenty-Five Great Essays* (New York: Penguin Academics, 2002), 117.

34 Associated Press, "Comply, Public Is Urged," *Birmingham News*, July 3, 1964.

35 Tom Chase, "Rights Law Promptly Tested; Some Resistance Remains," *Birmingham News,* July 3 1964.

the *Birmingham News* atop an Associated Press article.[36] "South's Leaders Hold Bill Illegal" and "Johnson Pleads for Compliance, but Vows Rights Enforcement" read two headlines in the *New York Times*.[37] A subheading in the New York Times described the Civil Rights Law of 1964 as an "Unfinished Task."[38] "Rights law now in effect; quick challenge indicated," declared the prominent front-page headline for the *Birmingham News* after President Johnson signed the bill.[39]

Indeed, the challenge did seem quite quick. "Barely was the President's signature dry," the *Birmingham News* reported, "before civil rights organizations announced plans to see if the law opens to Negroes the doors of motels, restaurants, [and] theaters that had been closed to them."[40] The newspaper also reported that Fred L. Shuttlesworth intended "to test the new law quickly."[41] The vulnerability of the law became apparent amid this very real sense of urgency to test its effectiveness.

James Farmer, the national director of the Congress of Racial Equality (CORE), gave perhaps the most direct insight into the widespread sentiment toward the susceptibility of the new civil rights legislation. The organization's annual convention happened to fall on the day Johnson signed the Civil Rights Act of 1964, which Farmer said was "'no magic carpet that's going to take us to the promised land.'" He encouraged his listeners to recognize their "'responsibility (to see) that this law becomes more than a scrap of paper the 13th and 14th amendments have become.'"[42] This grave description of the new law highlighted the role the government had to play in order to affect real cultural change. Until the people saw the law as persuasive and imperishable, there remained the potential that it might never become truly effective.

Government Action: Policing the Economy

The distinction between ending the institution of segregation and the ending the habit of segregation helps us explore the tactic employed by the federal government to achieve its ends, necessary for identifying the specific way or ways in which government may influence culture. Discrimination by state action (in the public sector) generally ended with The Civil Rights Cases of 1883.[43] More than half a century later, Brown v. Board of Education became the most seminal case in the crusade to route discrimination completely out of the public sector. In arguing Brown on behalf of the NAACP, Thurgood Marshall persuaded the Supreme Court to overturn the "separate but equal" doctrine, which the Court originally proclaimed in the notorious 1896 decision Plessy v. Ferguson.[44] In formulating his argument, Marshall declared that there existed "a denial of equal protection of the laws, the legal phraseology of the clause in the Fourteenth Amendment."[45] By this he meant that state sponsored segregation in public schools fundamentally betrayed the notion of equal protec-

36 Associated Press, "Rights Law Reaction Ranges from Praise to Misgiving," *Birmingham News*, July 3 1964.
37 United Press International, "South's Leaders Hold Bill Illegal," *New York Times*, July 3, 1964; and Cabbell Phillips,"Johnson Pleads for Compliance, but Vows Rights Enforcement," *New York Times*, July 3, 1964.
38 E. W. Kenworthy, "President Signs Civil Rights Bill; Bids All Back It," *New York Times*, July 3, 1964.
39 "Rights law now in effect; quick challenge indicated," *Birmingham News*, July 3 1964.
40 Associated Press, "Comply, Public Is Urged," *Birmingham News*, July 3, 1964.
41 Associated Press, "Rights Law Reaction Ranges from Praise to Misgiving," *Birmingham News*, July 3 1964.
42 Associated Press, "Rights Law Not 'Magic Carpet,' CORE Meet Told," *Birmingham News*, July 3, 1964.
43 The Civil Rights Cases, 109 U.S. 3 (1883).
44 Plessy v. Ferguson, 163 U.S. 537 (1896).
45 Brown v. Board of Education, 347 U.S. 483 (1954), Opening Argument of Thurgood Marshall, Esq., on Behalf of Appellants, http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf (accessed October 1, 2012).

tion. The Court then further enhanced the protection of the Fourteenth Amendment in 1958 when it decided Cooper v. Aaron, which held that the Supremacy Clause, which holds the laws of the federal government higher than the laws of the individual states, required individual states to comply with the Court's desegregation decisions.[46] One of the pillars of segregation, state-sanctioned segregation, crumbled.

Segregation still existed, though, in public places owned by private businesses (places of public accommodation). To many, discrimination by the state, a republican government founded on principles of equality, seemed particularly inappropriate, if not detestable. However, proponents of desegregation could not apply this argument to the private sector so easily. America's traditions of liberty and laissez-faire economics advocated individual autonomy and abhorred government intervention, principles which generally loathed government regulation in the private sector. However, most social interactions occur in the private sector, with people working at their jobs, purchasing goods and services, and generally participating in the market economy. The country would therefore never come close to ending discrimination if it could not desegregate beyond the public sector. Congress needed either to circumvent or to suppress the values of the free market economy in order to completely desegregate the South.

When drafting the Civil Rights Act of 1964, Congress wrestled over whether to base its authority to regulate segregation in places of public accommodation on the Fourteenth Amendment, as was the traditional basis for racial legislation, or on the Commerce Clause, which granted Congress the authority to regulate "interstate commerce."[47] The Commerce Clause could more likely succeed if challenged.[48] Robert Kennedy convinced Congress to accept the Commerce Clause as the better choice, and the bill it handed to President Johnson took immediate effect the moment he signed it (except for the employment and union membership provisions, which took effect a year later).[49] Federal law now prohibited discrimination in both the public and private sectors. With segregation having nowhere else to hide, the proponents of segregation looked for ways to oppose the new law.

> Perhaps nobody thought the matter would materialize into a larger issue.

The definition of "interstate commerce," the most apparent weakness in using the Commerce Clause to justify the new law, emerged as a pivotal issue. Although the blacks who entered Ollie's may not have realized it, the significance of the restaurant's location had little to do with the surrounding black neighborhood. Instead, the fact that Ollie's was located eleven blocks from the nearest Federal or Interstate Highway proved most revealing when the Supreme Court reiterated the limits of federal power.[50]

In the case at issue, Katzenbach v. McClung, when Justice Clark wrote that Congress's power to regulate commerce "is broad and sweeping," the Supreme Court upheld a long history of recognizing widespread federal power over commerce.[51] This apparently surprised Ollie McClung, Jr., despite the previous case history plainly

46 Cooper v. Aaron, 358 U.S. 1 (1958); U.S. Constitution, Art. 6, cl. 2.

47 Wickard v. Filburn, 317 U.S. 111 (1942).

48 Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases* (Lawrence, KS: University Press of Kansas, 2001), 18.

49 Ibid., 24; and E. W. Kenworthy, "President Signs Civil Rights Bill; Bids All Back It," *New York Times*, July 3, 1964.

50 Katzenbach v. McClung, 379 U.S. 294 (1964), Transcript of Record (No. 543), Complaint, 2.

51 Katzenbach v. McClung, 379 U.S. 294 (1964), 305.

supporting the decision.[52] Dating all the way back to 1824, when Chief Justice Marshall issued the opinion for the very first Commerce Clause case, Gibbons v. Ogden, the Court almost never departed from the trend of affirming that the Commerce Clause meant more than it said.[53] The Constitution simply granted Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[54] In 1942, the Court greatly expanded this scope in the Wickard v. Filburn case, which held that even though a private person's "activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress."[55] Facing this precedent, Ollie McClung had little hope of turning the tide against desegregation by arguing that the Civil Rights Act of 1964 "applies only to conduct in isolation from articles or activities directly in commerce" and that such conduct "might 'affect' commerce indirectly [italics added] in a particular case."[56] Heeding this ever-expanding federal authority over the economy, and following the federal momentum to desegregate the South, the Supreme Court easily dismissed this argument. It found that racial discrimination in the marketplace was an economic issue, describing it as a "national commercial problem of the first magnitude."[57]

In this manner the government successfully enforced morality in the economy. It stood on firmly established precedent, which had bestowed great power on the federal government to regulate economic matters. The government then used this power over the economy to institute a social policy, now widely regarded as both effective and apposite, considering the great overlap between economic and social issues. Furthermore, the government arguably defended laissez-faire principles by promoting an indiscriminate market that removed social hindrances to market transactions.

This government action spawned a new way of thinking about racial segregation in both Southern and American culture. The public began to believe that the government not only had the authority, but also had the ability, to end racial discrimination in the marketplace. We owe this cultural change to the Supreme Court's expeditious December 1964 rulings, which firmly settled the purpose and power of the fledgling civil rights law.

December 1964: After McClung

In order to persuade citizens to respect the law, the government needed to show strong proactive enforcement. It needed to show that it meant what it said. Although some notable instances of compliance between July and December of 1964 could have encouraged civil rights leaders, a lurking doubt remained as to the effectiveness of the Civil Rights Act of 1964 so long as challenges to the law remained pending before the Supreme Court.[58] The consequences of the Court's decision (or, rather, decisions, since the McClung and Heart of Atlanta cases were essentially

52 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See page 13 of transcript.); and James Harwood, "Justices Also Vote, 5 to 4, To Vacate Pending Convictions for 'Sit-Ins,'" *Wall Street Journal*, December 15, 1964.

53 Gibbons v. Ogden 17 Johns. 488 (1820); and Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review* vol. 68 (Winter 2001): 102-104, 111-132.

54 U.S. Constitution, art. 1, sec. 8.

55 Wickard v. Filburn, 317 U.S. 111 (1942), 125.

56 Katzenbach v. McClung, 1964 WL 72710 (U.S.) (Appellate Brief), Supplemental Brief for Appellees, 37.

57 Katzenbach v. McClung, 379 U.S. 294 (1964), 305.

58 United Press International, "St. Augustine Inns and Motels Are Ordered to Admit Negroes," *New York Times*, August 6, 1964; Associated Press, "Restaurants Desegregated Quietly in McComb, Miss.," New York Times, November 19, 1964; and Anthony Lewis, "Bench Unanimous: Ruling Clears the Way for Enforcing Law on Full Scale," *New York Times*, December 15, 1964.

homogenous) had several repercussions, not the least of which meant a confirmed end to the doubt and debate over whether the law would ever have full force and effect.

Opponents to the Civil Rights Act of 1964 based their opposition on principles of limited government. Ollie McClung, Jr. believed his lawsuit could have stopped "the spiraling growth of federal power."[59] When issuing its opinion on McClung's case on October 5, 1964, the federal district court found in his favor and held that, "If Congress has the naked power to do what it has attempted in title II [sic] of this act, there is no facet of human behavior which it may not control." The court further stated that "the rights of the individual to liberty and property are in dire peril."[60] Then, in the Supreme Court case, McClung's lawyers admitted to the Supreme Court that there exists "a conflict between the concept of human equality and individual rights under the Constitution." Although the Civil Rights Act of 1964 said that the former trumped the latter, this mere piece of legislation did not make it so. "[I] t has never been held," McClung's attorneys argued, "that Congress may by legislative fiat merely say that it is acting under granted power and thus foreclose judicial inquiry on the subject." For the opposition to the law, the Constitution preferred individual rights over racial equality, at least so long as the Court remained silent on the matter.

The Supreme Court's reasoning in McClung shattered this rationale. It left leaders such as George Wallace and shop owners such as Ollie McClung with no further hope of reversion after the nation's highest court vetted and rejected their main contentions. This provided the public with a sense of finality on the issue of segregation. As Roy Wilkins of the NAACP said, "This decision reinforces public confidence in the orderly processes of the law."[61]

Reporting on the decisions in December of 1964, newspapers suggested an overall conclusion to the long battle for civil rights. Although initially the *Birmingham News* clung to the notion that many still doubted the law's effectiveness, on December 16, 1964, two days after the decision, the paper reported that the McClungs would comply with the decision after meeting with their attorney. The McClungs observed that "many of our nation's leaders have accepted this edict, which gives the federal government control over the life and behavior of every American" and complained that the law "could well prove to be the most important and disastrous decision handed down by this court." However, they also said, "As law-abiding Americans we feel we must bow to this edict of the Supreme Court." In plain truth, they had little choice. If the McClungs had refused to desegregate, the restaurant may have been (more) forcibly desegregated by a court order.[62] Having "lost in an effort to have the high court uphold a lower court ruling that the law could not be constitutionally applied," the McClungs realized the battle had ended.

The fact that the court issued a unanimous decision surely put additional pressure on the McClungs and other opponents to relent. A *Birmingham News* editorial speculated, "Unanimity of the court as to the public accommodations section probably means there is no real prospect of judicial overturning of any other section of the new act." Robert McDavid Smith, one of the attorneys for McClung, admitted after reading the opinion that the only way around the new law was to "amend the Constitution," an unlikely event considering the law did not originate with judicial activism but rather in Congress.[63]

Some, but not all, political leaders remained head-

59 Ollie McClung, Jr. Interview, Birmingham Civil Rights Project, University of Alabama, Birmingham Mervyn H. Sterne Library Web site, MP3 audio file, http://oh.mhsl.uab.edu/om/ (accessed September 22, 2012). (See page 18 of transcript.)

60 McClung v. Katzenbach, 233 F. Supp. 815 (N.D. Ala. 1964), 825.

61 "Reactions to Decision are divided," *Birmingham News*, December 15, 1964.

62 Ibid.

63 Ibid.

strong in their objections, but their reactions hinted at the desperation they experienced. Although he called for more resistance, Governor Wallace said the ruling dealt "a staggering blow to the free enterprise system and the rights of private property owners. Mayor Ivan Allen of Atlanta expressed his assent to the ruling. The *New York Times* reported that he believed "it was obvious the Congress had the full right to take steps to eliminate discrimination against individuals on an interstate basis." Mississippi Senator James Eastland said "the Constitution means only what the temporary membership of the Supreme Court says it means," implying either that his side could perhaps one day overturn the law or that he fought for a lost cause because the Constitution no longer mattered.[64]

Perhaps the most compelling evidence of the "battle" over segregation ending with McClung and Heart of Atlanta can be found in the December 20, 1964 issue of the *New York Times*. On this day, the Sunday after the decisions, the newspaper included a multi-page spread that chronicled the history of the civil rights struggle up until that date. With headlines such as "Civil Rights: Decade of Progress" and "Civil Rights: South Slowly Yields," the paper chronicled all the events leading up to the climatic decisions issued six days earlier. One of the articles declared, "That a corner has been turned is evident not only from this week's decisions but also from the actual racial situation in the country. Resistance to the law is no longer the basic consideration." This comprehensive piece, which the paper only printed after McClung, not simply after Johnson signed the Civil Rights Act of 1964, gave little indication that there would be any further hesitation to accept desegregation as lasting.[65] This marked the end of the issue of segregation in the minds of Americans.

The decision effectively brought segregation to its knees.

Conclusion

McClung had an underrated influence on American culture. Martin Luther King believed that "the key to everything is federal commitment."[66] Full, true commitment necessarily consisted not only of the legislative process, but of judicial validation of civil rights laws as well. The McClung decision provided that judicial validation. It completed the process of government action needed to legitimize desegregation, both in the laws and, more importantly, in American culture. With the publication of this court decision, people went from having, at best, a limited faith in the Civil Rights Act of 1964 to regarding further holdouts of segregation as futile. Widespread and diverse facets of American culture, from civil rights activists to Southern white politicians, all shared in the changing tenor of thought. McClung therefore squashed resistance by unequivocally affirming the authority of the federal government to regulate economic matters.

The American federal government constitutes the most formidable state power in the country. Supreme Court interpretations of the Commerce Clause and Supremacy Clause have reinforced this power. The government did modify American culture by spawning a new way of thinking about desegregation. However, its authority over its citizens did not extend beyond regulating outward actions, such as racial discrimination in the transacting of business.

64 Ibid.

65 "Civil Rights: Decade of Progress," *New York Times*, December 20, 1964; and John Herbers, "Civil Rights: South Slowly Yields," *New York Times*, December 20, 1964.

66 Quoted in: David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: William Morrow and Company, Inc., 1986), 228.

Nevertheless, because of this ability to manage interstate commerce, a broad and sweeping concept, on top of state action, as described in the 14th Amendment, the federal government curbed the institution of segregation in America. Public reactions to the Civil Rights Act of 1964 and McClung v. Katzenbach indicated that the government, by way of the Commerce Clause, had changed Ollie's Barbecue, and the rest of Southern culture, from that point forth.