

## Sec. 8—Powers of Congress

## Cl. 3—Power to Regulate Commerce

tion to interstate commerce.<sup>711</sup> Perhaps its logical conclusion is reached with the Court's finding that even minor transactions have an effect on interstate commerce<sup>712</sup> and that the cumulative effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation.<sup>713</sup> "Commerce among the states must, of necessity, be commerce with[in] the states. . . . The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states."<sup>714</sup>

**And With the Indian Tribes.**—Congress' power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision,<sup>715</sup> has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of Native Americans. Although Congress in 1871 forbade the further making of treaties with Indian tribes,<sup>716</sup> cases regarding application of the old treaties, especially their effects upon attempted state taxation and regulation of on-reservation activities, continue to be a staple of the Court's

<sup>711</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>712</sup> NLRB v. Fainblatt, 306 U.S. 601 (1939); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–243 (1980); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

<sup>713</sup> United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Perez v. United States, 402 U.S. 146 (1971); Russell v. United States, 471 U.S. 858 (1985); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

<sup>714</sup> Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). Commerce "among the several States" does not comprise commerce of the District of Columbia or the territories of the United States. Congress' power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); *In re Bryant*, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865). Transportation between two points in the same state, when a part of the route is a loop outside the state, is interstate commerce. Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 (1903); Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the state's reach. Greyhound Lines v. Mealey, 334 U.S. 653, 660 (1948); Eichholz v. Public Service Comm'n, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the state of departure but in conjunction with an interstate trip are reachable. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

<sup>715</sup> United States v. Kagama, 118 U.S. 375 (1886). Rejecting the Commerce Clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. *Cf.* United States v. Holiday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). This special fiduciary responsibility can also be created by statute. *E.g.*, United States v. Mitchell, 463 U.S. 206 (1983).

<sup>716</sup> 16 Stat. 544, 566, 25 U.S.C. § 71.