NOTES

"AFFECTING COMMERCE" UNDER THE SHERMAN ACT—HOW LOCAL THE SQUEEZE?

The Sherman Antitrust Act[1] explicitly condemns restraints and monopolies "of trade or commerce among the several states."[2] However, as evidenced by the Supreme Court's initial Sherman Act review in *United States v. E.C. Knight Co.*,[3] the federal courts have historically been troubled by the jurisdictional scope of these provisions. Unfortunately, despite continuing efforts to define this scope, including the Supreme Court's recent opinion in *McLain v. Real Estate Board of New Orleans, Inc.*,[4] the jurisdictional inquiry triggered by a Sherman Act complaint remains a troubling and unsettled question.

As distinquished from a substantive inquiry under the Act, "[t]he jurisdictional question is one of constitutional power."[5] The question is not whether a substantive violation of the Act has occurred, but whether Congress, through its commerce power, can regulate the specific conduct of the parties in question.[6] Yet, because the courts must scrutinize the application of this federal commerce power in each specific Sherman Act complaint,[7] the jurisdictional question becomes exceedingly difficult where either one or both of the parties operate solely on an intrastate level or where a party, clearly operating in or affecting interstate commerce, applies a purely local, intrastate restraint.[8]

---

1. 15 U.S.C. §§ 1-7 (1976).
2. *Id.* §§ 1-2.
3. 156 U.S. 1 (1895).
4. 444 U.S. 232 (1980).
5. Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 522 (9th Cir. 1972).
6. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1939). In *Apex*, the Court stated:
> The addition of the words "or commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . . so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce.

Id. (citation omitted).

7. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974).
8. Despite allegations of its relative insignificance, *see* Comment, *Portrait Of The Sherman Act As Commerce Clause Statute*, 49 N.Y.U.L. Rev. 323, 327 (1974), this threshold jurisdictional inquiry has been the source of a substantial amount of litigation and the specific subject of two recent Supreme Court opinions, *see* McLain v. Real Estate Bd. of New Orleans,

Intrastate activities are not necessarily exempt from Sherman Act regulation. Just as the commerce power generally can be applied to a wide variety of intrastate activities,[9] so too can the Sherman Act be invoked where a sufficient nexus to interstate commerce is established. As appropriately analogized, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[10] For example, intrastate restraints may satisfy the jurisdictional test of the Sherman Act if they are an "integral part of an interstate transaction,"[11] thus being in the stream of interstate commerce. Alternatively, jurisdiction may be found where, though not "in commerce," the activities nevertheless exert a substantial effect upon interstate commerce.[12]

It is this second test, the "affecting commerce" doctrine of Sherman Act jurisdiction, and its application to ostensibly local, intrastate activities which is the subject of this discussion. Specifically, this Note will address the development and application of the "affecting commerce" standard under the Sherman Act, review the recent *McLain* decision clarifying this issue and discuss the discordant lower court interpretations of that opinion. Finally, the potential for still further expansion of Sherman Act jurisdiction to encompass additional intrastate activities will be explored.

Inc., 444 U.S. 232 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Such cursory conclusions of insignificance based upon historical, pre-1966, antitrust litigation patterns fail to appreciate the narrow, rather clearly established jurisdictional tests which were available to litigants during much of this period. *Compare* Swift & Co. v. United States, 196 U.S. 375 (1905) *with* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) *and* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980). In the relatively recent period prior to *McLain* and *Goldfarb*, however, these tests had become far from manifest and certain, thus providing a significant issue for litigation.

Inasmuch as success upon the jurisdictional question can often be the determinative issue of a Sherman Act complaint, particularly where a *per se* violation would not or could not be prosecuted under state law, such as the situation in *Goldfarb*, it is entirely within a defendant's best interest to vigorously pursue this issue whenever feasible. For example, an interesting though inevitably unsuccessful, post-*McLain* jurisdictional defense was presented in *Cesnik v. Chrysler Corp.*, where despite the defendants' obvious national commercial stature, the court's subject matter jurisdiction was contested on the basis of a purely locally applied restraint. 490 F. Supp. 859, 865 (M.D. Tenn. 1980) (court found sufficient interstate effects but failed to cite *McLain* whatsoever); *cf.* Comment, *supra* note 8, at 327 ("It would be pointless for a nationwide or multinational corporate giant to rest its defense, even in part, on the premise that its interstate contacts are insufficient to invoke federal antitrust jurisdiction.").

9. *Compare* Wickard v. Filburn, 317 U.S. 161 (1942), *with* Perez v. United States, 402 U.S. 146 (1971).

10. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949).

11. Goldfarb v. Virginia State Bar, 421 U.S. 773, 784-85 (1975).

12. *E.g.*, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

I. Development Of The "Affecting Commerce" Test Of Jurisdiction[13]

A. *Legislative History*[14]

As recognized by the Supreme Court in *United States v. South-Eastern Underwriters Association*,[15] a review of the legislative history of the Sherman Act reveals an extensive effort on the part of Congress to eradicate the "gross wrong"[16] of anti-competitive business activity throughout the nation.[17] The initial, if not primary, subjects of the floor debate concerning the Act can be fairly characterized as first, a search for the appropriate constitutional authority for regulating such activity and second, an effort to carefully word the Act so as to invoke the full, prevailing scope of this authority.

The original version of the Sherman Act was presented to the Senate in 1888 as S. 3445.[18] Initially proposed by Senator Sherman, it provided for broad and sweeping regulation of restraints which "tend, to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth and production. . . ."[19] Justified on the basis of the taxing power,[20] S. 3445 was referred to the Senate Committee of Finance[21] which subsequently revised this language to encompass a slightly more limited category of restraints tending "[1] to prevent full and free competition in the . . . production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or [2] which shall be

---

13. The general history and development of the Sherman Act in both Congress and the courts has been the subject of extensive litigation and commentary. Inasmuch as this Note will narrowly focus upon the present scope of only the "affecting commerce" jurisdictional test, this discussion of historical development will, of necessity, be rather brief. For a thorough discussion of this subject, *see, e.g.*, W. Letwin, Law & Economic Policy in America: The Evolution of the Sherman Antitrust Act (1965); H. Thorelli, The Federal Antitrust Policy (1955); A. Walker, History of the Sherman Law of the United States of America (1910); Note, *Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement*, 32 Vand. L. Rev. 1215 (1979); Note, *Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 Vill. L. Rev. 721 (1976).

14. The legislative history of the Sherman Act, is compiled and reprinted in E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes, ch. 1 (1978).

15. *See* 322 U.S. 534, 556-58 (1943).

16. 20 Cong. Rec. 1457 (1889) (remarks of Sen. Jones).

17. "That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements admits little, if any, doubt." 322 U.S. at 558-59.

18. S. 3445, 50th Cong., 1st Sess. (1888).

19. *Id.*

20. 19 Cong. Rec. 7513 (1888) (remarks of Sen. Sherman).

21. 19 Cong. Rec. 7513 (1888). Speaking in reference to a more generally worded bill defining and condemning trust activity, S. 3440, 50th Cong., 1st Sess. (1888), Senator Sherman indicated that Congressional authority to enact such legislation derived from both the commerce and taxing powers. 19 Cong. Rec. 7513 (1888) (remarks of Sen. Sherman).

transported from one State . . . to another . . . ."[22] Although this amended version was returned from committee without report,[23] subsequent floor debate revealed that the revised version of S. 3445 was worded so as to invoke both the taxing and commerce powers.[24]

Senate floor debate concerning S. 3445 carried over into the Fifty-first Congress,[25] throughout which the discussion was substantially devoted to the constitutionality of the authority ostensibly granted by this initial jurisdictional language.[26] After extensive debate, sounder reasoning eventually prevailed in referring Senator Sherman's bill to the Senate Judiciary Committee.[27] From there, the ultimately enacted version, firmly founded upon the federal commerce power and jurisdictionally requiring "trade or commerce among the several states," was introduced.[28]

Significant throughout this legislative history is that despite the sometimes bitter floor exchanges questioning the appropriately invoked constitutional power and the scope of its prevailing judicial construction, congressional desire to legislatively eradicate all unreasonable anticompetitive activity, wherever existing, was effectively unanimous.[29] The propriety of and exemption for purely local, intrastate restraints was never asserted as the rationale for limiting the jurisdictional scope of the Act.[30] Indeed, con-

---

22. S. 3445, 50th Cong., 1st Sess. (1888) (as amended September 11, 1888).

23. E. KINTNER, *supra* note 14, at 64.

24. *See, e.g.*, 20 CONG. REC. 1169 (1889) (remarks of Sen. Reagan); 20 CONG. REC. 1462 (1889) (remarks of Sen. George).

After reintroduction of S. 3445 in its amended version, support for the taxing power justification quickly dissipated. Even Senator Sherman, who originally proposed that congressional authority for enactment could be derived from both powers, *see* note 22, *supra*, quickly modified his position, apparently resting full constitutional authority upon the commerce power. *See* 20 CONG. REC. 1167 (1889) (remarks of Sen. Sherman).

25. S. 3445, 50th Cong., 2d Sess. (1889), was reintroduced by Senator Sherman as S. 1, 51st Cong., 1st Sess. (1889).

26. *See, e.g.*, E. KINTNER, *supra* note 14, at 15; 21 CONG. REC. 1765-72 (1890) (remarks of Sen. George); 21 CONG. REC. 2456-58 (1890) (remarks of Sen. Sherman); 21 CONG. REC. 2556-59 (1890) (remarks of Sen. Turpie); 20 CONG. REC. 1460-62 (1889).

27. 21 CONG. REC. 2731 (1890).

28. S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 2901 (1890) (as reported by the Senate Committee on the Judiciary).

29. S. 1, 51st Cong., 1st Sess., (1890), was passed by the Senate by a vote of 52 in favor, 1 opposed. 21 CONG. REC. 3152-53 (1890). In the House, the final Conference report was adopted by a vote of 242 in favor, none opposed and 85 not voting. 21 CONG. REC. 6312-14 (1890).

This is not to imply, however, that the record of floor debate upon the Act was devoid of substantial disputes. Nevertheless, with respect to the reach of the Sherman Act, the sentiment was repeatedly expressed that through the Act, Congress could enhance and supplement the activities of the state governments in eliminating the oppressive evils of trusts and monopolies. *See, e.g.*, H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890); 21 CONG. REC. 2456-57 (1890) (remarks of Sen. Sherman).

30. *See, e.g.*, H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890); S. REP. No. 825, 51st Cong., 1st Sess. 33 (1890).

Indeed, Senator George, who had been an early and rather vocal critic of the purported

gressional concern was almost singularly directed toward rapid provision of effective legislation which would pass constitutional scrutiny by the judiciary.[31] Further, as the *South-Eastern Underwriters*[32] opinion later noted, incorporated within this concern was an additional congressional intention to legislate to the fullest extent of the constitutional authority, not limited merely to the scope of prior judicial declarations of that power.[33]

B. *Initial Jurisdictional Decisions*

Despite the best efforts of a politically motivated[34] and somewhat constitutionally well-versed Congress, the initial review of a Sherman Act conducted by the Supreme Court in *United States v. E.C. Knight Co.*[35] nearly stripped the new Act of all utility whatsoever.[36] In *Knight*, the government sought to dissolve a major sugar trust which, through the purchase of four Philadelphia sugar refineries, had acquired nearly complete control of all sugar refining throughout the nation.[37] Without evaluating the substantive allegations of the complaint, the Court denied relief, holding that manufacturing affecting commerce "only incidently and indirectly," was not commerce.[38] Writing for the Court, Chief Justice Fuller quoted language of an earlier opinion which established the very narrow view that commerce was merely " '[t]he buying and selling and the transportation' " of processed and raw materials.[39]

Limited by such a restrictive construction of the commerce power and the Sherman Act, congressional authority to regulate anticompetitive practices was apparently confined to those activities strictly engaged in buying, selling or transportation of products destined for interstate delivery.[40] In-

---

constitutional underpinnings of the early versions of the bill, was an equally vocal supporter of the ultimately enacted legislation. "I regard the bill, so far as it goes, as a very good one, the best I think that can be framed under that particular power of Congress, the power over commerce . . . ." 21 CONG. REC. 2901 (1890) (remarks of Sen. George).

31. *See, e.g.*, 21 CONG. REC. 3151 (1890) (remarks of Sen. Butler).

32. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

33. *Id.* at 557.

34. There can be no question as to the substantial degree of political pressure exerted upon Congress in an effort to ensure preparation and enactment of effective federal antitrust legislation. For example, the 1888 platforms of both the Republican and Democratic parties contained specific antitrust planks. *See* E. KINTNER, *supra* note 14, at 54. Additionally, concern over growing anticompetitive practices and the need for effective combative legislation was addressed in the annual message to Congress of Presidents Cleveland and Harrison. *See* 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 1598-1600, 1628 (F. Isreal ed. 1966), (*reprinted in*, E. KINTNER, *supra* note 14, at 55-58, 60).

35. 156 U.S. 1 (1895).

36. *See* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 230 (1948).

37. 156 U.S. at 9.

38. *Id.* at 12.

39. *Id.* at 14 (quoting Kidd v. Pearson, 128 U.S. 1, 20 (1888)).

40. *Compare* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897) (railroad

deed, although subsequent Court opinions substantially vitiated the manufacturing-commerce distinction,[41] the *Knight* opinion undoubtedly provided the seed for the modern, though still relatively restrictive, "flow of commerce" or "in commerce" test of Sherman Act jurisdiction.[42] Nevertheless, even under this finite test of *Knight* and subsequent opinions, ostensibly intrastate activities could be regulated if such activities exerted a direct effect upon commerce and were "part and incident of such commerce."[43] Unfortunately, although the "flow of commerce" test substantially expanded the scope of federal commerce power by eliminating some of the prevailing artificial barriers to regulation,[44] the difficulties encountered through application of this new standard served only to further frustrate the congressional desire to eradicate all anticompetitive activity.[45]

C. *Birth Of The "Affecting Commerce" Standard*

After rather consistently adhering to its restrictive "flow of commerce" test, in 1941 the Supreme Court, through a series of now famous opinions, radically expanded the scope of the federal commerce power. In *United States v. Darby*,[46] the Court upheld congressional legislation prescribing employment standards for employees "engaged in [interstate] commerce or the production of goods for [interstate] commerce."[47] Though under the prevailing commerce power test such conduct was beyond regulation, the Court unanimously established that the commerce power was not confined merely

---

transportation cartel) *and* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) *with* Hopkins v. United States, 171 U.S. 578 (1898) *and* Anderson v. United States, 171 U.S. 604 (1898).

41. The *Knight* manufacturing-commerce distinction was easily distinguished by finding that a particular activity directly, rather than indirectly (as in *Knight*), affected commerce. *See, e.g.*, Swift & Co. v. United States, 196 U.S. 375, 397 (1905). *See also* United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899). Ultimately this distinction was altogether invalidated. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). This fundamental issue of what is commerce, however, remains a point of recurring debate. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

42. Although it was the *Swift* opinion which first explicitly articulated the "current of commerce" rationale, 196 U.S. at 398-99, this test was specifically fashioned in an effort to distinguish the earlier *Knight* opinion. *See id.* at 397.

43. *Id.*

44. For example, in *Swift* where the government sought to dissolve a large meat trust conducting intrastate slaughtering operations throughout the Midwest, *see* 196 U.S. at 391, the defendants argued that interstate commerce was not involved under the "coming to rest" and "original package" exceptions to federal commerce power authority. *See* Argument for Appellants, *id.* at 378-79. The Court gave short shrift to both arguments. *See* 196 U.S. at 399-400.

45. The sufficiency of "direct" effect upon interstate commerce, initially proposed by Justice Holmes in the "flow of commerce" test of *Swift*, was the specific subject of a number of highly controversial, restrictive Supreme Court opinions during the period 1905-1936. *See, e.g.*, Railroad Retirement Bd. v. Alton Ry., 295 U.S. 330 (1935); Houston E. & W. Tex. Ry. v. United States (Shreveport Rate Case), 234 U.S. 342 (1914).

46. 312 U.S. 100 (1941).

47. Fair Labor Standards Act of 1938, 29 U.S.C. § 202(a) (1976).

to commerce among the states; "[i]t extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of legitimate end, the exercise of the granted power . . . to regulate interstate commerce."[48] The Court further dismissed any argument as to the relative national insignificance of Darby's specific activity by stating, "[c]ongress . . . has made no distinction as to the volume or amount of shipments in the commerce . . . . It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great."[49]

Having signaled a dramatic shift in constitutional perspective, the Court further expanded the scope of the commerce power through its opinion in *Wickard v. Filburn.*[50] In *Wickard,* a small Ohio farmer growing wheat primarily for consumption on his own farm challenged congressional legislation establishing individual farm market quotas. Again, the Court unanimously upheld the authority of Congress to regulate such intrastate activities: "even if appellee's activity be local . . ., it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[51] Despite the clear insignificance of national impact of Filburn's marketed wheat, the Court indicated that any impact whatsoever was enough to justify federal regulation where "his contribution, taken together with that of many others similarly situated, is far from trivial. . . ."[52] The teachings of both *Darby* and *Wickard* were clear; intrastate activities not "in commerce" could nevertheless be regulated if they exerted a substantial effect upon commerce. The general "affecting commerce" test of congressional commerce power was thereby established.

Having historically followed the prevailing limitations of federal commerce power when reviewing its application to specific Sherman Act complaints, the Supreme Court was then faced with an interesting question. *Darby* and *Wickard* involved relatively recent legislation; the Sherman Act, however, was over fifty years old by the date of those decisions. Should the recent, expansive reading of the commerce clause retroactively apply to that Act as well?

The Court answered this question in a series of subsequent opinions. In *United States v. South-Eastern Underwriters Association,*[53] the Court ex-

---

48. 312 U.S. at 118.
49. *Id.* at 123.
50. 317 U.S. 111 (1942).
51. *Id.* at 125.
52. *Id.* at 128.
53. 322 U.S. 533 (1944).

tensively documented the legislative debate concerning the Act[54] and concluded that an otherwise interstate insurance activity "is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature."[55] Within the Sherman Act, the Court noted, Congress intended to legislate to the "utmost extent of its Constitutional power"[56] and thereby attempted to encompass "every person engaged in business whose activities might restrain . . . commercial intercourse among the states."[57] Therefore, by upholding Sherman Act jurisdiction over the local incidents of a national insurance business, the Supreme Court at least intimated that its recently announced expansive reading of the commerce power would similarly apply to congressional authority under the Sherman Act.

In *Mandeville Island Farms v. American Crystal Sugar Co.*,[58] the Court confirmed that local activities, such as those regulated via the "affecting commerce" standard in *Darby* and *Wickard*, could indeed be reached through the Sherman Act. In *Mandeville*, the Court was presented with a monopsonistic price-fixing conspiracy whereby a national sugar refiner, whose general sales activities clearly fell within the scope of the commerce power, conspired to set the price for sugar beets grown in California. Because the refining process transformed the beets into sugar and was conducted entirely within California, the defendants argued that the targeted activity fell within one of the exceptions to the "in commerce" standard of jurisdiction.[59] Nevertheless, the Court upheld jurisdiction under the "affecting commerce" test, noting that where a particular restraint substantively violated the Act, "the vital question becomes whether the *effect* [upon interstate commerce] is sufficiently substantial and adverse. . . ."[60] Sherman Act jurisdiction could therefore be invoked under this new standard even where potentially unavailable under the previous "in commerce" test. Although not clearly annunciated until much later, it was further apparent after *Mandeville* that the scope of this jurisdiction would continue "to expand along with expanding notions of congressional power."[61] Additionally, in a passage apparently obscured by later opinions, the *Mandeville* Court also responded to the defendant's argument as to the insignificance of any potential interstate effects of its conduct: "Congress' power . . . may be exercised in individual cases without showing any specific effect upon interstate commerce . . .; it is enough that the individual activity when multiplied into a general

54. *Id.* at 557-59 nn.45-47.

55. *Id.* at 547.

56. *Id.* at 558-59.

57. *Id.* at 553; *cf. id.* at 572 (Stone, C.J., dissenting) ("the restraints prohibited by the Sherman Act are of competition in the marketing of goods or services whenever the competition *occurs in or affects* interstate commerce") (emphasis added).

58. 334 U.S. 219 (1948).

59. See *id.* at 227-28.

60. *Id.* at 234 (emphasis added).

61. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 n.2 (1976).

practice is subject to federal control . . . or that it contains a threat to the interstate economy that requires preventative regulation."[62]

D. *Application of the "New" Test*

During the period from 1949 to 1976, the Court reviewed this "affecting commerce" jurisdictional standard in a variety of Sherman Act circumstances.[63] In *Burke v. Ford*,[64] for example, the Court was presented with a horizontal market division among an Oklahoma liquor wholesalers' cartel.[65] Inasmuch as all of the liquor imported from out of state had "come to rest" in the defendants' warehouses and thus was beyond the scope of the "in commerce" test, the lower courts denied jurisdiction.[66] Relying upon *Mandeville*, however, the Supreme Court reversed, finding jurisdiction satisfied instead under the "affecting commerce" test.[67] Of particular note, is the brief, conclusory analysis of substantiality of effect presented in the opinion:

> Horizontal territorial divisions almost invariably reduce competition among the participants . . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers . . . than would have occurred had free competition prevailed . . . . Thus the statewide wholesalers' market division inevitably affected interstate commerce.[68]

In view of *Burke* and *Mandeville*, therefore, the "effects" test appeared rather easily satisfied; although the particular restraint complained of need have some effect upon interstate commerce,[69] the likelihood of that effect need not be proven to a substantial degree. Indeed, *Mandeville* and *Burke* suggest that following traditional, practical economic theory, one could *presume* the existence of an effect upon interstate commerce.

In what has been graciously described as merely an anomolous deci-

---

62. 334 U.S. at 236 (citations omitted).

63. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976); Burke v. Ford, 389 U.S. 320 (1967); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954) (alleged conspiracy among Chicago plastering contractors); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949) (Boston area women's sportswear jobbers).

64. 389 U.S. 320 (1967) (per curiam).

65. *Id.*

66. *Id.* at 321. The court of appeals found that proof of a horizontal market division, by itself was an insufficient showing of an effect upon interstate commerce. *Id.*

67. *Id.* at 322.

68. *Id.* at 321-22.

69. Note that in both *Mandeville* and *Burke*, the defendants' general business activity was clearly within interstate commerce. Yet, in each case, the Court struggled with the interstate effects resulting from the specific restraint imposed. On the basis of these opinions, therefore, it would certainly be fair to characterize the jurisdictional test as specifically restraint-oriented analysis rather than one of the defendant's general conduct. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974).

sion,[70] the Supreme Court's opinion in *Gulf Oil Corp. v. Copp Paving Co.*[71] created substantial confusion over the proof of interstate effects required under the Sherman Act's "affecting commerce" test. In *Copp Paving*, the Court granted certiorari purportedly to decide only the narrow issue of the jurisdictional scope of the Clayton[72] and Robinson-Patman[73] Acts. Although the jurisdictional language of these Acts differs somewhat from that of the Sherman Act,[74] the plaintiffs in *Copp Paving* nevertheless argued that the jurisdictional tests applicable to all three were identical. The Court disagreed, holding that through the Clayton Act, Congress intended to reach only those activities actually "in commerce."[75] However, in responding to Copp's argument for the co-extensive reach of the Acts, the Court indicated that:

> Even if the Clayton Act were held to extend to acquisitions . . . having substantial effects on commerce, *a court cannot presume that such effects exist. The plaintiff must allege and prove* the apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions.[76]

Though purportedly directed solely toward Copp's Clayton Act argument, the Court's general comments on the pleading and proof requirements for showing an effect upon commerce had obvious implications for Sherman Act jurisdiction as well. Without reference to the earlier *Burke* and *Mandeville* opinions, the near presumptive analysis of effects followed in those cases was implicitly overruled.[77] Further, expressly established was that the proper focal point of analysis was upon the particular restraint involved, as implied in *Mandeville* and *Burke*, rather than the general interstate nature of the defendant's conduct.[78]

Soon after the *Copp Paving* decision, the Supreme Court added further mystery to the "affecting commerce" test through its opinion in *Goldfarb v.*

---

70. *See* 1 P. Areeda & D. Turner, Antitrust Law, 239 (1978).

71. 419 U.S. 186 (1974).

72. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified in scattered sections of 15, 29 U.S.C.).

73. Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976).

74. *Compare* Sherman Act, 15 U.S.C. § 1 (1976) ("commerce among the states"), *with* Clayton Act, 15 U.S.C. § 14 (1976) ("in commerce"), *and* Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) ("in commerce").

75. 419 U.S. at 198-201.

76. *Id.* at 202 (emphasis added).

77. The Court's discussion of the "affecting commerce" test and *sub silentio* overruling of the analysis of *Burke* and *Mandeville* was criticized in both dissenting and concurring opinions. *See id.* at 203-04, (Marshall, J., concurring), 208 n.6 (Douglas, J., dissenting), and has been further characterized as mere dictum, *see* United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1260 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975).

78. *See* note 69 *supra*.

Virginia State Bar[79] in which the fee schedule established by the Virginia Bar for real estate title examination was held to violate section one of the Sherman Act.[80] The Virginia Bar argued, in part, that any purported effect upon interstate commerce resulting from title examinations was only incidental, speculative and remote, thus beyond the scope of the commerce power.[81] Nevertheless, the Supreme Court sustained jurisdiction, finding that title examinations were integral and inseparable parts of the interstate commerce of real estate transactions.[82] Unfortunately, the Court neglected to specify the particular jurisdictional test applied in sustaining jurisdiction. Though later indicated to be the "in commerce" standard at issue,[83] this lack of specificity only added to the already substantial confusion surrounding the "affecting commerce" test.[84]

Then, only one year later, the Court apparently returned to its earlier *Burke* analysis in *Hospital Building Co. v. Trustees of Rex Hospital*[85] wherein the exclusionary practices of a private, tax-exempt North Carolina hospital were alleged to have violated sections one and two of the Sherman Act.[86] The plaintiff in *Hospital Building* operated a local, competing hospital which purchased a significant percentage of its supplies from out-of-state sellers, received revenue from a variety of out-of-state private and government insurance programs and provided care to many patients from other states.[87] In view of these and other interstate involvements,[88] the Court reversed the lower courts and found Sherman Act jurisdiction satisfied under the "effects" standard.[89]

Apart from the Court's specific holding, however, the analysis employed in *Hospital Building* is particularly interesting. For example, like the prior cases, the interstate nature of the *defendants' general* operations was not discussed. Unlike the others, however, the proof of effects in *Hospital Building* was established by showing the *general* interstate involvement of the *plaintiff*.[90] Following the earlier *Burke's* presumptive analysis, the Court

---

79. 421 U.S. 773 (1975).
80. *Id.* at 775.
81. Brief for Respondents at 16-25, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
82. 421 U.S. at 784-85.
83. *See* McLain v. Real Estate Bd. of New Orleans, 444 U.S. at 244.
84. *See, e.g.*, United States v. Foley, 598 F.2d 1323, 1328-29 n.3 (4th Cir. 1979).
85. 425 U.S. 738 (1976).
86. *Id.* at 740.
87. *Id.* at 741.
88. Additionally, the plaintiffs paid a management fee based upon gross hospital receipts to its parent Delaware Corporation located in Georgia and had further initiated out-of-state financing for a $4 million expansion. *Id.*
89. *Id.* at 739-40.
90. *Cf.* Page v. Work, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961) ("The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.").

then emphasized the practical, economic nexus between the defendants' conduct and the plaintiff's interstate involvements.[91] Further, the Court indicated that the "substantial effect" aspect of the test was satisfied "even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price."[92] Quoting an earlier opinion, an effect was substantial if it "resulted in *'unreasonable burdens on the free and uninterrupted flow'* " of interstate commerce.[93]

Contradicting the restrictive implications of *Copp Paving, Hospital Building* reestablished the expansive jurisdictional potential of the Sherman Act. At least one significant jurisdictional question remained however; was the Act applicable when a business, clearly operating in or affecting commerce, applied a restraint which directly affected only intrastate commerce? In other words, were the interstate commerce requirements imposed by the Act merely jurisdictional in nature, satisfied merely by the parties' general interstate activities, or did they further require that the particular restraint in question actually operate in or upon interstate commerce as well? *McLain v. Real Estate of New Orleans, Inc.*[94] supplied the answer.

II. McLain v. Real Estate Board Of New Orleans, Inc.[95]

A. *Disposition In The Lower Courts*

In *McLain,* a private individual representing himself and New Orleans area buyers and sellers of real estate brought a class action suit against the defendant realty associations. The plaintiff alleged there was a conspiracy to fix the price of brokerage services in violation of section one of the Sherman Act.[96] After initial discovery was conducted, the defendants moved for dismissal for lack of a requisite nexus to interstate commerce.[97] In response to this motion, the plaintiff offered the depositions of nine witnesses including the presidents of several local financing institutions in an effort to establish the existence of an appreciable amount of interstate commerce in the New Orleans real estate market.[98]

Despite the Supreme Court's intervening *Hospital Building* opinion, the district court found *Goldfarb* to be controlling.[99] Relying upon the depo-

---

91. 425 U.S. at 744-45.

92. *Id.* at 745.

93. *Id.* at 746 (emphasis in original) (quoting United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954)).

94. 444 U.S. 232 (1980).

95. 432 F. Supp. 982 (E.D. La. 1977), *aff'd,* 583 F.2d 1315 (5th Cir. 1978), *rev'd,* 444 U.S. 232 (1980).

96. 583 F.2d at 1317-18.

97. 432 F. Supp. at 983.

98. 444 U.S. at 238-39.

99. 432 F. Supp. at 983.

sition testimony offered by the defendants,[100] the Court concluded that contrary to the requirements of *Goldfarb,*[101] the functions performed by New Orleans area realtors were "incidental rather than indispensable occurrence[s] in the transactional chain of events."[102] Lacking a sufficient nexus to interstate commerce, the claim was dismissed.[103]

Although on appeal the Fifth Circuit's analysis was far more extensive than that of the lower court, it too found the plaintiffs allegations insufficient to establish the jurisdictional requirements of the Sherman Act and affirmed the judgment of the district court.[104] Consistent with *Copp Paving* and *Hospital Building,* the court of appeals began by narrowing its jurisdictional perspective to focus solely upon the impact of the particular challenged activities rather than the general business activities of the defendant.[105] Declaring that "real property is the quintessential local product"[106] and that the brokers' services were "entirely local in character,"[107] the court denied jurisdiction under the "in commerce" test.[108]

A more compelling jurisdictional argument, however, in the court's opinion, was that of "affecting commerce."[109] Accordingly, McLain argued that the "effects" test was satisfied merely by the *per se* nature of the alleged restraint.[110] This argument, having the support of several commentators and courts, was apparently that inasmuch as no adverse economic effect need be proven to establish the substantive element of a *per se* violation, it would be anomalous to require such a showing merely to establish jurisdiction.[111] Perceiving no legal foundation for such a jurisdictional distinction between *per se* and rule of reason allegations, the court found this argument equally unpersuasive.[112]

McLain alternatively argued that the facts and circumstances specifi-

---

100. The defendants offered the deposition testimony of two real estate financing individuals who testified that brokerage services were neither integral nor necessary to the financing of real estate. *Id.* at 984.

101. *See* notes 81-84 and accompanying text, *supra.*

102. 432 F. Supp. at 985.

103. *Id.* at 985 n.7.

104. 583 F.2d at 1323.

105. "The test is not that 'the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.' " *Id.* at 1319 (quoting Page v. Work, 290 F.2d 323, 330 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961)).

106. 583 F.2d at 1319.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1320.

111. *See id.* at 1320 n.5. In addition to the authorities surveyed by the court, this argument has additionally been advanced in 1 P. AREEDA & D. TURNER, ANTITRUST LAW, 321-32 (1978). *See also* Note, *Jurisdiction Under the Sherman Act: The "Interstate Commerce" Element and the Activities of Local Real Estate Boards and Brokers,* 1979 DUKE L.J. 860, 865.

112. 583 F.2d at 1320-21 n.5.

cally disclosed in his pleadings and proof satisfied the "affecting commerce" test.[113] Like the district court, however, the court of appeals erroneously believed that *Goldfarb's* "integral and inseparable" criteria also controlled the "effects" standard. Therefore, the court denied this jurisdictional ground as well, again without substantive analysis of the Court's intervening *Hospital Building* opinion.[114] Lastly, the court found it entirely unnecessary to allow the plaintiff the opportunity to prove his jurisdictional burden at trial, holding that the pretrial dismissal was proper.[115]

B. *The Supreme Court Opinion*

The Supreme Court unanimously[116] reversed, holding that McLain had shown a sufficiently demonstrable nexus with interstate commerce to at least proceed to trial.[117] As with the Court's earlier Sherman Act decisions, however, the particular pattern of analysis employed in *McLain* is far more significant than the specific judgment reached thereby.

The Court began its analysis by citing the early commerce power decisions of *Wickard v. Filburn* and *United States v. Darby* establishing the constitutional authority of Congress to reach wholly local activities which, though not in commerce, "nevertheless substantially *affect* interstate commerce."[118] After reviewing the historical application to the Sherman Act of this broad constitutional authority, the Court confirmed that jurisdiction under the Act "may be satisfied under either the 'in commerce' or the 'effect on commerce' theor[ies]."[119] Then, in a brief passage destined to play an extremely significant role in guiding future applications of the Sherman Act, the Court established the requisite jurisdictional elements of proof:

> [J]urisdiction may not be invoked . . . unless the relevant aspect of interstate commerce is identified . . . . To establish jurisdiction a plaintiff must allege the critical relationship [to interstate commerce] in the pleadings and if these allegations are controverted must proceed to demonstrate . . . either that the defendants' activity is itself in interstate commerce *or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce.*[120]

Although the Court cited *Copp Paving* in support of these requirements, the plain language of this passage signified a distinct shift in jurisdictional perspective. As the italicized language indicates, the particular re-

---

113. *Id.* at 1318.
114. *Id.* at 1322-23.
115. *Id.* at 1323.
116. Mr. Justice Marshall did not participate in the decision. McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 247 (1980).
117. *Id.* at 246-47.
118. *Id.* at 241 (emphasis in original). *See* notes 46-52 and accompanying text, *supra.*
119. 444 U.S. at 242.
120. *Id.* (emphasis added).

straint in question need not work directly in or upon interstate commerce. Furthermore, no longer need the "effects" inquiry focus solely on the impact upon interstate commerce caused by the specific restraint in question.[121] If that restraint merely affects the defendant's general business operation, which is itself clearly in or affecting commerce, then jurisdiction is satisfied. Additionally, that *McLain* altered the previously employed jurisdictional perspective was made explicit by the Court's application of this revised standard of proof to the specific facts before the Court: "To establish the jurisdictional element of a Sherman Act violation it would be sufficient . . . to demonstrate a substantial effect on interstate commerce generated by *respondents' brokerage activity.* Petitioners need not make the more particularized showing of an effect . . . caused by the alleged conspiracy to fix commission rates . . . ."[122]

Finally, completing its jurisdictional analysis of the facts presented in *McLain,* the Court certified that first, an appreciable amount of interstate commerce was involved in the activities of the New Orleans area real estate market[123] and second, that the defendants' general brokerage activities necessarily affected that interstate commerce. Relying primarily upon the plaintiff's proffered deposition testimony showing the multiplicity of out-of-state sources used to ultimately finance local residential property and provide title insurance therefor, the Court concluded that the requisite amount of commerce had been implicated so as to survive the defendants' pretrial motion to dismiss.[124] Consistent with the "practical economics" of *Burke* and *Hospital Building,* the Court held that McLain had made a sufficient jurisdictional showing so as to entitle him to go forward.[125]

---

121. *See* notes 70, 77-79 and accompanying text, *supra.*

122. 444 U.S. at 242 (emphasis added). Although, as this Note establishes, the analytical format and holding of *McLain* is entirely sound, the legal rationale offered by the Court in support thereof is unfortunately open to substantial criticism. For example, the Court stated that:

> The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an affect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co. v. United States,* 328 U.S. 781, 811 (1946); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 225, n.59 (1940).

Id. at 243. Yet, *American Tobacco* and *Socony* merely stand for the proposition that *economic ineffectiveness* of the restraint cannot be asserted to avoid *substantive* liability under the Act. *See* Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, [1981-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 64,017, at 76,260 n.36 (1st Cir.). In reality, neither of these cases truly support the jurisdictional analysis of *McLain.*

123. The Court found that the activities of providing both financing and title insurance for the New Orleans real estate market occurred in interstate commerce. 444 U.S. at 246.

124. *Id.* at 245. The Court also indicated that an appreciable amount of interstate commerce might be involved merely in the interstate movement of people in and out of the New Orleans area market. *Id.*

125. *Id.* at 246-47.

Before fully addressing the actual and potential impact of *McLain* upon the lower courts and Sherman Act jurisdiction in general, it is important to note that the law of the case in *McLain* is very narrowly limited to the jurisdictional showing necessary to survive *pretrial* summary judgment attack. Though highly inconceivable in view of the firm, convincing language of the Court, it is not entirely impossible that McLain might lose his jurisdictional issue at trial.[126] Whether armed with the same evidentiary proof, McLain could offensively obtain a summary judgment finding that jurisdiction was satisfied is not entirely clear. Indeed, as will be further discussed below, *McLain* has been minimally interpreted by a number of lower courts as merely reducing, relative to final trial analysis, the jurisdictional showing necessary to survive pretrial attack.[127] Nevertheless, in view of the substantial tendency for settlement in antitrust litigation, the practical significance of a plaintiff's ability to withstand pretrial jurisdictional attack should not be underestimated.

Furthermore, although the Court qualified its approval of the jurisdictional showing provided by *McLain*, a fair reading of the entire opinion leads one to the nearly inescapable conclusion that the only jurisdictional issue remaining for any trial resolution whatsoever is that of *sufficiency* of effect. For example, the Court established that at least two relevant activities occurred in interstate commerce: the provision of real estate financing and title insurance.[128] It further concluded that brokerage activities *ultimately* and *necessarily* affected these two interstate activities.[129] The Court's only equivocation, therefore, was related merely to the sufficiency of that necessary effect, intuitively measured in dollars, rather than any apparent question as to the sufficiency or strength of the nexus between brokerage activities and interstate commerce.

III. The Impact of McLain Upon the Lower Courts

A full analysis of *McLain* may best be obtained by reviewing the interpretations accorded to the Court's opinion by the few lower courts that have had an opportunity to apply the language of *McLain* to similar Sherman Act situations. Particularly enlightening in this respect is the dichotomy of in-

---

126. In several passages of the opinion, the Court qualified its holding, indicating the *potential* that McLain might not be successful on his jurisdictional showing at trial:

> At trial, respondents will have the opportunity, if they so choose, to make their own case contradicting this factual showing. . . .
>
> . . . Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial *may be able to show* that respondents' activities have a not insubstantial effect on interstate commerce.

Id. at 245-46 (emphasis added).

127. *See* notes 141-66 and accompanying text, *infra*.

128. 444 U.S. at 246.

129. *Id.*

terpretation that has developed between the Courts of Appeal for the Ninth and Tenth Circuits.

In *Western Waste Service Systems v. Universal Waste Control,*[130] the Court of Appeals for the Ninth Circuit had the opportunity, only two months after the *McLain* decision was announced, to apply the Supreme Court's new directive to a factually similar Sherman Act complaint. There, an Arizona corporation engaged in the Phoenix-area waste disposal business brought a Sherman Act complaint against a California corporation similarly engaged in the Phoenix waste disposal business.[131] Finding an insufficient nexus to interstate commerce, the district court granted a pretrial motion to dismiss.[132] The court of appeals, over a strong dissent,[133] reversed, holding that according to *McLain,* the plaintiff should be allowed to proceed to prove jurisdiction at trial.[134]

The trash collection business within the greater Phoenix area was apparently of a wholly local nature. Accordingly, in the district court, Western Waste Service submitted a large volume of evidence in an attempt to show that both *it and the defendants* substantially affected interstate commerce. This evidence disclosed, first, that both the plaintiff and the defendant had purchased a substantial amount of equipment from out-of-state suppliers.[135] Second, the defendant supplied scrap wood products to local paper brokers and recyclers for eventual interstate shipment.[136] Lastly, the defendant, Universal Waste Control, financed its equipment purchases from and paid a management fee to its parent corporation located in Illinois.[137]

Inferentially viewing this evidence in favor of the plaintiff, the court of appeals concluded that the defendants' business, in general, substantially affected interstate commerce.[138] Even further, the court found that the

---

130. 616 F.2d 1094 (9th Cir. 1980).

131. *Id.* at 1095.

132. *Id.*

133. *Id.* at 1099-1102 (Claiborne, J., dissenting).

134. *Id.* at 1099.

135. Western Waste and Universal had purchased equipment costing $212,342 and $425,741 respectively in the years 1975-76. *Id.* at 1098.

136. *Id.* Note that although the court analyzed this collection and interstate shipment of wood scrap under the "affecting commerce" doctrine, inasmuch as initial collection of this scrap could reasonably be viewed as an "integral part of an interstate transaction," Goldfarb v. Virginia State Bar, 421 U.S. 773, 784-85 (1975), this evidence, alone, should have been sufficient to establish jurisdiction under the "in commerce" test. *See id.*

137. For the years 1975-76, Universal made interest and management fee payments to Waste Management, Inc. of Illinois totaling $302,129 and $275,200 respectively. 616 F.2d at 1099.

138. *Id.* at 1098. In a very similar case involving the waste disposal business in St. Paul, Minnesota, a Minnesota district court denied jurisdiction and granted pretrial dismissal of a Sherman Act claim. *See* Heille v. City of St. Paul, [1981-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 63,997, at 76,183-85 (D. Minn.). The plaintiff in *Heille,* however, may have failed more as a result of insufficient evidentiary support rather than a necessarily incorrect reading of the *McLain* opinion. For example, contrasted with the extensive evidentiary showing established in

plaintiff had made the more particularized showing[139] that the allegedly unlawful activities in question had specifically affected interstate commerce.[140] Even disregarding this additional showing, however, the impact of *McLain* is therefore readily apparent in *Western Waste*. No longer need Sherman Act complainants prove that the particular challenged restraint affects commerce; a showing that the defendant's general activities so affect commerce is fully sufficient to establish jurisdiction.[141] Further consistent with *Mc-*

Western Waste, the *Heille* court was presented with only conclusory allegations that the equipment used by the parties in their waste disposal operations had been shipped in interstate commerce. *Compare* Western Waste, 606 F.2d at 1098 *with* Heille, [1981-1] TRADE REG. REP. (CCH) at 76,184. The court discounted the sufficiency of this singular showing because "neither party was in the business of buying and selling such equipment, rather the equipment was simply an incident of their trade, a one time or infrequent purchase." *Id.*

Although this holding does not represent a necessarily incorrect reading of *McLain*, it does present a rather restricted view of the showing necessary to establish jurisdiction. For example, the application of federal commerce power has hardly been limited merely to frequent or continuing interstate activities. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942). Additionally, despite the court's apparent concern for the specific amount of equipment purchased in interstate commerce, $200,000, for example, is not insubstantial or paltry for purposes of Sherman Act jurisdiction. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501-02 (1969). Additionally, commerce power jurisdiction was upheld in *Perez* for loans totalling only $3,000. *See* Perez v. United States, 402 U.S. 146 (1976). Even by a narrow reading of *McLain*, the *Heille* court's *pretrial* dismissal appears rather improvident. See note 223 *infra*, for a further discussion of the *Heille* opinion.

139. McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980).

140. 616 F.2d at 1098.

141. The dissent in *Western Waste* argued that *McLain* had changed the jurisdictional perspective to a plaintiff-oriented inquiry. *See id.* at 1101 (Claiborne, J., dissenting). Inasmuch as *Hospital Building*, rather than *McLain*, analyzed the jurisdictional impact of the defendants' activities solely from the perspective of their effect upon the plaintiff's interstate commerce, there may have been some support for that position prior to *McLain*. *See* notes 86-94 and accompanying text *supra*. There was never an indication, however, in any of the *McLain* opinions that the plaintiff, McLain, was personally, or even as a representative of a class, involved whatsoever with interstate commerce. Although, as the majority opinion in *Western Waste* accurately points out, a particularized showing of an effect upon the plaintiff's business is *one* manner of establishing jurisdiction, the dissent is clearly incorrect that *McLain mandates* such a showing. *See* 616 F.2d at 1089.

In a subsequent decision, another Ninth Circuit panel followed a slightly different analysis of jurisdictional effects. *See* Bain v. Henderson, 621 F.2d 959 (9th Cir. 1980). In *Bain*, a San Diego attorney filed a Sherman Act claim against several municipal judges who struck his name from the list from which court appointed counsel were selected. The plaintiff argued that the defendants' courtroom activity substantially affected the interstate commerce of criminal activity. *Id.* at 960. The court of appeals, however, affirmed the district court's pretrial dismissal for lack of jurisdiction under both the "in commerce" and "affecting commerce" tests. *Id.* at 961.

Although the court apparently agreed in principle with *McLain*'s jurisdictional focus upon the defendant's *general* activity rather than that of the particular challenged restraint, *see id.* at 961 n.2, it erred in the application of that test to the *Bain* facts. Specifically, the court examined the defendants' preparation of the attorney selection list to establish jurisdiction. *Id.* Yet, it was that activity that was ultimately at issue. A proper reading of *McLain* would have directed the Court to focus upon the overall judicial activities of the defendants and their effect

Lain, the *Western Waste* court narrowly limited its holding to merely allow the plaintiff an opportunity to prove jurisdiction at trial. The court took great pains to avoid commenting upon the evidentiary weight that the plaintiff's proffered evidence should be accorded at any subsequent trial.[142]

In stark contrast to the Ninth Circuit's opinion in *Western Waste* is the Tenth Circuit's analysis in *Crane v. Intermountain Health Care, Inc.*[143] In *Crane*, a physician, practicing in a Murray, Utah hospital owned and operated by the defendant health care corporation, brought a Sherman Act complaint alleging a conspiracy to restrain and boycott his practice.[144] The defendant corporation owned and operated sixteen other community hospitals throughout a three-state area.[145] Procedurally, the district court had initially dismissed the complaint prior to any discovery whatsoever merely upon the basis of the decision in a similar Tenth Circuit opinion.[146] Without the benefit of the Supreme Court's *McLain* opinion, the dismissal was initially affirmed by a panel of the Tenth Circuit.[147] The court of appeals, however, reviewed en banc those judgments in light of *McLain* and ultimately reversed.[148]

Despite the similarity of results in both cases, the analysis employed by the Tenth Circuit in *Crane* stands in direct contrast to that of *Western Waste*. In *Crane*, the plaintiff presented evidence disclosing the general interstate nature of his and the defendants' businesses in a manner quite similar to that presented in *Hospital Building*.[149] For example, Crane alleged that the defendant corporation operated a multi-state health care business which purchased supplies from out-of-state suppliers and received a major portion of its revenues from out-of-state insurers.[150] Additionally, Crane asserted that he *personally* purchased a large portion of his medical supplies from out-of-state sources and performed medical services at the defendants'

---

upon the relevant aspect of interstate commerce. 444 U.S. at 246.

Had the *Bain* court properly focused its jurisdictional perspective, the Sherman Act complaint would nevertheless have been dismissed. Even under the rather liberal interpretation of *McLain* and Sherman Act jurisdiction in general which is espoused herein, *some* logical nexus to interstate commerce must exist. Allegations that the municipal judiciary had a substantial economic effect upon the interstate commerce of criminal activity stretch practical economics and congressional intent far beyond rational limits.

142. *See* 616 F.2d at 1099.

143. 637 F.2d 715 (10th Cir. 1981)(en banc).

144. *Id.* at 716.

145. *Id.* at 719.

146. Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975).

147. The *McLain* decision was announced on the same day as the original panel of the Tenth Circuit affirmed the district court's dismissal. 637 F.2d at 720.

148. *Id.*

149. *See* notes 86-89 and accompanying text, *supra*.

150. 637 F.2d at 725.

hospital for patients from out of the state.[151] The court inferred from such allegations that Crane's complaint at least implied that the defendants' *allegedly unlawful activities* might, if successful, "spell . . . 'unreasonable burdens on the free and uninterrupted flow' of commerce" and as such he should have been allowed the opportunity to proceed to prove those jurisdictional allegations at trial.[152]

Crane, therefore, had presented the clearly sufficient, but more particularized showing discussed in *McLain* (*i.e.*, that the specific anticompetitive activity had itself affected commerce).[153] Yet, where the *Crane* court departed from the analysis of *McLain* and *Western Waste* was in its view of the necessity of this particularized showing. Over the vociferous dissent of but one judge,[154] the Tenth Circuit dismissed the plain meaning of the language of *McLain*, as interpreted in *Western Waste*, by stating that:

> An allegation that defendant's overall business has a general effect on interstate commerce is *neither necessary nor a sufficient condition* for Sherman Act jurisdiction . . . . It is not a sufficient condition because even though the defendant's overall business may impact interstate commerce greatly, the challenged activity may in every practical economic sense be unrelated to interstate commerce. A mere allegation that the defendant's general or overall business affects interstate commerce falls short of alleging the required "critical relationship," for it leaves the court—impermissibly under *McLain* . . .—to "presume" the nexus between the challenged activity and interstate commerce.[155]

Under the *Crane* court's interpretation, the *McLain* Court found that the alleged conspiracy to fix the rate of brokerage commissions had itself substantially affected interstate commerce. Therefore, in the Tenth Circuit's opinion, *McLain* did *not* signal a shift in jurisdiction perspective.[156] The dissenting opinion filed with *Crane*, however, emphasized the unanimity of *McLain* and aptly pointed out that the language of that opinion was clear:

> These pointed affirmative and negative statements . . . in *McLain*[157] make it plain that an antitrust plaintiff simply need not make a particularized showing of an effect on interstate commerce caused by the alleged conspiracy or other illegal acts. . . . Looking back at the earlier Supreme Court cases and drawing contrary conclusions from them means that we simply downgrade this recent, unanimous and emphatic decision by the Court on this issue.[158]

---

151. *Id.*
152. *Id.* (quoting Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 744 (1976)).
153. *See* 444 U.S. at 242.
154. 637 F.2d at 727 (Holloway, J., concurring and dissenting).
155. *Id.* at 723-24 (emphasis added).
156. *Id.* at 724.
157. *See* 444 U.S. at 242-43.
158. 637 F.2d at 727 (Holloway, J., concurring and dissenting) (footnote added).

In view of the arguments submitted to the Supreme Court for *McLain*, the majority in *Crane* was quite simply wrong in its restrictive interpretation of Sherman Act jurisdiction. It cannot be said that the *McLain* Court was inadequately briefed upon the prevailing jurisdictional tests and their application to the facts there at bar.[159] Indeed, the government's amicus brief argued for a far more expansive jurisdictional approach than even that apparently adopted by the Court.[160] Only by grossly distorting the clear language of *McLain* can the analysis of the *Crane* opinion be reconciled.

In an opinion discussing one of the few jurisdictional disputes that have actually reached trial stage, the Fifth Circuit recently affirmed the trial court dismissal of a Sherman Act complaint in *Alabama Homeowners, Inc. v. Findahome Corp.*[161] Similar to *McLain*, the *Alabama Homeowners* case involved a local real estate brokerage industry, this time in Mobile, Alabama.[162] The plaintiff, a newly organized brokerage company, attempted to establish jurisdiction by showing that the local real estate industry affected interstate commerce and that the defendants' publication of local real estate guides was therefore subject to Sherman Act regulation.[163] The plaintiff, however, was apparently only able to show that it had sold one home to a nonresident of Alabama and that the members of a local brokerage association, of which it was not a member, sold a number of homes financed through federally guaranteed programs.[164] At the close of the plaintiffs' case, the district court granted a defense motion for a directed verdict on the basis that even assuming jurisdiction, the particular restraint alleged did not violate the Sherman Act.[165] On appeal, the Fifth Circuit concentrated almost entirely upon the jurisdictional issue. Finding the plaintiffs' proof insufficient, it held that the case should have been dismissed for lack of jurisdiction.[166]

The court of appeals decision is probably correct. Contrary to the proof offered in *McLain*, the plaintiff in *Alabama Homeowners* did not establish that the defendants' general publishing activities "necessarily affect[ed] both the frequency and the terms of residential sales transactions."[167] At best, assuming that the Mobile real estate market affected several areas of interstate commerce, the defendants' activities had only an indirect affect upon that market. Even under the expansive view of Sherman Act jurisdic-

---

159. *Compare* Brief for Petitioner at 18-56, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), *with* Brief for Respondent Latter & Blum, Inc., at 5-11 *and* Brief for Certain Respondents at 8-39.

160. *See* Brief for Amicus United States at 8.

161. 640 F.2d 670 (5th Cir. 1981).

162. *Id.* at 672.

163. *Id.*

164. *Id.* at 673.

165. *Id.*

166. *Id.* at 674.

167. 444 U.S. at 246.

tion proposed in this Note, allegations that a particular activity only indirectly affects another activity which itself only indirectly affects interstate commerce stretch "practical economics" and congressional intent to an unrealistic degree.

Although a number of district courts have had an opportunity to apply *McLain* in appropriate Sherman Act circumstances,[168] several opinions particularly deserve attention. For example, in *General Glass Co. v. Globe Glass & Trim Co.*,[169] the court was presented with allegations by a local glass installation company that the defendant, Allstate Insurance Company, had conspired with its preferred automobile glass installation shops in violation of the Sherman Act.[170] The district court, though it ultimately denied a pretrial motion to dismiss,[171] expressed several erroneous reasons under which it felt jurisdiction could not factually be shown. Initially, although the court did note the relevance of *McLain*, it persisted in applying the jurisdictional test of *Page v. Work*.[172] The validity of the often-quoted *Page* test as the sole jurisdictional standard, however, was clearly undermined by *McLain*. It is no longer essential that the *plaintiff* have any interstate commerce contacts or effects thereon whatsoever. Though that showing is sufficient, it is not *necessarily* required; the *McLain* inquiry is primarily defendant-oriented.[173] Therefore, the facts disclosed in *General Glass* clearly placed the defendant, Allstate Insurance Company, within the jurisdictional scope of the Sherman Act due to the well renowned national nature of its insurance business.[174]

Additionally, the *General Glass* court erroneously required the more particularized showing that the ostensibly local activities actually affect the demand for and quantity of goods moving in interstate commerce, in that case, automobile glass.[175] Inasmuch as the demand for replacement glass was determined by a factor unrelated to the defendants' activities (automobile accidents in Illinois), and the effect of the questioned activity was merely to cause a "shift in the amount purchased from one local glass shop to an-

---

168. *See, e.g.*, Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815 (S.D. Fla. 1981) (southern Florida podiatry practice); Denver v. Santa Barbara Community Dialysis Center, Inc., [1981-1] Trade Cas. ¶ 63,946 (C.D. Cal.) (local competition in nephrologist services); Hahn v. Oregon Physicians' Serv., 508 F. Supp. 970 (D. Or. 1981) (Oregon podiatry practice); Cesnik v. Chrysler Corp., 490 F. Supp. 859 (M.D. Tenn. 1980); Hester v. Martindale-Hubbell, Inc., 493 F. Supp. 335 (E.D.N.C. 1980).

169. [1980-2] Trade Cas. ¶ 63,531 (N.D. Ill.).

170. *Id.* at 76,846.

171. *Id.* at 76,847.

172. 290 F.2d 323, 328 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). According to *Page*, "[t]he test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Id.*

173. *Accord*, Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815, 824 (S.D. Fla. 1981).

174. [1980-2] Trade Cas. at 76,846.

175. *Id.*

other," the court expressed substantial doubt that the plaintiffs could ever prevail on the jurisdictional issue.[176] Even if the court's conclusion as to effect was correct, however, a collusive shift in suppliers clearly presents an anticompetitive situation in which "practical economics" would dictate that jurisdiction was satisfied. Further, *McLain* established that the ineffectiveness of an otherwise anticompetitive activity or its failure to produce adverse consequences would not bar Sherman Act jurisdiction. To its credit, however, the *General Glass* court did ultimately concede that it was not altogether impossible for the plaintiff to show, at trial, the requisite nexus to interstate commerce and so allowed them to go forward.[177]

The unanswered *McLain* issue of substantiality of effect was the subject of the district court opinion in *Hahn v. Oregon Physicians' Service*.[178] There, the Court was presented with allegations by Oregon podiatrists that the defendants, state regulated health care contractors, a federally regulated health maintenance organization and a federally regulated individual practice association, had conspired to boycott the plaintiffs' service in violation of both the Clayton and Sherman Acts.[179] To support jurisdiction, the plaintiffs asserted that a number of their own activities involved interstate commerce and were in turn affected by the defendants' conduct.[180] The district court granted the defendants' motion for summary judgment, however, not because the plaintiff had not identified relevant aspects of interstate commerce, but because the defendants' effect upon that commerce was insubstantial in degree.[181]

The *Hahn* court compared the dollar volume of the transactions implicated in both *McLain* and *Hospital Building* with that presented by the plaintiff.[182] Apparently, the court perceived that these opinions established monetary, jurisdictional guidelines of substantiality.[183] Yet, neither *McLain* nor *Hospital Building* should be so interpreted. For example, in *Hospital Building*, the Court specifically indicated that an effect was substantial

---

176. *Id.* at 76,846-47.

177. *Id.* at 76,847.

178. 508 F. Supp. 970 (D. Or. 1981).

179. *Id.* at 972.

180. The plaintiffs asserted that the following activities of which they were engaged involved interstate commerce: (1) out-of-state purchase of medical supplies and equipment; (2) treatment of patients who cross state lines; (3) receipt of payments from out-of-state insurers; and (4) participation in the federal medicare program. *Id.* at 977.

181. *Id.*

182. *Id.*

183. The *Hahn* court noted that:

> [e]ven if the plaintiffs purchased all of their supplies and equipment out of state, the amount is inconsequential compared to their gross income. Fewer than two percent of their patients travel across state lines. And the largest sum any one of the plaintiffs received from an out of state insurance company is less than ½ of 1% of that plaintiff's gross income.

Id.

"even if its impact on interstate commerce falls *far short* of causing enterprises to fold or affect market price."[184] Indeed, an amount as low as $200,000 is not "paltry or 'insubstantial' " for purposes of antitrust jurisdiction.[185] Furthermore, it is entirely inappropriate to read any definition of "substantiality" into the *McLain* opinion. Therefore, particularly when viewed from a pretrial perspective, the *Hahn* decision appears clearly inconsistent with *McLain*.[186]

Therefore, in view of these opinions and without expanding the scope of the jurisdictional test established in *McLain*, several distinct methods for proving Sherman Act jurisdiction are presently available to plaintiffs seeking to apply the "affecting commerce" doctrine. Initially, one can establish jurisdiction by showing that the defendant's general activities have a substantial affect upon interstate commerce.[187] This method is of great practical significance where clear evidence of a substantial effect upon interstate commerce caused by the specific restraint in question is lacking. Where this more particularized showing is available, however, a plaintiff would certainly be well-advised to pursue this enhanced evidentiary showing.[188] Finally, inasmuch as a substantial effect upon interstate commerce is the ultimate jurisdictional inquiry, a plaintiff can establish jurisdiction by showing that it is in or affecting interstate commerce and that it has been substantially affected by the defendant's activity.[189] This two-part showing would be particularly appropriate where the defendant's general activity is neither "in commerce" nor clearly "affects" commerce but nevertheless has substantially affected the plaintiff's business. Additionally, this showing may be appropriate where little is known of the full scope of the defendant's activity but there is no question as to the interstate nature of the plaintiff's affected activities.

IV. Further Expansion for Sherman Act Jurisdiction

Despite the variety of methods now available to establish jurisdiction under the Sherman Act as a result of *McLain*, there are still a wide range of anticompetitive activities which apparently remain beyond the reach of the Act. For example, had plaintiff McLain unfortuitously launched his attack upon anticompetitive real estate marketing practices from a forum other

184. 425 U.S. at 745.

185. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501-02 (1969).

186. Although apparently not advanced before the district court, the plaintiffs in *Hahn* could potentially have asserted the collateral jurisdiction argument, *see* notes 207-19 and accompanying text, *infra*, based upon federal regulation of several of the defendants' businesses, *see* 508 F. Supp. at 977.

187. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

188. *See* Western Waste Serv. Syss. v. Universal Waste Control, 616 F.2d 1094 (9th Cir. 1980).

189. *See* Hospital Bldg. Corp. v. Trustees of Rex Hospital, 425 U.S. 738 (1976).

than New Orleans and smaller in size, it is not at all clear that the result of the Court's opinion would have remained unchanged. As a result, the methodology of case-by-case analysis unavoidably leads to a very real risk of inconsistent jurisdictional determinations, often influenced not so much by in-depth constitutional inquiry but by the individual skill and ingenuity of trial counsel.[190]

A clear example of where this risk of inconsistency had come to fruition prior to *McLain* is in the widely diverging decisions concerning the field of real estate brokerage services provided in individual localities throughout the nation.[191] Although *McLain* may have placed a substantial number of those earlier decisions in a position of doubtful validity, it by no means established that real estate brokerage services, wherever provided, sufficiently affect commerce as a matter of law.[192] As a result, unnecessary and somewhat unfounded jurisdictional battles undoubtedly will continue to be waged in nearly every similar case, not only at pretrial stages but at trial as well.

Yet, there apparently are at least two additional methods for establishing jurisdiction under the "affecting commerce" test, judicial acceptance and application of which could essentially eliminate the present uncertainties and inconsistencies surrounding Sherman Act jurisdiction. This Note, therefore, will conclude with an analysis of these methods, their constitutionality as applied to the Act and their anticipated impact upon Sherman Act litigation.

A. *"Class of Activities" Jurisdiction*

The now familiar "class of activities" test of general commerce power authority first appeared in the landmark commerce power decision of *United States v. Darby*.[193] Fashioned from the necessary and proper clause of the Constitution,[194] this test was used in *Darby* to authorize congressional regulation of intrastate activities which "are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."[195] *Darby* authorized Congress to regulate the activities of an individual member of an identifiable class of activities which affected interstate commerce as a whole even where the isolated, *individual* activity was clearly intrastate in nature and effect.

---

190. *See* Brief for Amicus United States at 13, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

191. *See* Petitioner's Brief for Certiorari at 15-17, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

192. Indeed, it is not entirely clear that even McLain, himself, will be able to establish the requisite jurisdictional element at trial. *See* note 121 and accompanying text, *supra*.

193. 312 U.S. 100 (1941).

194. U.S. CONST. art. I, § 8, cl. 18.

195. 312 U.S. at 121.

The full significance of this test was not apparent, however, until the noted 1964 civil rights cases of *Heart of Atlanta Motel, Inc. v. United States*[196] and *Katzenbach v. McClung*.[197] There, the Supreme Court affirmed the fundamental power of Congress to regulate individual members of a class of activities whose combined activity could be constitutionally regulated due to its total effect upon interstate commerce,[198] even where the isolated effect of an individual, regulated activity was clearly insignificant.[199] This "class of activities" approach was subsequently applied in *Perez v. United States*[200] to authorize application of federal criminal penalties to wholly local loansharking operations.[201] Indeed, *Perez* further established that an individual member of a legislatively designated class could be regulated even in the absence of *any* demonstrable nexus between the challenged activity and interstate commerce.[202]

The cases applying this "class of activities" test, however, have been presented with specific congressional legislation identifying a particular activity as "affecting commerce." For example, as was the case in *Katzenbach* and *Heart of Atlanta Motel,* Congress had affirmatively declared, through relevant identifying criteria, specific types of businesses deemed to affect commerce and so subject to federal civil rights regulation.[203] Consequently, the only jurisdictional function of the courts in such cases is to merely ascertain whether the legislature had a rational basis for its conclusion and whether the particular party before the court is indeed a member of that designated class.[204]

The congressional specificity apparent in these types of "class of activities" statutes, however, differs substantially from the very general prohibitions of the Sherman Act.[205] Yet, as the Supreme Court has noted, the absence of specific, formal congressional findings supporting a legislative determination that a particular class affects commerce "is not fatal to the validity of the statute."[206] Therefore, if congressional intent, based upon rational analysis, is the polestar of the Court's constitutional scrutiny of a legislatively designated class, then the application to the Sherman Act of this "class of activities" test of jurisdiction is not necessarily inappropriate. For

196. 379 U.S. 241 (1964).
197. 379 U.S. 294 (1964).
198. *Id.* at 302-03.
199. *Id.* at 300-01.
200. 402 U.S. 146 (1971).
201. *Id.* at 152-54.
202. *Id.* at 157 (Stewart, J., dissenting).
203. Pub. L. No. 88-352, 78 Stat. 241, 243 (codified in scattered sections of 28, 42 U.S.C.).
204. *See, e.g.,* Katzenbach v. McClung, 379 U.S. at 303-04.
205. However, note that the generalized language of the Sherman Act does not differ substantially from that construed in *Darby* under the Fair Labor Standards Act of 1938. *Compare* 15 U.S.C. § 1 (1976) *with* 29 U.S.C. § 202 (1976).
206. Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

example, as earlier discussed,[207] the congressional intent in enacting the Sherman Act to reach all anticompetitive activity *as a class* can hardly be doubted. Indeed, although there are inherent dangers in placing undue emphasis upon isolated floor comments, there is specific language directly supporting the application of such a test within the record of Senate debate on the Sherman Act.[208]

The use of this method of applying federal commerce power could have great practical significance in a Sherman Act context. In lieu of the present *McLain* requirement that a plaintiff at least show that the defendant's general business activity substantially affects interstate commerce,[209] a plaintiff using the "class of activities" test would need to prove only that the general industry or activity, of which the defendant is but a part, affects commerce. There would be no necessity whatsoever to show that an isolated, local anticompetitive activity itself substantially affected commerce so long as the relevant class of activities was rationally subject to commerce power regulation.

Certainly there are a number of concerns which must be addressed with respect to this proposal. It cannot be said that such an approach to Sherman Act jurisdiction, however, would necessarily be unconstitutional. Congress, through the Sherman Act, has already "left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce."[210] If this delegation of authority is appropriate, then the constitutional issue can be narrowed to whether the courts, *as well as Congress*, can make these rational "class of activities" determinations. Clearly they can; for even where Congress has made a legislative determination that a general class of activities affects commerce, the inquiry is "ultimately a judicial rather than a legislative [one]" and "can be settled finally only by this Court."[211] Neither can an individual activity object on the grounds that its activity, viewed in isolation, does not substantially affect commerce. The relative insignificance of an isolated member of a regulated class of activities has been affirmatively foreclosed as a rationale for individual exemption.[212]

There obviously are additional, practical concerns which must be addressed, such as the burden that adoption of this test might place upon the

---

207. *See* notes 16-32 and accompanying text, *supra*.

208. *See* 20 CONG. REC. 1457 (1889) (remarks of Sen. Jones). Although Senator Jones' specific reference to "class of evils" *id.*, related to the activities Congress had previously regulated under the Interstate Commerce Act, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.), his comments, as with many others, were clearly directed toward the general evil wrought by *all* anticompetitive activity.

209. 444 U.S. at 242.

210. United States v. Darby, 312 U.S. at 120.

211. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. at 273 (Black, J., concurring); *accord*, Katzenbach v. McClung, 379 U.S. at 303-04.

212. *See* Maryland v. Wirtz, 392 U.S. 183, 193 (1968), *rev'd on other grounds*, National League of Cities v. Usery, 426 U.S. 833 (1976).

already crowded federal docket. This concern is appropriate and cannot be lightly dismissed, however, it is not of *constitutional* stature. Where the power of Congress to reach an isolated member of a constitutionally regulated class can be shown, *judicial* denial of such regulation is of questionable propriety.[213] Furthermore, if the federal courts are reluctant to broaden the scope of Sherman Act jurisdiction for practical, docket-related reasons, they should openly address that particular concern rather than conceal it behind a cloak of purported unconstitutionality. Although it is true that from the trivial nature of a particular activity, a court may infer that Congress did not intend to regulate that activity, with respect to the legislative history of the Sherman Act, size of activity was relevant only to ensure constitutional application of the commerce power.

This proposal for utilization of a class of activities approach to Sherman Act jurisdiction has not entirely escaped the cognizance of antitrust litigants. For example, the government's amicus brief in *McLain* presented just such an argument.[214] Citing *Perez, Wickard* and *Heart of Atlanta Motel,* the government argued that:

> [O]nce a class of endeavors is found to affect commerce, Congress can regulate all of the activities of that class, even activities that do not separately affect commerce. Consequently, it is not necessary to show . . . that a particular conspiracy has indentifiable effects on interstate commerce. *It is enough to show that the conspiracy takes place in an industry that affects commerce through its local activities.*[215]

Applied to the facts of *McLain,* the government presented the national economic effects of all real estate brokerage activities and therefore asserted that Congress had the power to regulate the entire real estate industry.[216]

This argument makes sound practical economic sense. For example, a massive conspiracy to fix real estate commissions consummated by local realtors situated in small cities throughout the nation would undoubtedly exert a substantial effect on the elements of interstate commerce identified in *McLain.*[217] Yet, due to the size of any one "infected" locality, this highly anticompetitive activity might escape federal and state regulation altogether. Furthermore, it makes no sense whatsoever to declare that the real estate practice in Syracuse, New York may be regulated under the Sherman Act while simultaneously exempting that identical activity in New Orleans, Louisiana.[218] It is readily apparent that the practical realities of our modern,

---

213. *Accord,* Note, *supra* note 111, at 880-81.

214. *See* Brief for Amicus United States at 8, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

215. *Id.* (emphasis added).

216. *Id.* at 5.

217. *See* 444 U.S. at 245-46.

218. *Compare* United States v. Greater Syracuse Bd. of Realtors, Inc., 449 F. Supp. 887 (N.D.N.Y. 1978) *with* McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315 (5th Cir.

interrelated national economy have virtually antiquated the Supreme Court's insistence upon individual, case-by-case jurisdictional analysis.[219]

Additionally, as a result of the decisional consistency available through the "class of activities" test, application of this approach could actually help to reduce the crowded federal docket. No longer would defendants be encouraged to contest this jurisdictional element through expensive and time-consuming pretrial procedural tactics. Further, due to the inherent tendency towards pre-trial settlement of antitrust litigation, application of this approach would not necessarily result in any increase in the actual trial of Sherman Act complaints. Most importantly, however, through a predictable, wide-ranging application of Sherman Act jurisdiction, the congressional intent to eradicate all anticompetitive activity might at last be fully effectuated.

Despite the unanimity of the *McLain* opinion and the Court's failure to expressly adopt the government's argument therein, future adoption by the Court of this "class of activities" test is not entirely unforeseeable. In *McLain,* the Court did rely directly upon *Darby* and *Wickard* to establish the broad authority of the commerce power.[220] Unfortunately, where the Court strayed from the specific teachings of those earlier opinions was in its continued requirement that the general activity of each and every defendant *substantially* affect commerce.[221] *Darby, Wickard* and their progeny expressly discount any such requirement. The element of substantiality discussed in *Darby* and *Wickard,* and apparently referred to in *McLain,* is merely that the individual contribution "taken together with that *of many others,* . . ., is far from trivial."[222] Indeed, no one can seriously assert that the amount of wheat at issue in *Wickard* was itself a substantial effect upon the national commerce. So viewed, the Court's continued insistence upon individual substantiality of effect can only be viewed as a "long backward step" that the *McLain* Court was otherwise unwilling to take.[223]

1978), *rev'd,* 444 U.S. 232 (1980). *See generally* Note, *supra* note 117, at 877.

219. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW, 230 (1978). "[J]urisdiction should be presumed on the ground that every restraint that would violate the Sherman Act has the inherent tendency to affect interstate resource allocation and the interstate movement of goods and services in our national economy." *Id.*

220. *See* 444 U.S. at 241.

221. *See id.* at 242.

222. 317 U.S. at 128 (emphasis added).

223. *See* 444 U.S. at 244-45. Note, however, that a recent district court addressing this subject, specifically declined to adopt the "class of activities" test. *See* Heille v. City of St. Paul, [1981-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 63,997 at 76,184 n.4 (D. Minn.). In *Heille,* the court was apparently asked to invoke jurisdiction based upon the interstate commerce effects of the plaintiff's and defendant's general industry, in that case, the waste collection industry, rather than the parties' individual contributions. After an extensive review of the constitutional reach of the commerce power authorized by *Perez, Wickard* and *Katzenbach,* the court stated that expansion of Sherman Act jurisdiction "coterminous" with such authority "would read the interstate commerce requirement out of the Sherman Act." *Id.* It therefore

B. *Collateral Jurisdiction*

The final proposal for further expansion of the methods available for proving Sherman Act jurisdiction is effectively an offshoot of the "class of activities" test discussed above. Denominated for the purposes of the Note as "collateral jurisdiction," this test would invoke Sherman Act jurisdiction upon any activity which was subject to collateral commerce power regulation under another federal statute. Although this theory was obliquely presented and dismissed in *Gulf Oil Corp. v. Copp Paving Co.*,[224] in view of the renewed relevance of the "class of activities" test and the use of this collateral approach in similar situations,[225] it is worthy of further consideration.

In *Copp Paving* the defendants were regulated under the commerce power authority of the Fair Labor Standards Act (FLSA).[226] The plaintiffs therefore argued that inasmuch as the defendants were within the commerce power for the regulatory purposes of one act and because Congress had intended to apply the reach of the antitrust laws to their furthest permissible extent, the constitutional application of the commerce power to an activity already regulated under one federal act should be collaterally assertable under any similarly enacted statute, in that case, the Clayton Act.[227] The Court dismissed this argument on two grounds. First, as distinguished from the FLSA, Congress intended to specifically limit the jurisdictional scope of the Clayton Act to reach only those activities actually "in commerce."[228] Second and directly impacting upon Sherman Act jurisdiction, the Court held that the ultimate inquiry relevant to federal regulation of local activities was congressional intent.[229] Finding that intent less expansive under the Clayton Act than the FLSA, the Court ended its analysis of this argument.

The congressional intent of the Sherman Act, however, is not similarly limited in scope.[230] Consequently, *Copp Paving* may not have foreclosed the application of this collateral jurisdiction test to Sherman Act complaints. Indeed, as noted by one dissent in *Copp Paving*, although differing statutes enacted upon the commerce power may have distinctly dissimilar purposes, these dissimilar purposes, alone, should not necessarily limit the coextensive jurisdictional reach of the acts.[231]

As indicated above, this theory of collateral jurisdiction has been effectively used in other nonantitrust situations. For instance, such a test has been utilized in the area of federal trademark registration under the Trade-

---

declined to adopt such an analysis until approved by a higher court. *Id.*

224. 419 U.S. 186 (1974).
225. *See* notes 216-20 and accompanying text, *supra*.
226. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1976).
227. 419 U.S. at 196.
228. *Id.* at 195.
229. *Id.* at 196-97.
230. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743 (1976).
231. 419 U.S. at 208 (Douglas, J., dissenting).

mark Act of 1946.[232] Inasmuch as the authority for enactment of this Act was founded upon the commerce power, the Act specifically provides that only those marks "used in commerce" may be federally registered.[233] Furthermore, the Act defines "commerce" as, "all commerce which may lawfully be regulated by Congress."[234]

As a result, in *In re Smith Oil Corp.*,[235] the Trademark Trial and Appeal Board established that one method by which a local restaurant might prove the use of its mark in interstate commerce was to show that the restaurant was collaterally regulated under the Civil Rights Act of 1964. The theory employed in *Smith Oil* was simply that if an activity so affected interstate commerce so as to be lawfully regulated under one commerce power statute, then that same activity must certainly be subject to regulation under any other, equally expansive commerce power legislation.[236]

Utilization of this collateral jurisdiction test to Sherman Act circumstances is not only logically sound but has practical significance as well. If Congress truly intended a jurisdictional reach of the Sherman Act coextensive with that of the general commerce power, then application of that power through one statute to a particular activity should undeniably allow for application of the Sherman Act to that same activity. Practically, use of this methodology would relieve plaintiffs of the burden of proving that even a particular class of activities affected commerce where such a determination had previously been made by Congress in another statutory context.

V. Conclusion

Though historically troublesome, the "affecting commerce" test of Sherman Act jurisdiction has played an important role in federal regulation of anticompetitive activity. Though long overdue, the Supreme Court's recent illumination, in *McLain v. Real Estate Board of New Orleans, Inc.*, of the evidentiary requirements of this test has clearly expanded the usefulness and scope of jurisdiction under the Act to a substantial degree. *McLain*, however, has not entirely eliminated the continuing confusion and unpredictability of results arising from application of this test. Because there may still exist a large category of ostensibly local activities constitutionally reachable by the commerce power but apparently beyond the scope of even

---

232. Trademark Act of 1946, ch. 540, 60 Stat. 427 (codified in scattered sections of 15, 28 U.S.C.).

233. 15 U.S.C. § 1051 (1976).

234. *Id.* § 1127. Similar to the congressional intent behind the Sherman Act, it has been stated that Congress, through the Trademark Act of 1946, intended to regulate to the full constitutional extent of its commerce power. *See* Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), *aff'd*, 344 U.S. 280 (1952).

235. 156 U.S.P.Q. (BNA) 62 (TTAB 1967).

236. *Id.* at 63; *accord, In re* Cook United, Inc., 188 U.S.P.Q. (BNA) 284, 288 (TTAB 1975).

the expansive test of *McLain*, it is in the best interest of future Sherman Act complainants to urge the adoption of the "class of activities" and collateral jurisdiction tests presented in this Note.

Stephen P. Swinton