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CONSTITUTIONAL LAW—THE COMMERCE CLAUSE: ALLOCATING PROVISION OR INDIVIDUAL RIGHT? *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 126 (1984).

Consolidated Freightways Corporation of Delaware was successful in having Iowa's ban on the use of sixty-five foot twin trailer trucks declared invalid as a violation of the commerce clause.¹ On an issue that was bifurcated below, it then sought attorney's fees from the State of Iowa under 42 U.S.C. section 1988.² The United States District Court for the Southern District of Iowa held that Consolidated had failed to demonstrate a fourteenth amendment violation as a basis for applying 42 U.S.C. section 1983³ and that its success on the commerce clause claim did not establish the deprivation of any individual right, privilege, or immunity secured by the Constitution within the meaning of section 1983.⁴ Consolidated appealed.

The United States Court of Appeals for the Eighth Circuit affirmed the district court, holding that the commerce clause⁵ is a provi-

1. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

2. 42 U.S.C. § 1988 (1982) states in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow . . . a reasonable attorney's fee as part of the costs.

3. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. §1983 (1982).

4. *Consolidated Freightways Corp. v. Kassel*, 556 F. Supp. 740 (S.D. Iowa 1983).

5. The commerce clause U.S. CONST. art. I, §8, cl. 3, reads:

"The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." Although the commerce clause, on its face is an express grant of power to Congress to regulate commerce among the States, it has been recognized since the early part of the nineteenth century that where Congress has not acted some measurable power is left to the states to regulate commerce. *See Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). ("We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can . . . be considered as repugnant to the power to regulate commerce in its dormant state . . .") Chief Justice Marshall's use of the adjective "dormant" was picked up by the judiciary and by commentators over the years. Now, an action arising under the commerce clause resulting from state regulation in the area where Congress has not spoken is generally referred to as a "dormant commerce clause"

sion allocating power between state and national interests, not one that secures rights cognizable under section 1983. *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 126 (1984).

The commerce clause has its origin in the earliest form of post-colonial government.⁶ Article IV of the Articles of Confederation specifically addressed the problem of commercial isolationism⁷ and conveyed the idea that this government was singularly concerned with the preservation of commerce. Although the article obviously embodied a spirit of free trade, it was the last clause of the article, allowing the imposition of duties and tariffs between the states, which eventually shackled trade under the confederation.⁸

The countervailing commercial regulations which took effect simply by crossing state lines had bound-up commerce⁹ due to ineffectual remedial efforts in Congress and the legislatures. In an attempt to resolve the disputes, various states appointed commissioners to meet in Annapolis in September, 1786.¹⁰ However, when the representatives of only five states showed up at the appointed time, a public uproar over the critical state of commerce erupted. Alexander Hamilton responded by writing a letter to the state legislatures calling upon them to have their representatives assemble at Philadelphia in May, 1787, to reconsider the entire confederacy in a general convention.¹¹

Edmund Randolph, Virginia delegate, opened the convention by enumerating the defects of the confederation. Third on his five point

claim. Congress, rather than the commerce clause, is actually dormant; but this appears to be a term of art.

6. See E. PRENTICE & J. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* (1981).

7. The better to secure the perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively

ART. OF CONFEDERATION, art. IV, in M. JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 263-4 (1970).

8. *THE FEDERALIST* NO. 22, at 137 (A. Hamilton) (J. Cooke ed. 1961).

9. See also Prentice, *supra* note 6, at 2-3 (stating that internal trade was not the only source of confederation discord; the want of a single power to deal with foreign trade had resulted in American ships being barred from the West Indian trade under the English Navigation Act).

10. 5 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 113 (Washington 1845).

11. *Id.* at 114-17.

agenda was the problem of chaotic commercial regulation.¹² As one nineteenth-century commentator noted, "it was separate commercial legislation of the States and the want of a general power over the subject by the Federal government which threatened the harmony of the United States under the Confederation."¹³ Accordingly, the debate at the convention focused mainly on the regulatory power that would be vested in the federal government and few words were spent on the subject of freedom of trade.¹⁴ It should not be inferred, however, that the Framers did not believe in an individual right to engage in commerce. On the contrary, even that most ardent federalist, Alexander Hamilton, thought that the spirit of commerce would draw the nation together under the new union.¹⁵

The first outline of the commerce clause appeared in a draft of the Constitution thought to be proposed by Charles Pinckney.¹⁶ This draft, along with other drafts, was referred to a committee of detail. From this committee emerged a draft of the Constitution containing a provision that granted to Congress the power "to regulate commerce with foreign nations and among the several States."¹⁷ About a month later it was decided to add the words "and with the Indian tribes," still leaving the clause very broadly worded.¹⁸

The commerce clause was adopted in this short form¹⁹ because the convention was so concerned with the lack of uniformity in interstate commercial regulation. Their reaction to the crisis situation resulted in a commerce clause that shifts legislative power over interstate economic matters to a single national body rather than trying to solve economic provincialism by an express prohibition of interference with free trade.²⁰ Some commentators have even suggested that the Framers may have thought that the equality-oriented privileges and immunities clause of the fourth article of the Constitution was designed to define the scope of state legislative power in commercial matters where Congress had not yet acted, thus preserving a free trade ideal.²¹ Regardless

12. *Id.* at 126-27.

13. Prentice, *supra* note 6, at 6.

14. See J. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982).

15. THE FEDERALIST NO. 6 at 31-32 (A. Hamilton) (J. Cooke ed. 1961).

16. Prentice, *supra* note 6, at 7.

17. *Id.*

18. *Id.* at 9.

19. *Supra* note 5.

20. Eule, *supra* note 14, at 430.

21. *Id.* at 448.

of their intentions, the fact that the Framers²² left out an express reference to freedom of trade or interstate commerce has been called one of the "great silences" of our Constitution.²³

The Supreme Court's first construction of the commerce clause came thirty-five years after the Constitution's ratification. In *Gibbons v. Ogden*²⁴ the issue was whether New York law or federal law would govern the navigation rights of steamboats between New York and New Jersey. Chief Justice Marshall, writing for the Court, stated that the Constitution delegates to Congress the power to regulate interstate commerce.²⁵ Although Marshall's elaborate discussion mentioned a right to interstate commerce,²⁶ the actual holding of the case addressed itself only to the national and the state interests in regulating interstate commerce, finding the national interest supreme.²⁷

The next case involving the commerce clause was *Cooley v. Board of Wardens*.²⁸ In *Cooley* the issue was whether the State of Pennsylvania could require vessels to pay a fine for failing to take a pilot. The Court held that although the power to regulate interstate commerce was granted exclusively to Congress, some subjects of regulation were so local in nature as to demand diverse treatment by individual states when Congress has not spoken.²⁹ *Cooley* discussed the commerce clause solely in terms of allocating power between the state and federal governments and is now seen as a bridge to the modern cases because of the subject-matter analysis that it developed.³⁰

In the years following *Cooley*, the Court's analysis of the allocation of power metamorphosed into an inquiry as to whether the state's

22. See generally A. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941) (contains an exhaustive review of the Constitutional Convention proceedings relating to the commerce clause, with some insight into the intentions of the Framers).

23. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

24. 22 U.S. (9 Wheat.) 1 (1824).

25. *Id.* at 196-97.

26. In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right and gave to Congress the power to regulate it.

Id. at 211.

27. *Id.* at 196-97.

28. 53 U.S. (12 How.) 299 (1851).

29. *Id.* at 320.

30. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6-4, at 324-25 (1978) (Court began to focus on the nature of the subject matter being regulated, now largely abandoned, but which led the Court to consider *what the states did*, and not *what subject they did it to*).

regulatory burden was direct or indirect.³¹ There was scant reference to any right of interstate commerce until 1867 in *Crandall v. Nevada*.³² In *Crandall* the Court struck down a Nevada statute that taxed each person passing through or leaving the state by vehicles for hire. Curiously, the Court did not rely on the privileges and immunities clause³³ but rather on the right implied in the Constitution to cross state lines "to come to the seat of government . . . [and] to [have] free access to its sea-ports. . . ."³⁴ The commerce clause was discussed at length in the opinion, but the decision rested on this implied right.³⁵ Even though *Crandall* is not a commerce clause case, it does shed light on the construction of federal commercial powers.³⁶ Some years later, in *Crutcher v. Kentucky*,³⁷ the Court stumbled over the phantom right to interstate commerce. The case turned on whether the State of Kentucky could require that only heavily capitalized express companies be licensed to do business within its borders. The decision was grounded in the regulatory authority of Congress over interstate commerce and spoke mainly in terms of powers.³⁸ However, the opinion begins with the exhortation "[T]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."³⁹ Certainly this provided further evidence of an implied individual right to engage in interstate commerce.⁴⁰ Two cases following *Crutcher* reaffirmed its presumption that an individual right stemmed from the commerce clause.

*Western Union Telegraph Co. v. Kansas*⁴¹ involved a Kansas statute which required Western Union to pay a huge fee in order to continue to do business in the state. The Court again placed much emphasis on conflicting state and national interests, but intertwined its holding with the language from *Crutcher*: "[T]o carry on interstate commerce . . . is a right which every citizen . . . is entitled to exercise . . . [and a burdensome tax for the right to do business] cannot have the

31. *Id.* at 325-26.

32. 73 U.S. (6 Wall.) 35 (1867).

33. The decision was rendered several months before the fourteenth amendment was even ratified.

34. 73 U.S. (6 Wall.) 35, 44 (1867).

35. *Id.* at 48-49.

36. Prentice, *supra* note 6, at 37.

37. 141 U.S. 47 (1891).

38. *Id.* at 58-59.

39. *Id.* at 57.

40. See Tribe, *supra* note 30, at 423.

41. 216 U.S. 1 (1910).

effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."⁴²

In *Oklahoma v. Kansas Natural Gas Co.*,⁴³ the Court chastised the Oklahoma legislature for their statute restraining interstate transportation of natural gas stating, "[a]t this late date it is not necessary to cite cases to show that the right to engage in interstate commerce is not a gift of the State"⁴⁴ The Court, in holding the statute unconstitutional, noted that "[t]he inaction of Congress [notwithstanding a state's police power] is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce"⁴⁵

Sometime between the Civil War and the turn of the century, antebellum constitutional construction began to wane.⁴⁶ Whereas that theory of constitutional analysis had viewed the Constitution in a negative sense—as a shield against potential tyranny—the emerging school of thought demanded an affirmative Constitution.⁴⁷ In this context the construction of the commerce clause also changed. It became more of a sword against state oppression and less a shield for those engaging in interstate commerce.

The cases from the first half of the twentieth century are indicative of the change in constitutional analysis. In *Southern Pacific Co. v. Arizona*,⁴⁸ the issue centered around a burdensome state statute that required trains longer than a certain length passing through Arizona to be broken up and shortened, for somewhat tenuous safety reasons. The Court dropped its direct-indirect burden analysis and adopted the following test: A state regulation affecting interstate commerce is valid if (1) the regulation is rationally related to a legitimate state end, and (2) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation.⁴⁹ The cases of this era did not even allude to the correlative rights to engage in interstate commerce under the commerce

42. *Id.* at 21.

43. 221 U.S. 229 (1911).

44. *Id.* at 260.

45. *Id.* at 261.

46. Tribe, *supra* note 30, at 5.

47. Professor Tribe finds that the antebellum Constitution relied on the states as a buffer between individual rights and the federal government. After the Civil War, the states obviously could no longer fill this role and the Constitution's affirmative side began to be more heavily emphasized. *Id.*

48. 325 U.S. 761 (1945).

49. *Id.* at 770-71.

clause but focused totally on the allocation of power under the clause.

One notable exception is *H.P. Hood & Sons, Inc. v. Du Mond*.⁵⁰ *Hood* revolved around a Massachusetts milk distributor who was denied a license for an additional plant in New York on the grounds that it would reduce the supply of milk in New York markets. Although the *Hood* decision was also grounded in the superiority of the federal interest over the state interest,⁵¹ Justice Jackson, writing for the Court, noted that the commerce clause provides for "free access to every market . . . [and] such was the vision of the Founders"⁵² This echoed the right to interstate commerce traceable through the earlier commerce clause cases.

In *Bibb v. Navajo Freight Lines, Inc.*,⁵³ the Court found an Illinois statute requiring a specific type of mudguard to be an unconstitutional burden on interstate commerce. Even though the statute was a purely local, non-discriminatory safety measure, the Court held that when the regulation's benefit was slight or problematical, outweighed by the national interest in keeping interstate commerce unburdened, the regulation must bow.⁵⁴ The case followed the modern trend and did not contain even a comment on any "right" under the commerce clause.

*Raymond Motor Transport, Inc. v. Rice*⁵⁵ was the first of the "sixty-five foot double trailer" cases. Here, a Wisconsin statute allowed the longer double trailers, but only within a narrow scope, such as unloaded vehicles in transit from manufacturer or dealer to purchaser or dealer. In finding the statute a substantial burden on interstate commerce, the Court employed an analysis based on *Bibb* and held the Wisconsin statute invalid under the commerce clause because the statute's effect as a safety measure was only slight.⁵⁶ Thus, the balance was struck in favor of the national interest.

As the modern cases indicate, the Court in recent years has been much more concerned with making the "delicate adjustment of the conflicting state and federal claims"⁵⁷ The result of this adjustment has been that the commerce clause has been employed only in terms of its express constitutional power, and little effect given to its "great silence."

50. 336 U.S. 525 (1949).

51. *Id.* at 542.

52. *Id.* at 539.

53. 359 U.S. 520 (1959).

54. *Id.* at 524.

55. 434 U.S. 429 (1978) (Consolidated Freightways, Inc. was also a party in this case).

56. *Id.* at 447.

57. *Hood*, 336 U.S. at 553 (Black, J., dissenting).

Assuming there is a "right" to interstate commerce, an examination of the history of 42 U.S.C. section 1983⁵⁸ is necessary to determine whether that right would fall under its protection. Section 1983 received its modern interpretation⁵⁹ in *Hague v. C.I.O.*⁶⁰ The Supreme Court held that freedom of speech and assembly are rights secured to persons by the Constitution and as such were within the protection of section 1983.⁶¹ In 1961 Justice Douglas, writing for the Court, further defined section 1983 in *Monroe v. Pape*,⁶² holding its purposes were: (1) to override discriminatory state laws, (2) to provide a federal remedy where the state remedy is inadequate, and (3) to provide a federal remedy where the state remedy was not available in practice.⁶³ It has been said that *Monroe* "resurrected section 1983 from ninety years of obscurity."⁶⁴

Recent cases have further broadened section 1983's scope. In *Maine v. Thiboutot*,⁶⁵ the Court held that the phrase "and laws" was not limited to civil rights or equal protection laws but should encompass other rights as well, as indicated by the plain language of the statute.⁶⁶ Therefore, the Court upheld the judgment under section 1983 and the award of fees under section 1988 even though the violation only involved a federal social security statute.⁶⁷ Regardless of the broad holding, the Court has delimited section 1983. In *Chapman v. Houston Welfare Rights Organization*,⁶⁸ the Court held that an allegation of incompatibility between federal and state statutes which violated the supremacy clause does not give rise to a remedy under section 1983

58. Enacted as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act; see *supra* note 3.

59. See *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1167 (1977) (before *Hague*, § 1983 had only been successfully asserted in voting rights deprivation cases).

60. 307 U.S. 496 (1939) (city officials were interfering with assemblies and speeches organized by the CIO for the purpose of disseminating information about the National Labor Relations Act).

61. *Id.* at 513-14.

62. 365 U.S. 167 (1961) (police officers had broken into petitioner's home in the early morning, ransacked every room without a search warrant, and then held the father for ten hours on open charges in a two-day-old murder investigation).

63. *Id.* at 173-74.

64. *Supra* note 59, at 1169.

65. 448 U.S. 1 (1980) (respondents were denied welfare benefits to which they were entitled under the federal Social Security Act by the Maine Department of Human Services).

66. *Id.* at 6-8.

67. *Id.* at 4.

68. 441 U.S. 600 (1979) (a state welfare regulation conflicted with provisions of the federal Social Security Act, and respondents contended that the consequent violation of the supremacy clause invoked section 1983's jurisdictional counterpart, 28 U.S.C. §1343(a)(3)).

because the clause did not "secure rights."⁶⁹ Furthermore, the tone of the Court indicated there may be further restrictions: "[i]t would make little sense . . . to have drafted the statute [section 1343(a)(3),⁷⁰ the jurisdictional counterpart to section 1983] as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent."⁷¹ The question of whether the commerce clause should be treated like the supremacy clause, or whether it does in fact secure "rights," remains unanswered by the Court and unclear from history.⁷²

In *Consolidated Freightways Corp. v. Kassel*, the Eighth Circuit held that the commerce clause does not secure rights cognizable under section 1983.⁷³ The court began its rationale with a recitation of authority from *Gibbons to Rice*, standing for the proposition that the Supreme Court has consistently employed language in commerce clause cases that deal with the relationship between *national* and *state* interests, not with the protection of individual rights. The court said "[i]n the Supreme Court's opinion in this very case the emphasis is on the role of the Commerce Clause in preventing state regulation from 'trespass[ing] upon national interests.'"⁷⁴ The court of appeals clearly inferred that commerce clause decisions through the decades dealt with defining the boundary line between competing federal and state interests; therefore, the clause simply assigns power. In finding that the commerce clause is only an allocating provision, the *Consolidated* court obviously placed much importance on the terms that have traditionally been used in commerce clause cases.

Turning to those cases that support or at least refer to a right to

69. *Id.* at 615.

70. To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

28 U.S.C. § 1343(a)(3) (1982). See generally Travis and Adams, *The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. REV. 635 (1983).

71. *Chapman*, 441 U.S. at 615.

72. See *Confederated Salish & Kooteni Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975) (the district court held that an alleged violation of the commerce clause was sufficient to state a claim under § 1983), *aff'd* 425 U.S. 463 (1976) (Court did not reach the question of whether a claim was stated under § 1983 as it used other grounds for jurisdiction). *But see Connors v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938) (the district court held that § 1983's jurisdictional counterpart, § 1343(a)(3) (then codified as 28 U.S.C. §41(14)) did not grant jurisdiction for a commerce clause violation), *aff'd mem.* 305 U.S. 576 (1939) (decision was six months prior to the historic *Hague* opinion from which the § 1983 renaissance grew).

73. 730 F.2d 1139, 1144 (1984).

74. *Id.* (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (emphasis added by Eighth Circuit)).

engage in interstate commerce, such as *Western Union, Crutcher*, and others, the court found them to be red herrings at best, at worst mere dictum because "the *focus* of the Court's opinions [in those cases] was on the separation of powers between the national and state legislatures."⁷⁵ Relying on *Hood*, the Eighth Circuit said that "[d]espite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant⁷⁶ Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy."⁷⁷ Finally, the court noted that even though individuals may be benefited by indirect limitations placed on the states through the commerce clause, this benefit is not a "right" secured by the Constitution within the meaning of section 1983.⁷⁸ No authority was cited for this point.

In reaching the question of whether section 1983 secures an individual right under the commerce clause, the court used a historicity argument to the effect that section 1983's legislative history does not support the theory that it would encompass such a right.⁷⁹ The court recognized the *Thiboutot* holding as expanding the scope of section 1983, but found the expansion still limited to the fourteenth amendment.⁸⁰ In conclusion, the *Consolidated* court relied on the portion of *Monroe v. Pape*⁸¹ which held that section 1983's three purposes, relating to discrimination, exclude any alleged violation of the commerce clause as it is only an allocation provision.⁸² "To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under [section] 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act."⁸³ Accordingly, the court of appeals found that *Consolidated's* cause of action under section 1983 for commerce clause violations was not within the intent of Congress and that any widening of its scope was not warranted by the nature of the clause.⁸⁴ Citing *Chapman*,⁸⁵ the Eighth Circuit analogized the commerce clause to the supremacy clause "in

75. *Id.* at 1145 (emphasis added).

76. *Supra* note 5.

77. *Consolidated*, 730 F.2d at 1145.

78. *Id.*

79. *Id.* at 1145-46.

80. *Id.* at 1146.

81. *Supra* note 62.

82. 730 F.2d at 1146.

83. *Id.*

84. *Id.* at 1146-47.

85. *Supra* note 65.

the sense that both clauses limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of [section] 1983, neither does the Commerce Clause."⁸⁶ Fees, under section 1988, were therefore denied.

The primary weakness in the Eighth Circuit's opinion is in the shallow rationale used to determine that the commerce clause is an allocating provision. The court focused on the terminology that the Supreme Court has used in commerce clause cases saying that the "decisions are replete with references to the *national* or *federal interest* in preventing burdensome state regulation of interstate commerce."⁸⁷ Overlooking what the Supreme Court has said about rights,⁸⁸ the court of appeals mathematically determined that there are more terms relating to powers than to rights, *ergo* the commerce clause is a provision that allocates power. Having neatly found that the commerce clause is only an allocating provision, the court then easily decided that an allocating provision is not within the ambit of section 1983.

Overlooking the scanty historical analysis of the commerce clause that the court provides and assuming that the clause is an allocating provision, there are still some problems in finding that section 1983 does not apply. Obviously, not every case arising under the Constitution falls within the protection of section 1983,⁸⁹ but the *Consolidated* court relies too heavily on the *Monroe* decision, saying that a commerce clause action under section 1983 would unduly extend the Civil Rights Act. In *Maine v. Thiboutot*, the Court explicitly said that section 1983 is not limited to any subset of laws such as equal protection or civil rights statutes.⁹⁰ Therefore, if only an indirect right accrues to the people, such a right would also seem to be protected by section 1983.

The true significance of this case lies in its basic denial that there is a right to engage in interstate commerce. To deny that such a right accrues to the people via the commerce clause is to cut to the very essence of democracy, since the concept that privileged and protected rights cannot be taken from the people is fundamental to our form of government. The current concept of a "penumbra" of unenumerated rights⁹¹ secured through the ninth amendment⁹² indicates the protec-

86. 730 F.2d at 1144.

87. *Id.* (emphasis added by the Eighth Circuit).

88. See e.g., *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

89. *Chapman*, *supra* note 68, at 615 (holding that the supremacy clause does not secure rights within the meaning of § 1983).

90. *Thiboutot*, 448 U.S. at 6.

91. The "penumbra" doctrine was first outlined by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In finding a fundamental "right to privacy" was infringed by a Con-

tion that has been afforded such fundamental liberties. The right to interstate commerce is an economic concept and as such it could be found to exist through other rights secured by the Constitution, such as the property clause of the fifth amendment.⁹³

In denying certiorari, the Supreme Court has avoided a number of policy considerations and historical hurdles that it would have had to overcome before reaching the right to engage in interstate commerce question. First, the explosion in section 1983 litigation⁹⁴ and the general unprecedented civil activity⁹⁵ in the federal courts is already of much concern, and many proposals⁹⁶ have been made to limit the courts' jurisdiction. The Supreme Court has been dealing with the problem by using a mixture of substantive law and procedure based on statutory jurisdiction.⁹⁷ As commerce clause cases are an increasingly litigious area of constitutional law,⁹⁸ it seems unlikely that the Court would want to open the doors to yet another right and consequent claim under section 1983. Second, the Court could declare that any right to interstate commerce was part of the *Lochner*⁹⁹ era, and hence has disappeared. To do this the Court would have to equate the notion

necticut statute which prohibited the use of contraceptives by married persons, the Justice managed to identify some arguably related provisions of the Bill of Rights. 381 U.S. at 484. However, he gave no indication of how to search the shadows or penumbras of the Bill of Rights to find other fundamental guarantees. Such "penumbral" rights seem to be recognized without reliance on any specific guarantee. A partial list of the type of rights which have been "found" by the Court include the following: *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach one's child a foreign language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to send one's child to private school); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *Rochin v. California*, 342 U.S. 165 (1952) (right to be free from certain bodily intrusions); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel abroad); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives); and others.

92. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST., amend IX.

93. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST., amend. V.

94. Between 1961 and 1979, filings under section 1983 increased from 296 to 13,168. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 5 (1981).

95. During the six month period from July through December, 1981, 97,609 civil cases were filed in federal courts, an increase of 11.2% over the same period a year before. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 5 (1981).

96. See e.g., H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

97. *Travis and Adams*, *supra* note 70, at 636.

98. From 1953 to 1975 the Supreme Court issued only eight opinions on allegations of commerce clause violations by burdensome state laws, but from 1976 to 1982 the Court addressed the question ten times. *Eule*, *supra* note 13, at 426-27.

99. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that New York could not regulate working hours under the "liberty of contract" theory).

of a right to interstate commerce to an economic theory and then follow Justice Holmes' admonishment: "A constitution is not intended to embody a particular economic theory . . ."¹⁰⁰ Third, denying certiorari maintains a tolerable status quo; if the invalid law under the commerce clause is so serious that due process is violated, the injured party still has an action cognizable under section 1983.

More importantly, denial of certiorari signals that those who seek to carry on interstate commerce in the face of unconstitutional laws must also continue to carry their heavy burden.¹⁰¹ They will be forced to continue to bear the cost of litigating and have no recourse to recover their damages¹⁰² unless the invalid law is so egregious and unreasonable that due process is violated and section 1983 then implicated.

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100. *Id.* at 75 (Holmes, J., dissenting).

101. "Consolidated Freightways helped to pioneer the use of 28-foot trailers. We were instrumental in gaining their acceptance, twice winning Supreme Court affirmation of their safe performance." CONSOLIDATED FREIGHTWAYS, INC. 1983 ANNUAL REPORT TO SHAREHOLDERS 7 (1983).

102. One possible remedy for plaintiffs such as Consolidated would be an implied right of action under the commerce clause itself. The rationale for such a cause of action is contained in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) where the Court found an implied right of action under the fourth amendment for the warrantless search of the plaintiff's apartment by federal narcotics agents and held that the plaintiff could recover his damages. The *Bivens* reasoning was extended to the due process clause of the fifth amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and to the eighth amendment's proscription against cruel and unusual punishment in *Carlson v. Green*, 446 U.S. 14 (1980). Although attorney's fees would not be available under the *Bivens*-type cases, damages would be. As the *Bivens* Court said, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

