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NOTES


Historically, plaintiffs challenging state commercial regulations on the ground that they violate the commerce clause have brought their actions under the Constitution itself. However, some plaintiffs have added an additional claim based on 42 U.S.C. § 1983. The practical effect of presenting the constitutional issue under section 1983 is to entitle prevailing plaintiffs to attorney fees under the Civil Rights Attorney’s Fees Awards Act of 1976 (“section 1988”). However, the plaintiffs in Private Truck Council of America v. Secretary of State learned that success on the merits of the constitutional claim does not guarantee a recovery of attorney fees. In that case a class of out-of-state truck drivers successfully challenged Maine’s reciprocal truck tax as a violation of the commerce clause. Yet the Supreme Judicial Court of Maine refused to award attorney fees. The court maintained that a violation of the commerce clause does not give rise to a cognizable claim under 42 U.S.C. § 1983. Since the plaintiffs had failed to meet this section 1988 threshold requirement, they were not entitled to attorney fees.


   Every person who, under color of any statute . . . of any State . . . , subjects . . . any [person within the jurisdiction of the United States] 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.


   Because this statute permits an award of attorney fees “in any action . . . to enforce ” § 1983, this Note will focus on the requirements of a cognizable § 1983 claim without considering whether there might be other limits to recovering attorney fees in this context. For example, it has been held that the prevailing party “should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.” Consolidated Freightways Corp. v. Kassel, 556 F. Supp. 740, 741 (S.D. Iowa 1983) (quoting Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980)), aff’d, 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984). Thus special circumstances, like the plaintiff’s status as a wealthy corporation rather than an indigent needing some incentive to sue, might preclude an award.


5. U.S. CONST. art. I, § 8, cl. 3.

6. 503 A.2d at 221.
The United States Supreme Court has not yet addressed the issue of whether commerce clause violations are cognizable actions under section 1983, and the Court recently denied the plaintiffs' petition for a writ of certiorari in *Private Truck Council.* Justice White, joined by Justices Brennan and O'Connor, noted the existence of a conflict among the lower federal courts on this issue and dissented from that denial. Justice White observed that both the Third Circuit and the District Court for the District of Montana have suggested that commerce clause violations give rise to section 1983 claims, while the Eighth Circuit has explicitly rejected the assertion that such violations are cognizable under section 1983. Justice White and his fellow dissenters would have granted certiorari to resolve this conflict.

This Note will attempt to show that some commerce clause violations should give rise to cognizable section 1983 claims. Two fundamental questions will be addressed: Is the commerce clause the source of any "rights, privileges, or immunities secured by the Consti-

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11. This Note will only consider whether claims arising under the "dormant commerce clause" doctrine are cognizable under § 1983. That doctrine, growing out of the case of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), posits that the commerce clause, which on its face is only a specific grant of legislative power to Congress, also restricts the power of the states to enact certain commercial regulations even when Congress has not exercised its power to enact a uniform national regulation on the particular subject. See *Consolidated Freightways Corp. v. Kassel*, 556 F. Supp. 740, 746 (S.D. Iowa 1983), aff'd, 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984); see also *Eule, Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982) (describing the evolution of the phrase "dormant commerce clause" as a recognized term of art).

Claims arising under the dormant commerce clause are to be distinguished from challenges to state commercial regulations that are in direct conflict with existing congressional regulations. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210, 239-40 (1824) (New York laws granting exclusive steamboat navigation rights struck down because in conflict with congressional regulations of the coasting trade). Such direct conflicts between federal and state power are resolved by the supremacy clause in favor of federal law. However, the supremacy clause does not grant any particular right in these circumstances; it merely vindicates the greater authority of the federal enactment, which may or may not create "rights" protected by § 1983. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); notes 18-25 infra and accompanying text. The argument of this Note that the dormant commerce clause doctrine acts to protect an individual right of constitutional magnitude, see Part II infra, may not extend to these "nondormant" claims.

tution?” and if so, Does section 1983 protect whatever “rights, privileges, or immunities” grow out of the commerce clause? Part I will describe the present status of authority on this issue and argue that none of the conflicting opinions have adequately addressed the fundamental questions involved. Part II will demonstrate that the commerce clause does indeed protect a “right[], privilege[], or immunit[y].” Finally, Part III will maintain that the plain language of the statute and several Supreme Court decisions support the conclusion that the violation of any right secured by the Constitution gives rise to a section 1983 remedy.

I. THE PRESENT STATUS OF AUTHORITY

The existing judicial discussions of the relationship between the commerce clause and section 1983 are inadequate because they have not fully explored whether or not the commerce clause secures any “rights, privileges, or immunities” as required by section 1983. Those courts which have held that commerce clause violations do not give rise to cognizable claims under section 1983 have recognized that “benefits” may be conferred on individuals by the protections of the commerce clause. Yet they do not attempt to identify the nature of the benefits conferred, and they do not convincingly explain why those benefits are not “rights . . . secured by the Constitution” within the meaning of section 1983. Similarly, those courts that have maintained that commerce clause violations are cognizable under section 1983 simply assert that proposition without further analysis. No discussion of whether the commerce clause secures any “rights, privileges, or immunities” is presented.

In reaching its decision in Private Truck Council, the Supreme Judicial Court of Maine adopted the Eighth Circuit’s reasoning in Consolidated Freightways Corp. v. Kassel. The Consolidated Freightways court pointed out that not every case arising under the Constitution


15. Private Truck Council, 503 A.2d at 221; see also J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Private Truck Council of Am. v. State, 128 N.H. 466, 517 A.2d 1150 (1986) (both adopting the reasoning of Consolidated Freightways); Connor v. Rivers, 25 F. Supp. 937 (N.D. Ga. 1938), affd., 305 U.S. 576 (1939). The district court in Connor, by per curiam opinion, denied jurisdiction because the plaintiff had failed to satisfy the amount in controversy requirement of the jurisdictional statute. The court also rejected plaintiff’s attempt to establish jurisdiction under the jurisdictional counterpart of § 1983 (28 U.S.C. § 1343(a)(3) — which has no amount in controversy requirement). The court said, “While there is an allegation about the Georgia statute’s interfering with interstate commerce, it is clear that there is no claim or evidence that said Georgia Statute deprives the petitioner ‘of any right, privilege, or immunity, secured by the Constitution of the United States . . . .’ ” 25 F. Supp. at 938. No further analysis was presented. The Supreme Court affirmed without opinion.
falls within section 1983. For example, the Supreme Court has held that the supremacy clause alone does not give rise to a claim "secured by the Constitution." The Eighth Circuit reasoned that the commerce clause and supremacy clause are analogous, since both limit the power of the states to interfere with areas of national concern.

The court reasoned further that the commerce clause allocates power between the state and federal governments without establishing any individual rights against government. The court asserted that any benefits conferred on individuals indirectly through the protection of the dormant commerce clause are not "rights" within the meaning of section 1983. This is so, the Eighth Circuit believes, because dormant commerce clause litigation is really concerned with "the relative jurisdiction of nation and state," and because the origins of section 1983 indicate a desire to "enforce the protections of the Fourteenth Amendment" in the violent atmosphere of the post-Civil War South. The court also dismissed Supreme Court references to a constitutional "right" to engage in interstate commerce as "mere dicta" or as peripheral discussions in opinions focusing on "the separation of powers between the national and state legislatures.

16. Consolidated Freightways, 730 F.2d at 1143.
17. U.S. Const. art. VI, cl. 2.

Of course, it is technically true that the Supreme Court relies on the supremacy clause whenever it invalidates a state statute. This is true when the statute conflicts with a provision of the U.S. Constitution no less than when it conflicts "only" with a federal statute. However, precisely because the supremacy clause governs all situations of conflicting authority, it cannot be said to secure any one particular right independent of whatever rights may be secured by the prevailing federal provision.

Because they could not meet the "amount in controversy" requirement that 28 U.S.C. § 1331, the general federal question jurisdictional statute, contained until 1980, see Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, 94 Stat. 2369, the Chapman plaintiffs were attempting to establish jurisdiction under 28 U.S.C. § 1343(a)(3). This latter section, however, required them to show that they were vindicating a constitutional right. The Court's response to their supremacy clause argument was thus simply that a statutory entitlement does not attain constitutional stature simply because it is the supremacy clause which resolves the statutory conflict in favor of federal authority. See Chapman, 411 U.S. at 612-15.

19. The Eighth Circuit noted:

Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in 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 § 1983, neither does the Commerce Clause.

Consolidated Freightways, 730 F.2d at 1144 (footnotes omitted).

20. 730 F.2d at 1144.
21. 730 F.2d at 1145 (quoting Dowling, Interstate Commerce and State Power. 27 Va. L. Rev. 1, 23 (1940)).
22. 730 F.2d at 1145-46.
23. 730 F.2d at 1145.
There are a number of weaknesses in this analysis. First, the
court's comparison of the commerce and supremacy clauses may not
be entirely appropriate. The Supreme Court, in Chapman v. Houston
Welfare Rights Organization, explained that the supremacy clause
was not the "source" of any federal rights. Thus "an allegation of in­
compatibility between federal and state statutes and regulations does
not, in itself, give rise to a claim 'secured by the Constitution.' " In
contrast, the commerce clause may itself be the source of some federal
right, privilege, or immunity. The Eighth Circuit comes close to rec­
ognizing this possibility in its assertion that the dormant commerce
clause doctrine is the source of "benefits" to individuals, but the court
does not attempt to articulate the nature of these benefits. This is in­
adequate, because only after such an attempt has been made could it
convincingly conclude that such benefits do not rise to the status of
section 1983 rights.

Moreover, the court's attempt to link the interpretation of section
1983 to its original purposes in the post–Civil War era is analytically
incomplete in light of the extension of both the fourteenth amendment
and section 1983 to issues quite different from the Klan atrocities and
other incidents of racial violence that concerned post–Civil War legis­
lators. Finally, the court emphasizes that the function of the com­
merce clause is to allocate power between the federal and state
governments. The court seems to assume that power allocation and
protection of rights are mutually exclusive. Yet this assumption is un­
reasonable, since a single provision might both allocate power and se­
cure rights, privileges, or immunities for people.

25. 441 U.S. at 613, 615 (emphasis added).
26. See Part II infra.
27. See Part III.A infra.
affd., 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984). The district court there re­
jected plaintiff's argument that allocating power and securing rights are not mutually exclusive.
The court asserted that constitutional power-allocating provisions "are qualitatively different
from constitutional provisions which are normally viewed as securing rights." Issues of power
allocation (federalism) are matters of practicality, while individual liberties (rights) are matters of
principle. See J. Choper, Judicial Review and the National Political Process 201-02
(1980).

Choper describes matters of principle as those in which "our historic ideals and special regard
for the dignity of the individual . . . compel the collective will to subjugate its more immediate
needs [for effective government] to the preservation of designated individual rights." Id. at 201.
In contrast, federalism issues raise a pragmatic question of comparative skill and utility:
"whether, as a functional matter, the states are separately capable of effecting the desired result." 82
Id. at 202.

This "qualitative difference," however, is insufficient to defeat the claim that the commerce
clause can both allocate power and secure rights. The dormant commerce clause doctrine is not
simply a federalism issue of the sort described by Professor Choper. State commercial regulations
are struck down under the dormant commerce clause not because they are inefficient, but
because they treat outsiders in an impermissible manner. Outsiders cannot be made the victims of
purposive economic protectionism or discrimination. See text at notes 77-87 infra. This anti-
Two lower court decisions oppose the Eighth Circuit position and assert that commerce clause violations are cognizable under section 1983. In *Confederated Salish & Kootenai Tribes v. Moe*, the court held that it had jurisdiction under 28 U.S.C. § 1343(3) to hear the claims of individual tribe members that a Montana cigarette sales tax was unconstitutional as applied to them. The tribes maintained that the cigarette tax, imposed on sales by Indians to Indians within the bounds of the reservation, was a violation of their rights of tribal sovereignty, secured in part by the commerce clause. While recognizing that section 1983 was enacted primarily to enforce the fourteenth amendment, the court had "no difficulty in holding that plaintiffs' alleged violation of commerce clause rights is sufficient to state a claim under § 1983," thus giving rise to jurisdiction under section 1343(3).

In reaching this conclusion, the court relied on the Supreme Court's statement in *Lynch v. Household Finance Corp.* that the "rights, privileges, or immunities secured . . . by the Constitution and laws of the United States" include not only fourteenth amendment rights, but also rights under "all of the Constitution and laws of the United States." With similar ease, the court in *Kennecott Corp. v. Smith* con-

Protectionist principle preserves the "concept of Union," not uniformity in regulation or economic efficiency. See notes 79-83 infra and accompanying text. Just as Choper's principles of individual liberty thwart the collective will in order to preserve human dignity, so too the dormant commerce clause subjugates the more immediate needs of individual states by protecting individuals from protectionist legislation in order to preserve our notion of a federal union.


30. In 1979, Congress redesignated § 1343(3) as § 1343(a)(3). See Act approved Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284. Both § 1343(a)(3) and its predecessor provide that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States . . . ." This statute thus serves as the jurisdictional counterpart to 42 U.S.C. § 1983.

31. Jurisdiction over the claims brought by the tribes themselves was based on 28 U.S.C. § 1362, which deals specifically with claims "brought by any Indian tribe or band." 392 F. Supp. at 1304-05.

32. 392 F. Supp. at 1304.

33. Presumably, this application of the state tax is disallowed by the commerce clause. "The Congress shall have Power . . . To regulate Commerce with . . . the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. See *Kootenai*. 392 F. Supp. at 1301. The tribes' rights were also secured by the Hellgate Treaty and the Montana Organic and Enabling Acts. 392 F. Supp. at 1304.

34. 392 F. Supp. at 1305.


36. 405 U.S. at 549 n.16 (quoting United States v. Price, 383 U.S. 787, 797 (1966)). The "rights, privileges, or immunities" language construed by the Court in *Lynch* parallels the text of § 1833. See note 2 supra. The Court in *Price* was interpreting language in §§ 241 and 242 of the Federal Criminal Code (18 U.S.C. §§ 241 & 242) identical to that of their civil counterpart, § 1833: "Both include rights or privileges secured by the Constitution or laws of the United States. Neither is qualified or limited. Each includes, presumptively, all of the Constitution and laws of the United States." 383 U.S. at 797.

37. 637 F.2d 181 (3d Cir. 1980).
included that commerce clause violations were cognizable under section 1983. Kennecott brought suit challenging the New Jersey Corporation Takeover Bid Disclosure Law,\textsuperscript{38} seeking a declaratory judgment that the law was unconstitutional and an injunction restraining enforcement of the statute. On appeal the defendants argued that the anti-injunction act\textsuperscript{39} precluded a federal court from granting such relief. The court decided that the anti-injunction provision did not apply to Kennecott's claim because section 2283 contained an explicit exception for section 1983 actions "such as this case."	extsuperscript{40} This conclusion was explained in a footnote: "The present action is properly brought under § 1983 because it seeks redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act. \textit{See Maine v. Thiboutot.}"	extsuperscript{41}

It is easy to see why the Eighth Circuit found these cases to be so unpersuasive.\textsuperscript{42} Neither opinion directly discusses what rights, if any, the commerce clause secures. Without first identifying such a right, the precedents relied upon by the \textit{Kootenai} and \textit{Kennecott} courts do not support their conclusions, since those precedents devote no discussion to the commerce clause. For example, in \textit{Lynch v. Household Finance Corp.},\textsuperscript{43} the plaintiff brought suit under sections 1983 and 1343(3) challenging the validity of a summary prejudgment garnishment statute. The district court dismissed the complaint for lack of jurisdiction, claiming that section 1343(3) applied only when "personal" rather than "property" rights were impaired. The Supreme Court expressly rejected such a distinction: "This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction."\textsuperscript{44} Thus, the district court could properly have exercised jurisdiction. While this statement shows the Court's willingness to extend sections 1983 and 1343(3) beyond "personal" rights, it does not provide any gui-

\textsuperscript{38} N.J. STAT. ANN. §§ 49:5-1 to -19 prohibit commencement of a tender offer until at least twenty days after its announcement. The Third Circuit's opinion in \textit{Kennecott} does not describe the nature of Kennecott's commerce clause claim. It merely states that the action sought "redress for deprivations of constitutional rights secured by the commerce clause . . . ." 637 F.2d at 186 n.5. Presumably the claim is based on the alleged conflict between the New Jersey statute and the Williams Act, 15 U.S.C. § 78m (d)-(e), 78n (d)-(f) (1982). The Williams Act is the source of federal tender offer regulation and was enacted pursuant to Congress' power to regulate interstate commerce. \textit{See} 15 U.S.C. § 78(b).

\textsuperscript{39} "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1982).

\textsuperscript{40} \textit{Kennecott}, 637 F.2d at 186 (relying on \textit{Mitchum v. Foster}, 407 U.S. 225 (1972)).

\textsuperscript{41} 637 F.2d at 186 n.5. Maine v. Thiboutot, 448 U.S. 1 (1980), is discussed in the text accompanying notes 45 & 46 infra.

\textsuperscript{42} Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139, 1142-43 (8th Cir.), cert. denied, 469 U.S. 834 (1984).

\textsuperscript{43} 405 U.S. 538 (1972).

\textsuperscript{44} 405 U.S. at 542.
dance in determining whether the commerce clause secures any rights at all.

In Maine v. Thiboutot the Court was considering section 1983 in relation to federal statutory rights, not those secured by the Constitution. The Court there held that state violations of the Social Security Act were cognizable under section 1983. Previous cases suggested to the Court, "explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Thiboutot itself concerned statutory rights, but the Court's statement implies that section 1983 "broadly encompasses" two sorts of violations: violations of rights established by the Constitution as well as of rights under federal statutes. This breadth of coverage could include rights established by the commerce clause (if any exist) as easily as those stemming from the Social Security Act. However, while both Lynch and Thiboutot demonstrate the potential for expansive interpretation inherent in section 1983, neither opinion adequately supports the conclusion that commerce clause violations merit section 1983 protection; courts must first demonstrate that the commerce clause actually secures rights. Part II addresses this question.

II. THE COMMERCE CLAUSE AS A RIGHT-SECURING PROVISION

The commerce clause serves to allocate power between the national and state governments. It gives Congress the ultimate authority to regulate interstate commerce, displacing conflicting state regulations, without completely divesting the states of power over commercial regulation. Nevertheless, it may at the same time be the source of an individual right, privilege, or immunity.

Consideration of four factors illustrates that the commerce clause is a right-securing provision. First, the Supreme Court's references to a right under the commerce clause to engage in commerce demonstrate that the commerce clause has been seen as a right-securing provision. Second, the doctrine of standing in the federal courts, which generally precludes litigants from invoking the rights of third parties, suggests that individual plaintiffs bringing commerce clause suits must be asserting the violation of one of their own rights. Third, contemporary dormant commerce clause theory highlights the protection from discriminatory or protectionist state commercial regulation that the commerce clause gives to individuals. Finally, the relationship between the commerce clause and the privileges and immunities clause

45. 448 U.S. 1 (1980).
46. 448 U.S. at 4.
47. See Consolidated Freightways. 730 F.2d at 1144; Dowling, supra note 21, at 22-23.
48. See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding a state statute regulating the sale of petroleum products imported into Maryland from out of state).
49. U.S. CONST. art. IV, § 2.
supports the conclusion that the commerce clause serves to secure individual rights as well as to allocate power.

A. The Right To Engage in Commerce

It should not be surprising that the commerce clause might secure an individual right, since references to a right to engage in interstate commerce are quite persistent in our constitutional history. Such a right is first mentioned in *Gibbons v. Ogden*, but received no extensive attention until the Court decided *Crandall v. Nevada* in 1867. Nevada imposed a tax of one dollar on every person leaving the state by any vehicle engaged in transporting passengers for hire. The Supreme Court struck down the tax, because it infringed the right of the citizen to have free access to the seat of government (a right secured by the "privileges or immunities" clause of the fourteenth amendment). Justice Clifford, however, argued in dissent that the tax should be struck down because it conflicted with the commerce clause: "I am clear that the State legislature cannot impose any such burden upon commerce among the several States. Such commerce is secured against such legislation in the States by the Constitution, irrespective of any Congressional action."

An individual right to engage in commerce, secured by the commerce clause, was explicitly recognized in *Crutcher v. Kentucky* and

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50. 22 U.S. (9 Wheat.) 1 (1824):

[I]t 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.


51. 73 U.S. (6 Wall.) 35 (1867).

52. The statute was challenged by an agent of a stage coach company (who refused to report the number of passengers carried out of state) as an unconstitutional interference with Congress' power to regulate interstate commerce. The Court rejected this argument, but struck down the tax because it impaired the right of every citizen to travel to the seat of government (protected by the fourteenth amendment's "privileges or immunities" clause). Similarly, the citizen "has the right to free access to [the nation's] seaports, through which all the operations of foreign trade and commerce are conducted . . . and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 73 U.S. at 44.

53. U.S. CONST. amend. XIV, § 1, cl. 2. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

54. 73 U.S. at 49.

55. 141 U.S. 47 (1891). The Court in *Crutcher* struck down a Kentucky statute imposing a minimum capitalization requirement on out-of-state express companies wishing to obtain licenses to do business in the state. Justice Bradley stated that regulation of this sort of commerce was primarily the responsibility of Congress. He went on to hold that "[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." 141 U.S. at 57. *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-4, at 423 (1978) (mentioning that the right to carry on interstate commerce is recognized in *Crutcher*).
Both cases used strong language to protect "the substantial rights of those engaged in interstate commerce." The Court protected the plaintiff corporations' "privilege to engage in" interstate commerce from impermissible burdens, and declared that those plaintiffs did not have to surrender their constitutional rights under the commerce clause "any more than [they] would have been bound to surrender any other right secured by the National Constitution.

This sort of "rights talk" is not an archaic relic of the Lochner era; similar language can be found in the more recent case of Garrity v. New Jersey. In the course of holding that police officers could not be compelled to give self-incriminating testimony as an alternative to losing their jobs, the Garrity Court said, "There are rights of a constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. Western Union Tel. Co. v. Kansas, 216 U.S. 1." Thus it is evident that the commerce

56. 216 U.S. 1 (1910). In Western Union, foreign corporations were required to pay a charter fee before they could engage in local business in the state. Similar requirements were not imposed on Kansas corporations. Justice Harlan, writing for the Court, emphasized the "diligence and firmness" with which the Court had guarded the freedom of interstate commerce against hostile state and local action. 216 U.S. at 26. Kansas' statutory requirement had to be struck down, because it was an impermissible burden on Western Union's interstate commerce and "its privilege to engage in that commerce." 216 U.S. at 37. The position of the Court was summed up in these words:

The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution. 216 U.S. at 48.

57. 216 U.S. at 26 (emphasis added).

58. 216 U.S. at 37.

59. 216 U.S. at 48. Obviously, the Court was not at all reluctant to talk about a right to engage in commerce, and it did so using language strikingly similar to that employed in section 1983. "It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States." The right of states to regulate their domestic affairs "must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land." 216 U.S. at 37-38.

60. 385 U.S 493 (1967).

61. 385 U.S. at 500. The opinion then referred to a number of rights of presumably equal constitutional stature: the right to assert diversity of citizenship to obtain access to the federal courts, the guarantees of the first amendment, and the twenty-fourth amendment right to vote in national elections without paying a poll tax. The right to be free from self-incrimination also is at that level of importance, since the Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use . . . of statements obtained under threat of removal from office, [and] extends to all, whether they are policemen or other members of our body politic." 385 U.S. at 500.

The Eighth Circuit in Consolidated Freightways dismissed this discussion in Garrity as "mere dictum." 730 F.2d at 1145. However, the Garrity reference is a strong statement included in an important analogy which seems to equate the commerce clause right with those secured by the first and fourteenth amendments.
clause has been explicitly recognized as a right-securing provision frequently in our constitutional history.

B. Standing in Commerce Clause Challenges

The ability of individual plaintiffs to bring suit under the commerce clause on their own behalf, in light of the Court's standing requirements for federal litigants, also suggests that some individual right must be at stake. This proposition would be questioned by some commentators, who maintain that even though dormant commerce clause litigation is initiated by private parties, it is in reality the relative jurisdiction of the federal and state governments that is at issue.62 But if dormant commerce clause litigation is about that alone, it is difficult to see how private plaintiffs could ever satisfy the existing standing requirements.

The standing doctrine currently applied in the federal courts has two components: the article III "case or controversy" requirement,63 and a set of judicially fashioned prudential requirements.64 The article III requirement dictates that the only plaintiffs who may bring suit are those who can personally allege some actual or threatened injury that is fairly traceable to the defendant's supposedly illegal conduct and that is likely to be redressed by the requested relief.65 This requirement is satisfied by dormant commerce clause plaintiffs; they typically have suffered some economic injury due to state commercial regula-

62. See Dowling, supra note 21, at 22-23. See also Choper, The Scope of National Power Vis- a'-Vis the States: The Dispensability of Judicial Review, 86 YALE L.J. 1552 (1977). Choper maintains:

[T]he person attacking state and local laws is asserting the interests of the central government, not his own constitutionally secured liberties. It may be that considerations of standing should preclude the litigant from asserting such third-party interests even though the underlying substantive issue is adjudicable. But the weight of the argument appears to favor a grant of standing: because of judicial practice, Congress has implicitly authorized this method for securing the Court's protection of important federal interests . . . .

Id. at 1587 n.194.

Yet this "implicit authorization" does not preclude the simultaneous judicial protection of individual interests. Individual and federal interests need not be mutually exclusive. Choper himself recognizes that individual interests are also at stake. He thinks the Court should continue to review state commercial regulations, because such legislation can adversely affect "the federal government or persons engaged in interstate activities . . . . The phenomenon is most clearly exemplified by laws that discriminate against outsiders to the benefit of local interests, either private or governmental." Id. at 1585 (emphasis added). It may be the existence of these personal interests which makes acquiescence in dormant commerce clause litigation by individual plaintiffs more easily acceptable. While speaking in terms of protecting federal interests, the judicial practice which has granted individuals standing in dormant commerce clause litigation might be an implicit recognition that individual rights are at stake.


tions and easily meet this standard.\textsuperscript{66}

In addition to those mandated by the Constitution, the Supreme Court has imposed a number of prudential requirements.\textsuperscript{67} Thus even if the article III conditions are met, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."\textsuperscript{68} The imposition of these prudential principles cuts against the argument that dormant commerce clause plaintiffs are merely asserting the interests of Congress against the states. They cannot solely be raising Congress' interests because the Court has held that plaintiffs must generally assert their own legal rights and interests, not those of third parties.\textsuperscript{69} Similarly, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."\textsuperscript{70} Allowing individual plaintiffs to bring suit under the commerce clause in the face of this rule suggests that some individual right is within "the zone of interests" protected by the commerce clause.

Supreme Court discussion of standing in dormant commerce clause cases does not refer to the individual plaintiff as a representative of congressional or national interests. Rather, it is assumed that some private, individual right is at stake. In \textit{Hunt v. Washington State Apple Advertising Commission},\textsuperscript{71} for example, the Court addressed the issue of whether the Commission had standing to challenge a North Carolina statute discriminating against out-of-state apple producers. The Court accepted the Commission as a representative of the apple producers, since its "attempt ... to secure the industry's right to publicize its [apple] grading system [was] central to the Commission's purpose."\textsuperscript{72} The Court concluded that the Commission did have "stand-

\textsuperscript{66} See, e.g., \textit{Philadelphia v. New Jersey}, 437 U.S. 617 (1978) (invalidating New Jersey's prohibition on the importation of waste into the state, which forced the city of Philadelphia to transport its waste to landfill sites farther away from the city); \textit{Hunt v. Washington State Apple Advertising Commn.}, 432 U.S. 333 (1977) (invalidating North Carolina's requirement that apples sold in the state be marked with USDA grades, which raised the cost of doing business in North Carolina for Washington growers and dealers, who grade their apples differently).

\textsuperscript{67} See \textit{Valley Forge}, 454 U.S. at 474-75; see also \textit{Warth v. Seldin}, 422 U.S. 490 (1975): Without such limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

\textsuperscript{422} U.S. at 500 (emphasis added).

\textsuperscript{68} \textit{Gladstone, Realtors v. Village of Bellwood}, 441 U.S. 91, 99-100 (1979) (emphasis added).

\textsuperscript{69} \textit{Warth}, 422 U.S. at 499.


\textsuperscript{71} 432 U.S. 333 (1977).

\textsuperscript{72} 432 U.S. at 343-44 (emphasis added).
ing to assert the rights of the individual growers and dealers in a representational capacity."73 While the rights asserted in Hunt did have an impact on federal/state relations (a state statute was invalidated under the federal Constitution), the Court’s ruling that standing existed was premised on the private interests that were at stake.

Courts sometimes make exceptions to the prudential (but not the constitutional) rules where it would be difficult or impossible for the person whose rights are truly at stake to protect his own interest.74 But that exception does not apply here. Congress could easily assert its own right to regulate interstate commerce by streamlining its own internal machinery or creating some new regulatory agency to prevent state legislatures from invading any national interests in unburdened commerce.75 Thus, Congress can protect itself in this context, and courts need not create an exception allowing private parties to assert its rights.76 The fact that courts allow individual plaintiffs to bring dormant commerce clause suits in the face of these standing requirements suggests that some right, privilege, or immunity is involved in dormant commerce clause litigation.

C. Contemporary Dormant Commerce Clause Theory

The work of two contemporary scholars, Professors Donald Regan and Julian Eule, further suggests that the commerce clause secures an individual right — the right to be free from protectionist or discriminatory state commercial legislation. Regan argues that the Supreme Court’s dormant commerce clause jurisprudence has been, and should be, focused on preventing states from engaging in purposeful economic protectionism.77 He argues that a state statute is protectionist if and only if:

(a) the statute (or whatever) was adopted for the purpose of improving the competitive position of local (in-state) economic actors, just because they are local, vis-à-vis their foreign (by which I mean simply out-of-state) competitors; and

(b) the statute (or whatever) is analogous in form to the traditional

73. 432 U.S. at 346 (emphasis added).
75. See Eule, supra note 11, at 436.
76. See United States v. City of Yonkers, 592 F. Supp. 570 (S.D.N.Y. 1984). The district court there held that private litigants could not assert the rights of Congress in order to challenge the validity of a statute containing a legislative veto. The court declined to allow those litigants to "dress up an individual complaint in the guise of a fundamental constitutional challenge, in a context in which the institutions having a stake in the outcome have no desire to raise or litigate such a challenge." 592 F. Supp. at 581. This reasoning would apply with equal force to the dormant commerce clause if it were really national, not individual, interests which alone were at stake.
instruments of protectionism — the tariff, the quota, or the outright embargo (all of which can be on imports or exports).\textsuperscript{78}

This anti-protectionism principle is primarily grounded in a structural argument.\textsuperscript{79} Protectionism cannot be allowed because it is hostile to the concept of Union. Protectionism is the economic equivalent of war, and the resentment and retaliatory measures that it fosters are practical obstacles to the maintenance of a federal union. Even though this end is structural, the means chosen to achieve it involve protection of the individual. Out-of-state competitors are protected against legislation directed at them, and they are allowed to challenge such legislation in court. This seems to be the very definition of a right.\textsuperscript{80}

In contrast to the \textit{Consolidated Freightways} court’s assertion that commerce clause litigation is primarily concerned with balancing national and state interests,\textsuperscript{81} Regan believes that the anti-protectionism principle is the only genuine national interest at stake in most dormant commerce clause cases.\textsuperscript{82} The other national interests asserted in these cases, such as fostering uniform commercial regulation and economic efficiency, are “spurious”;\textsuperscript{83} they are really just rhetorical shorthand for protectionism. Thus the only national interest genuinely involved in every dormant commerce clause case is connected to shielding the individual from unconstitutional protectionist state action.

A competing theory of the dormant commerce clause also emphasizes the discriminatory impact on foreign economic actors. Professor Julian Eule believes dormant commerce clause theory should focus on the process-oriented protection of representational government.\textsuperscript{84} Eule would have the Court strike down those state economic regula-

\textsuperscript{78} Regan, \textit{supra} note 77, at 1094-95 (emphasis added).
\textsuperscript{79} Id. at 1111-13.
\textsuperscript{80} See \textit{BLACK'S LAW DICTIONARY} 1189 (5th ed. 1979) (citing \textit{RESTATEMENT OF PROPERTY} § 1 (1936)): “A legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act.”
\textsuperscript{81} See text at notes 18-19 \textit{supra}.
\textsuperscript{82} Regan, \textit{supra} note 77, at 1174-80. “Most dormant commerce clause cases” means, for Regan, movement-of-goods cases, a category that includes all dormant commerce clause cases except those involving: (1) state regulation of the instrumentalities of interstate transportation; (2) state taxation of interstate commerce; and (3) the state as a market participant. \textit{Id.} at 1098-99. While the anti-protectionism principle is the sole ground for dormant commerce clause review of movement-of-goods cases, Regan maintains that the principle itself applies to all dormant commerce cases. Thus, “[s]tate regulations of the instrumentalities of transportation [like those involved in \textit{Consolidated Freightways}] or state taxes on commerce will be struck down if they violate the anti-protectionism principle.” \textit{Id.} at 1099.
\textsuperscript{83} Id. at 1175. Regan maintains that the two cases most often cited for their national interest rhetoric are both about protectionism. \textit{Id.} at 1176 (referring to Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and H.F. Hood & Sons v. Du Mond, 336 U.S. 525 (1949)). See also Regan’s discussion of \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137 (1970), \textit{id.} at 1207. \textit{Pike} is often cited as the source of the modern balancing test used in dormant commerce clause cases.
\textsuperscript{84} See Eule, \textit{supra} note 11, at 437-43.
tions that disproportionately burden out-of-state actors who are not represented in the local decisionmaking process. Such action is desirable, he argues, because "the discriminatory or protectionist nature [of the regulation] represents a breakdown of the mechanism of democratic government." 85 Eule summarizes his position as follows:

When regulations promulgated by a legislative body fall solely or predominantly on a group represented in the legislature there is cause to believe the enactment will be rationally based, efficacious, and no more burdensome than is necessary to achieve the proffered purpose. When the state enacts legislation . . . falling principally on out-of-staters not represented in the regulating body, such a presumption is unwarranted. 86

The theories of Regan and Eule are not in complete agreement. 87 However, both theories focus on the impact that impermissible state commercial regulations have on economic actors rather than the impact of those regulations on "spurious" national interests. Under these theories individuals have a right to be free from protectionist or discriminatory legislation directed against them — a right secured by the commerce clause.

The reasoning in modern dormant commerce clause cases is consistent with the existence of such a right. 88 A representative example is Hunt v. Washington State Apple Advertising Commission. 89 The North Carolina regulation struck down in that case required that only USDA grades could be used on containers of apples sold in the state. This prevented Washington apple producers from using their own highly respected state grades, forced them to alter their marketing strategies, and raised their cost of doing business in North Carolina while their competitors in that state were unaffected. The Court's invalidation of the regulation can be seen as an attempt to protect out-of-state actors from discriminatory, protectionist treatment. This analysis aligns Hunt with the older commerce clause cases (Crutcher

85. Id. at 443.
86. Id. at 445 (emphasis added).
87. Indeed, Regan rejects Eule's "Carolene Products" representation-reinforcing theory of the dormant commerce clause. He sees no warrant for assuming that out-of-state interests ought to be represented in the local legislative process. Rather, so long as the state does not act with a protectionist purpose by singling out foreigners for special treatment just because they are foreigners, the state may do as it pleases. See Regan, supra note 77, at 1160-65.
88. Cf. id. at 1206-87 for an extended discussion of the Court's application of the anti-protectionism principle.
89. 432 U.S. 333 (1977). See also, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978). The Court there stated that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." 437 U.S. at 627 (emphasis added). New Jersey's landfill restrictions were impermissible because they "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." 437 U.S. at 628 (emphasis added). The Court here obviously seems concerned with the impact of state regulation on persons, not merely on goods or national power. See text at note 76 supra; see also Regan, supra note 77, at 1221 (analyzing Hunt).
and Western Union) where similar treatment of out-of-state actors was found to interfere with a right to engage in commerce secured by the Constitution. All of this evidence suggests that the commerce clause secures a right to be free from discriminatory or protectionist state economic legislation.

D. The Relationship Between the Commerce Clause and the Privileges and Immunities Clause

Assuming that the commerce clause does secure a right, privilege, or immunity, it could not be an absolute right to engage in unfettered trade. The Constitution does not establish a complete free market. It is more accurate to say that the commerce clause protects residents of one state from discriminatory or protectionist legislation directed at them by another state. The nature of this right can be better understood by comparing the commerce clause with the privileges and immunities clause of article IV. This comparison both illustrates the contours of the commerce clause right and demonstrates that a provision may secure individual rights as well as promote structural concerns.

The Supreme Court has recognized the existence of a “mutually reinforcing relationship” between the commerce clause and the privileges and immunities clause. This relationship explains the parallel doctrinal development of the two clauses and the significant overlap of the protections that they provide. It is important to note in our discussion that historically, both the commerce clause and the interstate privileges and immunities

90. See discussion of Crutcher and Western Union at notes 55-59 supra and accompanying text. See also notes 99-107 infra and accompanying text (discussing Toomer v. Witsell, 334 U.S. 385 (1948), where a protectionist state statute was struck down under the privileges and immunities clause of article IV).
91. See Eule, supra note 11, at 434: Congress’ authority under the commerce clause is plenary and includes within it the power to regulate free trade as well as to burden it, to encourage commercial intercourse or to prohibit it. . . . The commerce clause thus cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value.
92. See Part II.C supra.
93. “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” U.S. Const. art. IV, § 2.
94. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 280 n.8 (1985) (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)). In Hicklin, the Court struck down the “Alaska Hire Act” as a violation of the privileges and immunities clause. The Court said, Although appellants raise no Commerce Clause challenges to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause — a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism . . . — renders several Commerce Clause decisions appropriate support for our conclusion.
95. L. Tribe, supra note 55, § 6-33, at 411 n.19.
clause of article IV [have] provided a setting for federal judicial intervention to control state and local impositions upon the citizens and residents of other states, not only in the service of nationhood but also in the interest of the adversely affected citizens and residents themselves.96

These close connections between the clauses and their common attention to both the structural concerns of nationhood and federalism as well as individual interests should be expected. Each clause was originally embodied in the same provision of the Articles of Confederation. Article IV of that document provides:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, . . . 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 . . . .97

This passage illustrates that even though the primary purpose of these constitutional provisions may have been to foster national unity (in both the Articles and the present Constitution), individual rights are also protected under the clauses. Rather than merely stating that national unity and uniformly regulated commerce were important federal interests, the framers guaranteed certain privileges to the "people of each State." Thus the method chosen to achieve nationhood was the affirmative protection of individual rights.98

Interpretation of the privileges and immunities clause has been "closely parallel to that of the commerce clause"99 since the Supreme Court's decision in Toomer v. Witsell.100 The Court there recognized the fundamental right of citizens of different states to do business on substantially equal terms.101 A South Carolina statute requiring out-of-state fishermen to pay a much higher licensing fee than state residents was struck down as a violation of the article IV privileges and immunities clause.102 The Court maintained that the primary purpose

96. Id. at 413 (emphasis added).
97. ARTICLES OF CONFEDERATION art. IV, quoted in Piper, 470 U.S. at 280 n.7 (emphasis added).
98. A concern for the commercial rights of individuals was shown in the first judicial interpretation of the article IV privileges and immunities clause, Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Justice Washington there enumerated the fundamental rights protected by article IV. Among them was the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade." 6 F. Cas. at 552. The natural rights theory which underlay the Corfield decision is currently in ill repute, but the Court has noted that "those privileges on Justice Washington's list would still be protected by the Clause." Piper, 470 U.S. at 281 n.10 (citing Baldwin v. Montana Fish & Game Commn., 436 U.S. 371, 387 (1978)). Therefore, a fundamental right to engage in interstate trade seems secured by the Constitution, either by the privileges and immunities clause, the commerce clause, or the interaction of the two.
99. L. TRIBE, supra note 55, § 6-32, at 404-05.
100. 334 U.S 385 (1948).
101. See note 103 infra.
102. The statute required the payment of a license fee of $25 for each shrimp boat owned by
of the privileges and immunities clause was to help fuse a collection of independent, sovereign states into one nation. 103 In order to further that goal, discrimination against citizens of other states is precluded where there is no substantial reason for the differential treatment besides the mere difference in citizenship. 104 Since there was no demonstration in Toomer of any reasonable relationship between the danger represented by noncitizens as a class and the severe discrimination they were subjected to, the license fee could not withstand constitutional scrutiny. 105

This result could probably also have been reached using dormant commerce clause principles. 106 Indeed, Justices Frankfurter and Rutledge believed that Toomer should have been decided under the commerce clause, and Justice Rutledge maintained that this "was exactly that sort of state regulation the commerce clause was designed to strike down." 107 Toomer thus illustrates the "bridge [built] between federalism and personal rights" by the privileges and immunities clause. 108 The commerce clause, so closely linked historically and functionally to article IV, section 2, can also serve as such a bridge—fostering nationhood, allocating power and securing personal rights, all at once. This relationship between the commerce clause and the privileges and immunities clause, and the recent scholarly work on dormant commerce clause theory discussed above, both suggest that the commerce clause could fulfill such a role.

III. SECTION 1983 AND THE COMMERCE CLAUSE

Since the commerce clause seems to secure a protective right for individuals, it must be determined whether or not that right is a "right, privilege, or immunity" within the meaning of section 1983. The Supreme Court has not established any set of guidelines, and the legislative history of section 1983 is not dispositive on this issue. However, both the unqualified statutory language and the failure of any of the Supreme Court's limitations on section 1983 coverage to apply to

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103. 334 U.S. at 395. "In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396 (emphasis added).
104. 334 U.S. at 396.
105. 334 U.S. at 399.
106. See L. Tribe, supra note 55, § 6-32, at 404.
107. 334 U.S. at 410.
the commerce clause lend support to extending section 1983 to violations of that provision.

A. Language and History of Section 1983

The language of the statute itself is not qualified or limited in any way. Presumably, therefore, it should apply when any federally secured right, privilege, or immunity (including the right, secured by the commerce clause, to be free from discriminatory or protectionist state economic legislation) is violated under color of state law. 109

The Supreme Court has taken the unrestricted nature of this language seriously. For example, the Court in Maine v. Thiboutot 110 interpreted the phrase “and laws” in section 1983 broadly. There the Court had to decide whether the phrase “any rights . . . secured by the . . . laws” should mean what it says, or should instead be limited to rights secured by some subset of laws. “Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.”111 Additionally, the Court has noted that the language of 18 U.S.C. § 241 (section 1983’s criminal counterpart) “is plain and unlimited. . . . [I]ts language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States.”112 Since section 1983’s reference to rights, privileges, or immunities secured by the Constitution is similarly unqualified, courts should read it broadly and include the commerce clause right within its protection.

Neither the origin nor the legislative history of section 1983 provides any reason to interpret section 1983’s scope more narrowly. Section 1983 originated as section 1 of the Ku Klux Klan Act of 1871. 113 This act was one of the five civil rights acts enacted between 1866 and 1875 in order to elaborate and enforce effectively the new liberties in the Reconstruction amendments. The 1871 Act was a response to the lawless activities of the Klan and other vigilante groups harassing freedmen and Union sympathizers in the South. State and local offi-

110. 448 U.S. 1 (1980). See also text accompanying notes 45 & 46 supra.
111. 448 U.S. at 4.
112. Price, 383 U.S. at 800 (emphasis in original). Section 241 provides in part, “If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States [they shall be subject to fine and imprisonment].” 18 U.S.C. § 241 (1982).
Officials in the Southern states fostered this "vigilante terrorism" through "tacit complicity and deliberate inactivity." The congressional debates on the 1871 Act contain repeated references to the Klan atrocities, showing that Congress was primarily concerned with suppressing the Klan's private lawlessness and preventing further abdication of law enforcement responsibility by Southern officials pursuing a policy of official inactivity.

Section 1 of the Act, today's section 1983, was the least controversial part of the legislation. Those members of Congress who did attempt to define the scope of the "privileges and immunities" that could be secured by the national government (thus defining the scope of the Act) frequently cited *Corfield v. Coryell.* That opinion "suggested that the privileges and immunities safeguarded by article IV comprehended 'the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.'" But reliance on *Corfield* may not be particularly helpful in determining the scope of section 1983, since "[i]t did not directly confront the question whether article IV guaranteed substantive rights or only equality of enjoyment of such rights as the several states chose to extend to their citizens."

While one commentator has suggested that "[a]n expansive interpretation of the 1871 Civil Rights Act seems improbable in the light of the political atmosphere in which the measure was passed," opponents of the legislation recognized the breadth of the remedy established. Senator Thurman of Ohio said:

> [The Act] authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character . . . and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

Justice Douglas quoted such opposition statements in his opinion for the Court in *Monroe v. Pape* (the source of modern section 1983

115. *Id.* at 1154.
116. *Id.* at 1155.
117. *Id.* at 1155. *Corfield,* 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), is discussed in note 98 supra.
119. *Id.* (footnote omitted).
120. *Id.* at 1156.
doctrine) without saying whether supporters of the Act attempted to refute or restrict this interpretation. This tends to support a reading of section 1983 that is as broad as its opponents feared and its language implies.

Although section 1983 was passed to support enforcement of the fourteenth amendment, interpreters of section 1983 should not be compelled to tie the scope of the Act to that of the fourteenth amendment. After all, the expansion of the fourteenth amendment into the areas of sex, alienage, and privacy has transported the amendment far from the racial problems with which its authors were immediately concerned. Hence, it would be no more faithful to section 1983's original purpose to link its scope to that of the fourteenth amendment than to apply it broadly to all constitutional rights. And notwithstanding the expansive interpretation given to the fourteenth amendment, the Supreme Court has not even tied the scope of section 1983 to the original purpose of the fourteenth amendment. Maine v. Thiboutot, for example, concerned a denial of benefits under the Social Security Act. Thus, section 1983 has been applied in contexts very different from the racial discrimination and vigilante violence that inspired it.

The inconclusive history of the Act allows two competing visions of section 1983 to arise. The first sees section 1983 addressing an important but limited problem in post–Civil War race relations. In this vision, the core concern of the provision, even today, should be racial. In the second, section 1983 is the primary civil mechanism for vindicating all constitutional rights. "The Court has toyed with intermediate approaches under which section 1983 protects only 'civil' rights [as in Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900)] or only 'personal' rights [as in Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)], but these have never come to represent a coherent approach to the section. If not confined by its origins, section 1983 seems destined to protect all constitutional rights." The

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123. The 1871 legislation was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1873), quoted in Monroe, 365 U.S. at 171.


125. See Eisenberg, supra note 12, at 483-86.

126. Id. at 486. This second vision prompts a further question: "[M]ay section 1983 be given a broad functional scope, applied to many rights, without losing penetration within its core area of historical concern?" Id. at 487. The concern here is that judges might be unwilling to break down traditional state immunity privileges to vindicate all rights, thus hampering § 1983's effectiveness in all areas, including its traditional racial ones. But this concern no longer works against extending § 1983 to the commerce clause right in the § 1988 attorney fees context. No immunities need to be upset, since attorney fees can already be recovered from the state. Hutto v. Finney, 437 U.S. 678 (1978). See also note 12 supra.
Court's rejection of any limitation of section 1983 to "civil" or "personal" rights implies that the second, broader, vision should prevail.

B. Contracts Clause Exception

There is some evidence that not all constitutional rights are rights within the meaning of section 1983. It has been held, in *Carter v. Greenhow* and *Poirier v. Hodges*, that the contracts clause does not give rise to section 1983 rights. Yet these two cases are not persuasive. In 1885, the *Greenhow* Court held that the contracts clause does not directly secure any individual rights under the Constitution. The only right secured to an individual by that clause, the Court argued, is a right to have state laws impairing the obligation of contract judicially invalidated; this right, the Court maintained, is secured indirectly and incidentally.

This reasoning does not stand up to analysis, since it fails to distinguish the contracts clause from any other constitutional provision. A person claiming a violation of the first or fourteenth amendment seeks to have the offending statute declared invalid as well. The "right" to have offending state laws invalidated that the *Greenhow* Court describes is actually a remedy. It is a judicial response to a violation of the right that is directly secured by the contracts clause: the right to be free from state action impairing contractual obligations. The Court's opinion does not support the exclusion of this right from section 1983 protection.

Similarly unpersuasive is *Poirier v. Hodges*, where the court also refused to extend section 1983's coverage to the contracts clause. The *Poirier* court believed section 1983 should only apply to violations of the fourteenth amendment and to rights held applicable to the states by incorporation through that amendment. Since the contracts

127. See Maine v. Thiboutot, 448 U.S. 1, 5 (1980) ("under § 1983 state 'officers may be made to respond in damages not only for violations of rights conferred by federal civil equal rights laws, but for violations of other federal constitutional and statutory rights as well'") (quoting Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966)).


129. 114 U.S. 317 (1885).


132. 114 U.S. at 322. The Court found no right under § 1983 here, and it provided no help in determining what rights might actually be secured by that section. "It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an action for redress under [§ 1983]; and, fortunately, it is not necessary to do so in this case." 114 U.S. at 323.

133. See notes 11 & 18 supra.

134. 445 F. Supp. at 842. The court argued that historically, § 1983 was intended by Congress to enforce the fourteenth amendment. They derived this intent from the fact that the statute was enacted pursuant to, and in order to implement, the fourteenth amendment. 445 F.
clause has never been incorporated, the court held that it gave rise to no rights redressable under section 1983.\textsuperscript{135}

Just why incorporation into the fourteenth amendment should be of decisive importance here is unclear. Since the contracts clause is by its terms applicable to the states, there was no need to apply it to the states by incorporation. Surely first amendment rights would be protected by section 1983 if that amendment had been applied to the states without first being incorporated into the fourteenth amendment. The mere fact of incorporation alone cannot be fundamental.\textsuperscript{136}

These contracts clause precedents should not be given much weight and certainly should not be the basis for excluding the commerce clause from section 1983 coverage. The Supreme Court has not addressed the issue since 1885, and its recent cases suggest that it would not reach the same conclusion today. The broad language used by the Court in \textit{Price} and \textit{Thiboutot}\textsuperscript{137} suggests that any right secured by any part of the Constitution, whether it is the contracts clause, the commerce clause, or the fourteenth amendment, should fall within the coverage of section 1983.

C. \textit{Limitations on Section 1983 Protection of Statutory "Rights"}

Despite the expansive language of \textit{Thiboutot}, which placed the denial of benefits under the Social Security Act within the purview of section 1983, the Supreme Court has recognized that not all federal statutes secure rights protected by section 1983. The Court's rules for determining which statutory rights are protected by section 1983 may provide guidance by analogy in determining which constitutional rights are protected by section 1983.

The \textit{Thiboutot} Court maintained that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."\textsuperscript{138} Thus, "the plain language of the statute," which included no limitations or modifiers, "undoubtedly embrace[d] [violations of] the Social Security Act."\textsuperscript{139}

Yet two limitations on the application of \textit{Thiboutot}'s broad interpretation of section 1983 were set out by the Court in \textit{Pennhurst State Supp.} at 842. "Hence, the Fourteenth Amendment is the 'centerpiece' of the statute, . . . and the scope of § 1983 is identical with those rights guaranteed by the Fourteenth Amendment." \textsuperscript{135} 445 F. Supp. at 842. \textit{But see} notes 123-28 \textit{supra} and accompanying text. The contracts clause has never been incorporated into the sphere of fourteenth amendment protection. It is an independent obligation of the states; thus the court could not include it in the fourteenth amendment centerpiece. No reference was made to the \textit{Carter v. Greenhow} analysis.

\textsuperscript{135} 445 F. Supp. at 842.

\textsuperscript{136} Nor need the scope of § 1983 be tied to the fourteenth amendment at all. \textit{See} notes 123-28 \textit{supra} and accompanying text.

\textsuperscript{137} \textit{See} notes 109-12 \textit{supra} and accompanying text.

\textsuperscript{138} 448 U.S. at 4.

\textsuperscript{139} 448 U.S. at 4.
School and Hospital v. Halderman. First, in order for Thiboutot to be controlling, the statute in question must create a "right" within the meaning of section 1983. Second, section 1983 is not available where the "governing statute provides an exclusive remedy for violations of its terms." The Court failed to articulate any set of criteria by which to decide whether a "right" under section 1983 exists. It did, however, distinguish the plaintiff in Thiboutot, who was personally entitled to funds under the Social Security Act, from the plaintiffs in Pennhurst, who could only claim that a state mental health program receiving federal grant money had not provided adequate "assurances" to the federal government that certain statutory standards had been met. The Court concluded that it was "at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of §1983." Thus, courts deciding whether a section 1983 right exists must not fail "to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States." The exclusive remedy exception precluded use of section 1983 in Middlesex County Sewerage Authority v. National Sea Clammers Association. The Court there considered whether section 1983 was a source of express congressional authorization of private suits under the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972. Congress had provided remedial provisions within the statutes themselves, and the Court held that those provisions precluded coverage by section 1983. The Court

140. 451 U.S. 1 (1981). Pennhurst involved an attempt to bring a § 1983 claim under the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-81 (1982). The federal grant program established by that statute required each state hoping to receive funds to submit a spending plan for approval by the Secretary of the Department of Health and Human Services. That plan was to include assurances that any program receiving funds would protect the human rights of the disabled consistently with the statutory "Bill of Rights." 451 U.S. at 13-14. The plaintiff in Pennhurst argued that the "Bill of Rights" portion of the Act granted to mentally retarded persons a right to appropriate treatment and services in the setting "least restrictive of . . . personal liberty," 42 U.S.C. §§ 6010(1) and (2), and maintained that the state had violated that right. 451 U.S. at 8-9.

141. 451 U.S. at 28 (quoting Maine v. Thiboutot, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting)).

142. 451 U.S. at 28. The Court also concluded that the "Bill of Rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act "simply does not create substantive rights." 451 U.S. at 11. Rather than establishing enforceable rights and obligations, that provision did "no more than express a congressional preference for certain kinds of treatment." 451 U.S. at 19. This was "too thin a reed to support the rights and obligations read into it by the court below." 451 U.S. at 19.

143. 451 U.S. at 27.


did not delineate how detailed the remedial provisions must be to foreclose section 1983 protection, but merely held that the provisions in question were "sufficiently comprehensive."¹⁴⁷

These statutory exceptions are not readily applicable to the cognizability of dormant commerce clause claims. First, the exclusive remedy cases provide little guidance in determining what sort of rights are covered by section 1983. The Court avoided that issue in Sea Clammers and did not provide any helpful criteria in Pennhurst. But the individual interest protected by the commerce clause, which is judicially enforceable through private actions, is stronger than the congressional "preference"¹⁴⁸ that did not support rights or obligations in Pennhurst. The commerce clause confers an enforceable right on individuals by imposing a "binding obligation" on the states, rather than merely "encouraging" states not to enact discriminatory or protectionist economic regulations.¹⁴⁹ In addition, the Pennhurst exclusive remedy exception does not apply here, since neither the Constitution nor Congress provides an exclusive remedy for commerce clause violations. Congress can eliminate an undesirable state regulation merely by enacting a supreme federal rule on that regulatory subject, while individuals frequently exercise a private right of action by bringing dormant commerce clause actions challenging state regulations. Thus, private suit against a state official is not a novel remedy for commerce clause violations; invoking section 1983 as the basis for such suits merely allows the threshold requirement of a section 1988 attorney fees claim to be satisfied.¹⁵⁰

D. Types of Rights Protected by Section 1983

The broad, unqualified language of section 1983 and the Supreme Court interpretations of that language in Maine v. Thiboutot¹⁵¹

¹⁴⁷. 453 U.S. at 19-21. Congress had created so many specific statutory remedies that the Court found it hard to believe that it intended to preserve the § 1983 right of action. 453 U.S. at 20. Both statutes contained "unusually elaborate enforcement provisions, conferring authority to sue . . . both on government officials and private citizens. . . . In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies [like suit under § 1983] for private citizens suing under" the Acts. 453 U.S. at 13-14. Those provisions similarly precluded the express remedy of § 1983 under the Pennhurst exclusive remedy exception. After reaching this conclusion, the Court did not go on to consider whether any rights within the meaning of § 1983 were secured by the Acts.

Justices Stevens and Blackmun dissented from this reasoning, arguing that the proper question with regard to federal statutes is not whether the § 1983 action has been preserved, "but rather whether Congress intended to withdraw that right of action." 453 U.S. at 27. These justices thought the burden was on the defendant to prove an exception "[b]ecause the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable anytime a violation of a federal statute is alleged, see Maine v. Thiboutot, 448 U.S. 1, 4." 453 U.S. at 27 n.11.

¹⁴⁸. See note 142 supra.

¹⁴⁹. Id.

¹⁵⁰. See text at notes 3-6 supra.

¹⁵¹. 448 U.S. 1 (1980).
Lynch v. Household Finance Corp.152 make it difficult to limit the protections of section 1983 to any particular subset of rights, such as civil or personal rights. The Supreme Court has said that section 1983 covers "not only . . . violations of rights conferred by federal equal civil rights laws, but . . . violations of other federal constitutional and statutory rights as well."153 Similarly, the Court in Thiboutot stated that a major purpose of section 1983 (and section 1988) "was to benefit those claiming deprivations of constitutional and civil rights."154 Thus the Court seems to apply section 1983 even to those constitutional rights which are not commonly referred to as civil rights.

A distinction between personal and property rights in a context closely related to section 1983 was expressly rejected in Lynch. The Court there argued that all property rights, almost by definition, are personal:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal right" . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.155

In spite of these interpretations, the Consolidated Freightways court opined that section 1983 protects only civil rights, or "'important personal rights akin to [the] fundamental rights protected by the Fourteenth Amendment.'"156 This view was first asserted in Holt v. Indiana Manufacturing Co.157 and was reaffirmed by the Eighth Circuit in First National Bank of Omaha v. Marquette National Bank of

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152. 405 U.S. 538 (1972).
154. 448 U.S. at 9 (emphasis added).
155. 405 U.S. at 552. The Lynch Court was construing the jurisdictional counterpart of § 1983, now codified at 28 U.S.C. § 1343(a)(3) (1982). See note 30 supra. That statute states:
(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) 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 . . . .


Based on its reading of the legislative history of the Civil Rights Act of 1871, "the direct lineal ancestor of §§ 1983 and [1343(a)(3)]," the Court was reluctant to pare down § [1343(a)(3)] jurisdiction — and the substantive scope of § 1983 — by means of the distinction between personal liberties and property rights, or in any other way. The statutory descendants of § 1 of the Civil Rights Act of 1871 §§ 1983 and 1343(a)(3) must be given the meaning and sweep that their origins and their language dictate.

405 U.S. at 545, 549 (emphasis added).
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In Holt a company brought suit under what is now section 1983 to enjoin the collection of certain state taxes levied against the value of several of its U.S. patents. The Company asserted that those patents were not legally subject to state taxation, and thus suit was instituted "to redress the deprivation, under color of a [tax] law of the State of Indiana, of a right secured by the laws of the United States."159 In rejecting the Company's claim, the Court merely stated that the statute was enacted to enforce the fourteenth amendment, referred "to civil rights only and [was] inapplicable here."160 This interpretation, however, was explicitly rejected in Thiboutot, where the Court stated that section 1983 protects "constitutional and civil rights."161 Thus, section 1983 is applicable to more than "civil rights only."

The Eighth Circuit's discussion in Marquette National Bank is more extensive, but unpersuasive. The plaintiff bank there asserted that a state banking regulation conflicted with a federal regulatory statute, depriving the bank of rights secured by that statute.162 While recognizing that Thiboutot clearly expands section 1983 beyond the fourteenth amendment, the court refused to apply the broad language of Thiboutot to the alleged statutory violation in Marquette National Bank.163 The Eighth Circuit based this refusal on a belief that Thiboutot did not change the type of statutory rights protected by section 1983. The court reasoned that the rights at stake in Thiboutot, "of beneficiaries to receive minimal subsistence and support under the AFDC program so as to be able to obtain food and shelter[,] represent important personal rights akin to the fundamental rights protected by the Fourteenth Amendment. . . . '[S]uch fundamental human, highly personalized rights are just the stuff from which § 1983 claims are to

159. 176 U.S. at 69.
160. 176 U.S. at 72.
161. 448 U.S. at 9 (emphasis added). See text accompanying notes 153-54 supra.
162. The plaintiff bank claimed that 12 U.S.C. § 85 preempted the states' power to regulate the interest rates of national banks. Section 85 authorizes national banks to charge interest at the rate allowed to the most favored lender in their state. The Minnesota statute in question here placed a 12% interest ceiling on charges by bank credit issuers (credit cards). The Eighth Circuit ultimately held that the authority provided by § 85 was not a right, privilege, or immunity secured by federal law within the meaning of § 1983. Such authority is an incidental part of a broad regulatory scheme and "is not in the nature of the rights protected by the Civil Rights Act." 636 F.2d at 198.
163. The Eighth Circuit did not believe that the Supreme Court intended in Thiboutot to affirm the existence of a § 1983 remedy for the violation of each and every federal law or the deprivation of any right provided by a federal statute. The language in Thiboutot suggests that section 1983 actions should be broadly permitted, even in areas outside welfare, First Amendment, and social security cases. However, the Court fails to say this explicitly. In light of the narrow holding in the case concerning social security cases, the general language in the opinion, and the major ramifications of such a holding, we do not think such an expansion of section 1983 is justified. 636 F.2d at 197-98 n.2.
be made.' 164 Because the extension of section 1983 was not expressly mandated by Thiboutot, the Marquette National Bank court concluded "that section 1983 does not authorize a suit for an alleged violation of a purely economic regulatory statute affecting only commercial institutions." 165

There are problems with this analysis, however. First, the Eighth Circuit's attempt to limit section 1983 to personalized rights is inconsistent with the expansive language and spirit of Thiboutot and Lynch. 166 Additionally, the Eighth Circuit's attempt to limit the scope of Thiboutot to its narrow holding is not entitled to much deference. The Supreme Court spelled out the limits to Thiboutot in Pennhurst and Sea Clammers. 167 The implication of those decisions is that all federal statutory rights are cognizable under section 1983 if an actual substantive right, rather than a mere "congressional preference," is involved, and if the statute securing the right provides no exclusive remedy. No mention is made in those decisions of a limitation based on the nature of the right involved. There is no requirement that the right be highly personal or a civil right.

Thus section 1983 can be extended to protect a broad range of statutory and constitutional rights. The language of the statute is unqualified, seemingly applying to violations of the individual right secured by the commerce clause, and its legislative history fails to put clear limits on its coverage. Those exceptions to section 1983 protection that have been judicially developed — the Pennhurst standards and the contracts clause exception — are narrow and inapplicable to the commerce clause. These factors, and the Court's refusal to limit section 1983's coverage to any particular set of rights, support using section 1983 to remedy violations of rights secured by the commerce clause.

IV. CONCLUSION

Rather than acting solely to allocate power between the federal and state governments, the commerce clause also secures an important individual right. The individual right to be free from discriminatory or protectionist state economic legislation, protected by the commerce clause, is an important part of the constitutional system. Since the unqualified language and expansive Supreme Court interpretations of section 1983 clearly embrace this constitutional right, dormant com-

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164. 636 F.2d at 198 (quoting Gomez v. Florida State Employment Serv., 417 F.2d 569, 579 (5th Cir. 1969)).
165. 636 F.2d at 199 n.3.
166. See notes 110-11 & 154-55 supra and accompanying text.
167. See text accompanying notes 140-50 supra.
merce clause challenges to protectionist state legislation should be considered cognizable section 1983 claims.

— Gregory A. Kalscheur