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Brian Thomas Atkinson

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***Dennis v. Higgins*: Commerce Clause "Rights" Actionable Under Section 1983**

Since the Revolution, Americans have resisted unfair taxation by the government, on both the federal and state levels. Plaintiffs challenging discriminatory state taxes traditionally have alleged that the state conduct in question is a direct violation of the Constitution itself.¹ With *Dennis v. Higgins*,² however, these plaintiffs now have an alternative weapon with which to attack such conduct: 42 U.S.C. § 1983.³ In *Dennis*, plaintiff brought a Commerce Clause⁴ claim under section 1983, arguing that Nebraska's attempt to use its taxing power in retaliation against him for basing his operations in another state violated his "right" to participate freely in interstate commerce.⁵ The plaintiff's innovative and successful implementation of section 1983 marks a significant turning point in the life of the statute, which is normally found in the arsenal of civil rights plaintiffs. First, foregoing a constitutional claim and proceeding under section 1983 entitles a prevailing plaintiff, such as *Dennis*, to attorney's fees under 42 U.S.C. § 1988,⁶ relief previously unavailable to individuals relying on traditional causes of action to combat Commerce Clause violations.⁷ Second, the result in *Dennis* may finalize the conversion of section 1983 from an obscure remedy for state-sponsored violations of a few constitutional guarantees⁸ into an enforcer of any claim

1. See, e.g., *Consolidated Freightways Corp. v. Kassel*, 556 F. Supp. 740, 742-43 (S.D. Iowa 1983) (alleging a Commerce Clause violation), *aff'd*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984). General federal question jurisdiction is based upon 28 U.S.C. § 1331 (1988).

2. 111 S. Ct. 865 (1991).

3. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 (1988).

4. U.S. CONST. art. I, § 8, cl. 3. The clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

5. *Dennis*, 111 S. Ct. at 867.

6. 42 U.S.C. § 1988 (1988) provides that "[i]n any action or proceeding to enforce a provision of section [. . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

7. See *infra* notes 148-51 and accompanying text.

8. Only 21 cases were decided under § 1983 between 1871 and 1920, the first 49 years of the legislation's existence. See Comment, *The Civil Rights Act: Emergence of an Adequate*

arising under a constitutional provision, such as the Commerce Clause, that merely allocates power between the federal and state governments. Just as the Commerce Clause restricts state activity in the area of interstate commerce, other Article I provisions restrict state activity in the areas of intergovernmental taxation, foreign relations, import duties, and immigration.⁹ After *Dennis* each of these prohibitions on state action is a possible source of section 1983 claims.

The plaintiff in *Dennis* was not the first to take this route. The United States Supreme Court granted certiorari in *Dennis* to resolve a split among the circuits regarding the viability of Commerce Clause claims under section 1983.¹⁰ Using a framework of analysis developed in *Golden State Transit Corp. v. City of Los Angeles*,¹¹ the *Dennis* Court held for the first time that a plaintiff may bring an action for Commerce Clause violations under section 1983.¹²

This Note places *Dennis* in historical context by tracing the development of section 1983 as a potent remedy for those deprived of their individual rights by state action.¹³ It criticizes the majority for failing to explain adequately why an expansive reading of section 1983 was proper, and finds its dismissal of the dissent's version of the statute's legislative history unconvincing.¹⁴ The Note also determines that use of the *Golden State* framework to ascertain whether statutory provisions are within the scope of section 1983 is inappropriate for analyzing the Commerce Clause.¹⁵ It argues that the dissent correctly recognized a distinction between constitutional provisions that secure individual rights and those

Federal Civil Remedy?, 26 IND. L.J. 361, 363 (1951). Indeed, the statute's apparent dormancy during this period forced a cautious Court to articulate its assumption that the statute had not been repealed. See *Giles v. Harris*, 189 U.S. 475, 485 (1903) ("We assume that [§ 1983] . . . has not been repealed . . ."); *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) ("assuming [§ 1983] is still in force"). For a discussion of the limited number of guarantees § 1983 protected, see *infra* notes 86-101 and accompanying text.

9. U.S. CONST. art. I, § 10.

10. See *infra* note 31 and accompanying text. A number of commentators had anticipated the Court's grant of certiorari on this issue. See Michael G. Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1551 (1989); Gregory A. Kalscheur, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right to Be Free of Protectionist State Action*, 86 MICH. L. REV. 157, 158 (1987); Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 260 (1991); *The Supreme Court, 1990 Term—Leading Cases*, 104 HARV. L. REV. 129, 340 (1990).

11. 493 U.S. 103 (1989).

12. *Dennis*, 111 S. Ct. at 873.

13. See *infra* notes 76-133 and accompanying text.

14. See *infra* notes 134-37 and accompanying text.

15. See *infra* notes 138-41 and accompanying text.

that allocate power.¹⁶ It also identifies the significance of making the fee-shifting provisions of section 1983 available to Commerce Clause plaintiffs and explains why this is contrary to congressional intent.¹⁷ Finally, the Note explores the potential effects of the decision¹⁸ and recommends legislative action to curb the adverse consequences.¹⁹

The plaintiff in *Dennis* operated a multistate trucking company based in Ohio.²⁰ Because Nebraska imposed certain taxes and fees only upon vehicles registered in Ohio and other specified states,²¹ plaintiff filed a class-action suit in Nebraska state court challenging the taxes on the grounds that they constituted an unlawful burden on interstate commerce.²² Plaintiff sought injunctive relief and a refund of all taxes paid.²³ Significantly, the plaintiff also included a claim that the State was liable under section 1983,²⁴ seeking recovery of his attorney's fees and costs.²⁵ After a bench trial on stipulated facts, the court held that the Nebraska taxes and fees violated the Commerce Clause.²⁶ Although the trial court permanently enjoined the State from assessing or collecting the taxes and fees, it dismissed plaintiff's section 1983 claim.²⁷ Plaintiff appealed the dismissal of his section 1983 claim to the Supreme Court of Nebraska.²⁸ Affirming the dismissal, the Supreme Court of Nebraska held that "[d]espite the broad language of § 1983 . . . there is no cause of action under [it] for violations of the commerce clause."²⁹ The Nebraska court believed that incidental benefits inuring to individuals as a result of allo-

16. See *infra* notes 142-47 and accompanying text.

17. See *infra* notes 148-51 and accompanying text.

18. See *infra* notes 152-59 and accompanying text.

19. See *infra* notes 160-61 and accompanying text.

20. *Dennis*, 111 S. Ct. at 867.

21. NEB. REV. STAT. §§ 60-305.02-.03 (1984), amended by NEB. REV. STAT. §§ 60.305.02-.03 (1988).

22. *Dennis*, 111 S. Ct. at 867.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The taxes and fees at issue violated the Commerce Clause because they were imposed only on motor carriers whose vehicles were registered outside Nebraska. *Id.*; cf. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (noting that the Supreme Court applies a per se test of invalidity to state statutes that directly discriminate against out-of-state participants in interstate commerce).

27. *Dennis*, 111 S. Ct. at 867-68. The trial court held that plaintiff failed to prove he was entitled to judgment under § 1983. See *Dennis v. State*, 234 Neb. 427, 429, 451 N.W.2d 676, 678 (1990), *rev'd sub nom. Dennis v. Higgins*, 111 S. Ct. 865 (1991).

28. *Dennis v. State*, 234 Neb. at 429, 451 N.W.2d at 678; see *Dennis*, 111 S. Ct. at 868.

29. *Dennis v. State*, 234 Neb. at 430, 451 N.W.2d at 678. The Supreme Court of Nebraska relied heavily upon the reasoning of the Eighth Circuit Court of Appeals in *Consolidated Freightways Corp. v. Kassel*. *Id.*; see *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1143-44 (8th Cir.) (holding that Commerce Clause claims are not cognizable under

cations of regulatory power by the Commerce Clause were not the type of interests Congress sought to protect in section 1983.³⁰ Plaintiff subsequently petitioned the United States Supreme Court for a writ of certiorari, which the Court granted to resolve the conflict on this issue among the federal courts of appeals.³¹

In an opinion by Justice Byron White, the Court reversed the Supreme Court of Nebraska's refusal to find a cause of action for Commerce Clause violations under section 1983.³² In the first section of the opinion, Justice White noted that while section 1983 was designed originally to ensure primarily "a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto,"³³ the Court had not restricted the statute to that limited purpose.³⁴ Instead, it had construed section 1983 broadly, giving full effect to the statutory language, which speaks of "any rights, privileges, or immunities secured by the Constitution and laws."³⁵

Justice White then proceeded to determine whether the Commerce

§ 1983 because the clause merely allocates power between the federal government and the states and does not secure any individual rights), *cert. denied*, 469 U.S. 834 (1984).

30. *Dennis v. State*, 234 Neb. at 431-32, 451 N.W.2d at 678.

31. *Dennis*, 110 S. Ct. 2559 (1990). The Supreme Court of Nebraska noted this division of authority. See *Dennis v. State*, 234 Neb. at 429, 451 N.W.2d at 678. The Eighth, Ninth, and Tenth Circuits had held that no § 1983 cause of action could arise for Commerce Clause violations. See *Kraft v. Jacka*, 872 F.2d 862, 869 (9th Cir. 1989); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476-77 (10th Cir. 1985); *Kassel*, 730 F.2d at 1143-44. The Courts of Appeals for the Third, Sixth, and Eleventh Circuits reached the opposite result. See *Continental Ill. Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated on other grounds*, 494 U.S. 472 (1990); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980). Nor was this the first time the Court had considered granting a writ of certiorari on this issue. See *Private Truck Council of Am., Inc. v. Quinn*, 476 U.S. 1129, 1129 (1986) (White, J., joined by Brennan and O'Connor, JJ., dissenting from denial of certiorari and noting split among the circuits).

32. *Dennis*, 111 S. Ct. at 868. Justices Marshall, Blackmun, Stevens, O'Connor, Scalia, and Souter joined Justice White's opinion. *Id.* at 867.

33. *Id.* at 869 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 611 (1979)). While Justice White agreed with the dissenting justices that the legislative history of § 1983 clearly reflected its original purpose, *id.*, he criticized them, however, for creating a "cut-and-paste" legislative history to support their assertion that § 1983 does not apply to constitutional provisions that allocate power. *Id.* at 868 n.4. For a discussion of the dissent's rejoinder to this criticism, see *infra* notes 62-65 and accompanying text.

34. *Dennis*, 111 S. Ct. at 869.

35. 42 U.S.C. § 1983 (1988) (emphasis added); see *Dennis*, 111 S. Ct. at 869-70 (quoting *Monell v. Department of Social Servs.*, 436 U.S. 658, 700-01 (1978) (holding that § 1983 "provide[s] a remedy . . . against all forms of official violation of federally protected rights"), and citing *Maine v. Thiboutot*, 448 U.S. 1, 4, 6-8 (1980) (refusing "to limit . . . section 1983 to civil rights or equal protection laws") and *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (rejecting an attempt to limit the constitutional rights encompassed by the phrase "rights, privileges, or immunities")). For further commentary on *Monell*, *Lynch*, and *Thiboutot*, see *infra* notes 109, 113-17, and 120 and accompanying text.

Clause creates a "right" within this expansive reading of section 1983.³⁶ Acknowledging that the Commerce Clause is a power-allocating provision³⁷ that gives Congress preemptive authority over the regulation of interstate commerce,³⁸ Justice White concluded that it also does more: "[I]t is also a substantive 'restriction on permissible state regulation' of interstate commerce."³⁹ Moreover, Justice White observed, individuals injured by impermissible state regulation may successfully obtain injunctive and declaratory relief.⁴⁰ The combination of a substantive restriction on state power and an entitlement to relief under the Commerce Clause, the Court held, constitutes a "right" within the purview of section 1983.⁴¹ To bolster his position, Justice White cited a number of Supreme Court precedents that describe the Commerce Clause as conferring

36. *Dennis*, 111 S. Ct. at 870-71; see *infra* notes 41-49 and accompanying text.

The question of what rights the Commerce Clause imparts is implicit in the two main types of claims that may arise under the Commerce Clause. One variety includes challenges to state commercial statutes or regulations that have been preempted directly or indirectly by existing federal schemes. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239-40 (1824) (striking down a state law granting an exclusive ferry franchise because of direct conflict with applicable congressional regulation). The Supremacy Clause resolves such direct conflicts in favor of federal law. See, e.g., *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913) (ruling that federal food and drug laws override conflicting state law). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25 (2d ed. 1988) (discussing the preemption of state law by federal law when direct conflicts between federal programs and state actions arise).

The second type of claim challenges the power of the states to enact specific statutes or regulations that unduly impair interstate commerce, even when Congress has not exercised its power to enact any conflicting statutes or regulations. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980) (finding that state statute prohibiting out-of-state banks and holding companies was implicitly limited by Commerce Clause). This type of challenge was at issue in *Dennis*, and is usually referred to as the "dormant Commerce Clause" problem. See, e.g., *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (holding that dormant Commerce Clause prohibits state law requiring in-state timber to be processed prior to export). See generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982) (discussing the origins of this terminology). Under the dormant Commerce Clause doctrine, courts evaluate the validity of state regulations affecting interstate commerce by balancing the "desirability of permitting diverse responses to local needs [against] the undesirability of permitting local interference with . . . the unimpeded flow" of goods between the states. TRIBE, *supra*, § 6-4, at 407.

37. The Supreme Court of Nebraska accepted defendant's argument that the Commerce Clause merely allocates power between the federal and state governments and therefore does not confer "rights." See *Dennis v. State*, 234 Neb. 427, 431-32, 451 N.W.2d 676, 678 (1990), *rev'd sub nom. Dennis v. Higgins*, 111 S. Ct. 865 (1991). Justice Kennedy's dissent relied, in part, on this argument. See *Dennis*, 111 S. Ct. at 874 (Kennedy, J., dissenting); *infra* notes 58-75 and accompanying text.

38. *Dennis*, 111 S. Ct. at 870.

39. *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)).

40. *Id.* at 870-71 (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247 (1990)).

41. *Id.* at 871.

"rights" in various contexts.⁴²

Justice White also discussed *Golden State Transit Corp. v. City of Los Angeles*,⁴³ which set forth the current test for determining whether a federal statute confers a "right" within the scope of section 1983.⁴⁴ Under *Golden State*, the Court must consider whether Congress intended the provision,⁴⁵ in this case a constitutional rather than a statutory one, to benefit the plaintiff.⁴⁶ Under this test, the Commerce Clause confers rights within the scope of section 1983 if the framers intended it to benefit individuals in addition to promoting national economic union.⁴⁷ Justice White pointed to the history of Commerce Clause interpretation cited in *Boston Stock Exchange v. State Tax Commission*⁴⁸ to support his conclusion that the framers intended the Commerce Clause to benefit individuals who have suffered injury as a result of impermissible state regulation of interstate commerce.⁴⁹

Finally, Justice White considered two additional arguments the State raised.⁵⁰ The first analogized the Commerce Clause to the Supremacy Clause,⁵¹ noting that the Court previously had held that the Supremacy Clause does not confer any rights within the purview of sec-

42. *Id.* (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) ("right under the Commerce Clause"); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("right[] of constitutional stature"); *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 26 (1910) ("substantial rights of those engaged in interstate commerce"); *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) ("To carry on interstate commerce is . . . a right [to] which every citizen . . . is entitled . . .")).

43. 493 U.S. 103 (1989).

44. *Dennis*, 111 S. Ct. at 871. The test is discussed *infra* notes 118-27 and accompanying text.

45. The other two *Golden State* considerations are: (1) whether the provision in question creates obligations binding on the governmental unit or merely expresses a congressional preference for certain kinds of treatment, and (2) whether the interest asserted by the plaintiff is too vague or amorphous to be enforceable by the judiciary. *Golden State*, 493 U.S. at 106. In *Dennis*, the State did not dispute that these two considerations weighed in favor of recognition of a right. *Dennis*, 111 S. Ct. at 871-72.

46. *Dennis*, 111 S. Ct. at 872.

47. *Id.*

48. 429 U.S. 318 (1977).

49. *Dennis*, 111 S. Ct. at 872. In *Boston Stock Exchange* the Court held that regional stock exchanges challenging a state transfer tax were within the "zone of interests" protected by the Commerce Clause. *Boston Stock Exch.*, 429 U.S. at 321 n.3. Justice White also relied upon the Court's "repeated references to 'rights' under the Commerce Clause." *Dennis*, 111 S. Ct. at 871 (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (engaging in interstate commerce is a "right[] of constitutional stature"); *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 26 (1910) (referring to "the substantial rights of those engaged in interstate commerce"); *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) ("To carry on interstate commerce is . . . a right which every citizen . . . is entitled to exercise . . .")).

50. *Dennis*, 111 S. Ct. at 872.

51. *Id.*

tion 1983.⁵² Justice White rejected the analogy on the grounds that the Commerce Clause is a source of federal rights, in contrast to the Supremacy Clause, which merely affords priority over conflicting state laws to federal rights created by other provisions of the Constitution.⁵³ The State further argued that the Commerce Clause could not be a source of rights within the scope of section 1983 because it is subject to qualification or elimination by Congress.⁵⁴ Justice White, rejecting this argument, noted that the federal statutory rights protected by section 1983 under *Golden State*⁵⁵ also could be qualified or eliminated by Congress.⁵⁶ For these reasons the majority allowed the section 1983 claim to stand.⁵⁷

Justice Anthony Kennedy began his dissent criticizing the majority for ignoring structural and historical factors that he considered critical.⁵⁸ According to Justice Kennedy, the majority failed to recognize the important structural distinction between constitutional provisions that allocate power and those that secure the rights of individuals against the state.⁵⁹ Because section 1983 was designed as a mechanism for protecting individual rights, only violations of the provisions that secure those rights should fall within its scope.⁶⁰ In support of the argument that the Commerce Clause does not create such rights but rather allocates power, Justice Kennedy cited the plain language of the Commerce Clause as well as the intent of the framers.⁶¹ Even if the majority did not recognize

52. *Id.*; see *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979).

53. *Dennis*, 111 S. Ct. at 872. Justice White distinguished the Commerce Clause from the Supremacy Clause on the grounds that the former imposes substantive limitations on the ability of states to regulate interstate commerce, whereas the latter merely acts as a referee when state and federal laws conflict. See *id.*

54. *Id.*

55. See *Golden State*, 493 U.S. at 108.

56. *Dennis*, 111 S. Ct. at 872.

57. *Id.* at 873.

58. Justice Kennedy filed a dissenting opinion, which Chief Justice Rehnquist joined. *Id.* (Kennedy, J., dissenting).

59. *Id.* (Kennedy, J., dissenting).

60. *Id.* (Kennedy, J., dissenting). The Privileges and Immunities, Extradition, and Fugitive Slave Clauses represent right-securing provisions in the original Constitution. See *id.* (Kennedy, J., dissenting) (citing U.S. CONST. art. IV). Justice Kennedy cited these clauses as the only "provisions of the Constitution as first enacted . . . that secur[e] the rights of persons 'as between such persons and the states.'" *Id.* (Kennedy, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 69-70 (1871)). He also included the Reconstruction Amendments and the Bill of Rights provisions incorporated into the Fourteenth Amendment among the "individual rights" § 1983 was designed to protect. *Id.* (Kennedy, J., dissenting).

61. *Id.* at 873-75 (Kennedy, J., dissenting) ("By its own terms . . . the Commerce Clause is a structural provision It does not purport to secure rights."). Justice Kennedy argued that both the events surrounding and the writings documenting the failure of the Articles of

the distinction between power allocating and right securing, he contended, it erred in refusing to acknowledge that the sponsors of section 1983 recognized it and specifically drafted the statute with this distinction in mind.⁶² Justice Kennedy, relying upon various statements made by the supporters of section 1983 at the time of its enactment,⁶³ concluded that "[t]he sponsors of § 1983 . . . gave us a straight-forward answer to the question of which constitutional violations give rise to a § 1983 action, and told us that violations of power-allocating provision such as the Commerce Clause do not."⁶⁴ According to Justice Kennedy, rather than acknowledge Congress' unequivocal intent to limit the scope of section 1983, the Court imposed its own expansive reading of the statute without adequate justification.⁶⁵

Justice Kennedy then observed that no previous case that found a violation to be within the scope of section 1983 had concerned a power-allocating provision of the Constitution.⁶⁶ Indeed, the only section 1983 case that involved a power-allocating constitutional provision found no section 1983 cause of action.⁶⁷ Justice Kennedy argued that the language

Confederation and the drafting and ratification of the Constitution evidenced the framers' preoccupation with creating an economic union. *Id.* at 875 (Kennedy, J., dissenting). He found no evidence of intent to secure personal rights under the Commerce Clause. *Id.* (Kennedy, J., dissenting).

62. *Id.* at 874 (Kennedy, J., dissenting).

63. Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1988)). While debating the power of Congress to enact § 2 of the Act, which used the same "rights, privileges, or immunities" language of § 1, Representative Shellabarger, Chairman of the House Select Committee which drafted the Act and Floor Manager of the bill, articulated a distinction between the provisions of the Constitution that allocate power and those that secure rights. *Dennis*, 111 S. Ct. at 874 (Kennedy, J., dissenting) (citing CONG. GLOBE, 42d Cong., 1st Sess., app. 69-70 (1871)). Justice Kennedy relied on this statement as evidence that the drafters of § 1983 recognized this distinction and incorporated it into the statute. *Id.* at 874-75 (Kennedy, J., dissenting). Bolstering this position, he observed that "[e]very specific mention of the rights secured by the 1871 Act" refer to either the Privileges and Immunities, Extradition, and Fugitive Slave Clauses in Article IV sections or the rights secured by the Reconstruction Amendments. *Id.* at 875 (Kennedy, J., dissenting) (citing statements made by other Congressmen in debates on the 1871 Act). Justice White criticized the dissent's reliance on the comments of Representative Shellabarger because they did not specifically address the scope of § 1983. *See id.* at 869 n.4.

64. *Dennis*, 111 S. Ct. at 876 (Kennedy, J., dissenting). Justice Kennedy also noted that the Court historically has "placed great reliance" upon legislative history in analyzing § 1983 problems. *Id.* at 874 (Kennedy, J., dissenting) (citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545-46 (1972); *Monroe v. Pape*, 365 U.S. 167, 172-85 (1961), *overruled in part on other grounds by Monell*, 436 U.S. 658 (holding that local governments may be defendants in § 1983 suits)).

65. *Id.* (Kennedy, J., dissenting).

66. *Id.* (Kennedy, J., dissenting) (citing *Monroe*, 365 U.S. at 171 (Fourteenth Amendment) and *Lane v. Wilson*, 307 U.S. 268, 274 (1939) (Fifteenth Amendment)).

67. *Id.* (Kennedy, J., dissenting). Justice Kennedy referred to *Carter v. Greenhow*, 114

in cases cited by the majority to support its finding of a "right" to engage in interstate commerce represented nothing more than "scattered statements . . . [that constitute] weak support for its conclusion."⁶⁸ Justice Kennedy also rejected the majority's application of the test for the presence of a section 1983 right, set forth in *Golden State Transit Co. v. City of Los Angeles*,⁶⁹ because that case dealt with the search for rights secured by mere statutes instead of rights secured by the Constitution.⁷⁰ Even if *Golden State* were applicable, Justice Kennedy indicated he would reach the opposite result because the plaintiff in *Dennis* was an incidental rather than a primary beneficiary of the Commerce Clause's allocation of power.⁷¹

The final section of Justice Kennedy's dissent examined the implications of the majority's decision.⁷² At a minimum, Justice Kennedy noted, the majority "creates a whole new class of § 1983 suits derived from Article I."⁷³ Justice Kennedy described the majority's view of section 1983 as "all-inclusive," meaning that it provides the potential for creating a section 1983 cause of action for any violation of federal law.⁷⁴ The Court's decision also permits all future dormant Commerce Clause plaintiffs an opportunity to recover attorney's fees under section 1988, which Justice Kennedy believed clearly contradicts congressional

U.S. 317 (1885), which concerned an alleged violation of the Contracts Clause. *See id.* at 322. The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

68. *Dennis*, 111 S. Ct. at 877 (Kennedy, J., dissenting). Justice Kennedy believed that none of the cases cited by the Court held that the Commerce Clause secures a personal right; rather, he argued, they are merely examples of the Commerce Clause's power allocation at work. *See id.* (Kennedy, J., dissenting).

69. 493 U.S. 103 (1990); *see infra* notes 118-33 and accompanying text.

70. *Dennis*, 111 S. Ct. at 873 (Kennedy, J., dissenting) ("The *Golden State* test, arguably necessary in assessing whether any of the hundreds of [federal statutes] secure rights within the meaning of § 1983, is not appropriate . . . where the question is whether a right is secured by a provision of the Constitution.").

71. *Id.* at 873, 877-79 (Kennedy, J., dissenting). Justice Kennedy argued that the majority had confused the concept of standing with that of a cause of action when it tried to characterize the plaintiff as a primary beneficiary of the Commerce Clause. *Id.* at 878 (Kennedy, J., dissenting). He acknowledged that the Commerce Clause clearly gives rise to a legal interest in an individual against injurious state regulation. *Id.* at 879 (Kennedy, J., dissenting). This interest in turn gives the plaintiff in *Dennis* standing to challenge the Nebraska taxes and fees. *Id.* (Kennedy, J., dissenting). However, "[t]his ability . . . is not equivalent to finding a secured right under § 1983. If that were so, all violations of federal law would give rise to a § 1983 cause of action." *Id.* (Kennedy, J., dissenting).

72. *Id.* at 879-80 (Kennedy, J., dissenting).

73. *Id.* at 879 (Kennedy, J., dissenting). Justice Kennedy suggested that Article I prohibitions upon state activity in the areas of intergovernmental taxation, state involvement in foreign relations, import duties, and immigration all were possible sources of § 1983 claims after *Dennis*. *Id.* (Kennedy, J., dissenting).

74. *Id.* (Kennedy, J., dissenting).

intent.⁷⁵

Dennis is the latest chapter in the disparate history of section 1983. An examination of this history is useful in evaluating the significance of the decision. The statute was enacted to complement the three Reconstruction Amendments.⁷⁶ The first Reconstruction amendment outlawed slavery.⁷⁷ The second guaranteed all persons the privileges and immunities of citizenship, due process, and equal protection of the laws.⁷⁸ The third prohibited governmental interference with citizens' right to vote.⁷⁹ All three specifically authorize Congress to enforce, by appropriate legislation, the rights they secure.⁸⁰ Pursuant to this authority, Congress enacted the predecessor to section 1983 to bolster enforcement of the Fourteenth Amendment.⁸¹ In so doing, Congress responded to harassment of freedmen and Union sympathizers by the Ku Klux Klan and similar groups in the postbellum South⁸² and to the perception that state

75. *Id.* (Kennedy, J., dissenting). Justice Kennedy noted that most dormant Commerce Clause challenges to state regulations come from well-financed business entities and industry associations, and questioned the policy of making attorney's fees recoverable by such plaintiffs. *Id.* at 879-80 (Kennedy, J., dissenting); *see, e.g.,* *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 336 (1977) (upholding an agricultural association's challenge to North Carolina advertising regulations that discriminated against out-of-state apple producers).

76. *See generally* THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION CASES AND MATERIALS* 3-57 (3d ed. 1991) (giving a brief history of federal civil rights activity during Reconstruction and discussing the Thirteenth Amendment, the Black Codes, the Civil Rights Act of 1866, and the Fourteenth Amendment).

77. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

78. *Id.* amend. XIV, § 1. The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

79. *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

80. *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2. *See generally* 7 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 132-55 (1987) (discussing legislation enacted during 1866-1872 to enforce the post-Civil War amendments).

81. Section 1983 originated as § 1 of the Civil Rights Act of 1871. *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *overruled in part on other grounds by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The legislation was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version of cause of action provision codified at 42 U.S.C. § 1983 (1988)).

82. *See Kalscheur, supra* note 10, at 175-76 ("The 1871 Act was a response to the lawless activities of the Klan and other vigilante groups harassing freedmen and Union sympathizers

and local government officials were pursuing an official policy of inaction towards these activities.⁸³

To place *Dennis* in its proper context it is necessary to examine the evolution of section 1983 jurisprudence. Victims of unconstitutional state action rarely based claims upon section 1983 until the late 1930s.⁸⁴ The multitude of explanations offered by commentators to explain this period of dormancy⁸⁵ suggests that it was not due to any single factor, but rather to a combination of all or most of them.

Between 1871 and 1920,⁸⁶ a period Justice Blackmun has labelled the "Dark Age of Civil Rights,"⁸⁷ the Supreme Court gave the Privileges or Immunities Clause of the Fourteenth Amendment an extremely narrow substantive scope.⁸⁸ In *The Slaughter-House Cases*⁸⁹ the Court held that the Constitution secures only the rights of national citizenship.⁹⁰ Examples of these rights of national citizenship include the right to vote in federal elections, the right to petition, assert claims against, and be protected by the federal government, and the right to travel freely within

in the South."); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1142-69 (1977) [hereinafter *Section 1983 and Federalism*].

83. Included in the 1871 Act was a jurisdictional provision that allowed access to federal court regardless of the amount in controversy. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version of jurisdictional provision codified at 28 U.S.C. § 1343(a)(3) (1988)). See Kalscheur, *supra* note 10, at 176 ("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 1983 and Federalism*, *supra* note 82, at 1153-54 ("The legislators who proposed the bill saw themselves confronted not with common felonies but with a concerted plan of organized violence.").

84. See Comment, *supra* note 8, at 363 (noting dearth of § 1983 cases prior to World War II).

85. See, e.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3-20 (1985) (attributing the dormancy to the Court's narrow interpretation of the Reconstruction amendments and to congressional sentiments toward postwar reconciliation); Collins, *supra* note 10, at 1495-96 (attributing dormancy to the availability of implied rights of action brought directly under the federal question statute and attributing the resurgence of 1983 claims to the declining judicial recognition of these implied rights of action); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952) (suggesting that poor drafting of the Reconstruction amendments allowed courts to misconstrue statutes enacted to enforce them); *Section 1983 and Federalism*, *supra* note 82, at 1156-61 (attributing the dormancy to popular apprehension about expansion of the federal government and apathy toward the plight of freed slaves).

86. Comment, *supra* note 8, at 363.

87. Blackmun, *supra* note 85, at 11.

88. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875) (noting that the states' role as the primary guardians of rights between private persons was not altered by the Fourteenth Amendment).

89. 83 U.S. (16 Wall.) 36 (1872).

90. See *id.* at 79-80 (noting that the privileges of national citizenship include the right to be protected by and to participate in the national government).

the nation.⁹¹ Because the scope of the Fourteenth Amendment's Privileges or Immunities Clause was so drastically confined, it follows that its primary enforcement mechanism, section 1983, remained relatively unimportant and infrequently used.⁹²

Prior to the middle of the twentieth century, courts further limited the utility of section 1983 with narrow constructions of the statute's specific provisions.⁹³ To violate section 1983 under these restrictive constructions, a person had to deprive another of a federally secured right while acting "under color of" a state statute or custom.⁹⁴ In early section 1983 cases narrowly interpreting this provision, federal courts required the violative conduct to be sanctioned affirmatively by the state.⁹⁵

Courts also adopted a confined reading of the statute's "rights, privileges, or immunities" language. The United States Supreme Court restricted section 1983's scope to "civil rights only."⁹⁶ It excluded from this scope certain "political" rights, such as the right to hold state office and the right to vote in state elections.⁹⁷ The Court confined section 1983 further by limiting its reference to rights "secured by" the Constitution and laws. As one commentator has noted, "[a]ccording to the old Court, the phrase ['secured by' served to] exclude[] rights that did not . . . take their origin in or derive 'directly' from the Constitution or federal law."⁹⁸ Thus, the Constitution did not "secure" property rights for purposes of section 1983 because they originated in the common law.⁹⁹ The Equal Protection Clause did not "secure" rights under section 1983 because the laws challenged usually were of state origin.¹⁰⁰ Interests protected by the Contracts Clause met the same fate.¹⁰¹

91. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

92. See *Collins*, *supra* note 10, at 1504-05.

93. See *generally id.* at 1499-1506 (discussing the Court's narrow construction of § 1983's language).

94. See 42 U.S.C. § 1983 (1988).

95. See, e.g., *Browner v. Irvin*, 169 F. 964, 965, 968 (C.C.N.D. Ga. 1909) (involving a § 1983 claim against a police chief who arrested and beat a suspect that was dismissed because his actions were not authorized by the state).

96. *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900). "Civil rights" consisted of the right to sue, to be sued, and to testify in state court; the right to make contracts; and the right to buy, sell, and inherit property. See *Collins*, *supra* note 10, at 1500-01.

97. See *Baldwin v. Franks*, 120 U.S. 678, 691 (1887); see also *Giles v. Harris*, 189 U.S. 475, 497 (1903) (Harlan, J., dissenting) (arguing that political rights are not civil rights within the meaning of the predecessor of § 1983).

98. *Collins*, *supra* note 10, at 1503.

99. See *Marcus Brown Holding Co. v. Pollak*, 272 F. 137, 141 (S.D.N.Y. 1920) (Hand, J.) ("[T]he general right of property does not have its origin in the Constitution . . .").

100. *Collins*, *supra* note 10, at 1503; see, e.g., *Holt*, 176 U.S. at 72 (holding predecessor to § 1983 unavailable for equal protection challenge to state tax).

101. See, e.g., *Carter v. Greenhow*, 114 U.S. 317, 322 (1885) (holding that Contract Clause

The Court expanded the scope of section 1983 toward the end of the 1930s. In *Hague v. CIO*,¹⁰² Justice Stone read section 1983's jurisdictional provision¹⁰³ to encompass "personal," but not "property," rights.¹⁰⁴ The "personal" right at stake was the First Amendment's guarantee of freedom of speech;¹⁰⁵ *Hague* therefore broadened section 1983's coverage to include violations of rights secured by the Bill of Rights, which previously had been beyond its scope.¹⁰⁶

With *Monroe v. Pape*¹⁰⁷ the Court began what has been described as the "modern era" for section 1983,¹⁰⁸ holding for the first time, that actions by state officials not authorized by state law are actionable under section 1983 if they involve misuse of state power.¹⁰⁹ In *Monroe* the plaintiff sought relief under section 1983 after thirteen Chicago police officers entered his home without a search warrant and arrested him.¹¹⁰ The *Monroe* Court based its decision largely on the legislative history of the statute.¹¹¹ *Monroe* is pertinent to *Dennis* because it was the first case to rely heavily upon legislative history to determine the scope of section

rights were not within scope of predecessor to § 1983 because they were not "directly secured" by the Constitution).

102. 307 U.S. 496 (1939) (Roberts, J., plurality opinion).

103. See *supra* note 83.

104. *Hague*, 307 U.S. at 531-32 (Stone, J., plurality opinion).

105. *Id.* (Stone, J., plurality opinion).

106. The Court's narrow reading of the Fourteenth Amendment's Privileges or Immunities Clause in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), excluded the guarantees of the Bill of Rights. *Id.* at 79-80 (holding that Fourteenth Amendment protected only rights of national citizenship). This in turn excluded those guarantees from the reach of § 1983 due to its early intimate relationship with the Fourteenth Amendment. See *supra* note 81. As the Court expanded the reach of the Fourteenth Amendment through incorporation of the Bill of Rights into the Due Process Clause, see *TRIBE*, *supra* note 36, § 11-2, at 772-74, it was logical for the amendment's enforcement mechanism, § 1983, to expand as well. See *Collins*, *supra* note 10, at 1534.

107. 365 U.S. 167 (1961), *overruled in part on other grounds by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

108. See, e.g., *Collins*, *supra* note 10, at 1537. Section 1983 was used sparingly during its first 50 years. See *supra* notes 84-85 and accompanying text.

109. *Monroe*, 365 U.S. at 184-85, 187 (violation of Fourteenth Amendment rights alleged as a result of an unauthorized intrusion into plaintiff's home by police officer). But see *Monell*, 436 U.S. at 700 (concluding that cities do not "cause" constitutional deprivations within the meaning of § 1983 unless their agents act pursuant to established custom or policy). Prior to *Monroe* actions by state officials outside the scope of their authority were not actionable under § 1983. See *supra* notes 94-95 and accompanying text; see, e.g., *Browner v. Irvin*, 169 F. 964, 965-68 (C.C.N.D. Ga. 1909) (holding that beating by police officer was not actionable under § 1983 because it was not sanctioned by state law).

110. *Monroe*, 365 U.S. at 170.

111. *Id.* at 173-83, 188-91; *id.* at 194-201 (Harlan, J., concurring); *id.* at 225-37 (Frankfurter, J., concurring in part and dissenting in part).

1983.¹¹²

The Court continued to rely upon legislative history to discern the scope of section 1983 in *Lynch v. Household Finance Corp.*¹¹³ In *Lynch* a creditor garnished a defaulting debtor's savings account under the provisions of a Connecticut statute that authorized pre-judicial garnishment.¹¹⁴ The debtor brought a class-action suit in federal district court against the sheriffs who levied upon the accounts and the creditors who invoked the statute.¹¹⁵ The defendants argued that 28 U.S.C § 1343(3), the section giving a district court jurisdiction to hear a section 1983 claim, was unavailable to remedy this deprivation of property because section 1983 addresses violations of "personal" rather than "property" rights.¹¹⁶ The Court rejected this distinction because no support for it appeared in the legislative history.¹¹⁷ *Lynch* is significant because it illustrates the Court's persistent reliance upon legislative history to determine the scope of section 1983.

In *Golden State Transit Corp. v. City of Los Angeles*,¹¹⁸ however, the Court abandoned its traditional deference to legislative history in section 1983 cases. In *Golden State* the city of Los Angeles was charged with violating federal labor laws by conditioning the renewal of the plaintiff's taxicab franchise on settlement of a pending labor dispute between the plaintiff and its union.¹¹⁹ The issue before the Court was whether the federal statute in question granted the plaintiff rights enforceable under section 1983.¹²⁰ Justice John Paul Stevens developed a two-step functional analysis to resolve this question.¹²¹ The first step involves a three-pronged test to determine whether the plaintiff has asserted the requisite violation of a federal right:¹²² to constitute a "right," the interest asserted must create obligations binding on the governmental unit, as opposed to expressing a mere preference for certain kinds of treatment;¹²³

112. See *id.* at 172-85 (quoting extensively from congressional floor debates surrounding enactment of the statute).

113. 405 U.S. 538 (1972).

114. *Id.* at 539 (citing CONN. GEN. STAT. REV. § 52-329 (1961)).

115. *Id.* at 539-40.

116. *Id.* at 542.

117. *Id.* at 545-46.

118. 493 U.S. 103 (1989).

119. *Id.* at 104.

120. *Id.* at 105. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), which held that the "and laws" language of § 1983 was not restricted to civil rights or equal protection laws, § 1983 was extended to redress violations of federal statutory rights. *Id.* at 4-8.

121. *Golden State*, 493 U.S. at 106.

122. *Id.*

123. *Id.*

the right cannot be "too vague and amorphous" to be enforceable by the judiciary;¹²⁴ and Congress must have intended the statute violated to benefit the plaintiff asserting the interest.¹²⁵ The second stage of analysis involves an inquiry into whether Congress has specifically foreclosed a section 1983 remedy for the violation of the federal right asserted by the plaintiff.¹²⁶ If such a preclusion is found, the defendant will escape liability under section 1983.¹²⁷

Applying this test, Justice Stevens first observed that the case did not come within any exception to a potential section 1983 remedy.¹²⁸ He noted that because Congress had occupied the field of labor-management relations to ensure equal bargaining power to each side,¹²⁹ it intended both parties to benefit from the provision.¹³⁰ The federal right created was the right of each side to bargain with the other, free from governmental interference.¹³¹ The city's refusal to renew the franchise impeded the plaintiff's ability to exercise its statutory right.¹³² Thus, plaintiff had an action under section 1983.¹³³ *Golden State* therefore developed the necessary framework for testing whether a specific federal statute secures a right within the scope of section 1983.

With the Court's recognition of a section 1983 cause of action for violations of the Commerce Clause, *Dennis* finalizes the transformation of section 1983 from a narrow remedy for deprivations secured by the Reconstruction amendments to a broad remedy available for vindication of state officials' violations of many federal rights, statutory or constitutional. This transformation eliminates any remaining doubts about the scope of section 1983 and vests a new category of plaintiffs with causes of action under the statute. The *Golden State* functional test, developed to determine whether a statute secures a right within the meaning of section 1983, now applies with equal vigor to the Commerce Clause.

The *Dennis* majority reaffirmed the notion that an historical inquiry into the legislative intent behind section 1983 will not be dispositive.

124. *Id.* (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987)).

125. *Id.* This requirement has been referred to as the "intended to benefit" test because it attempts to identify the class of individuals Congress sought to protect when it enacted the law in question. See *Dennis*, 111 S. Ct. at 879 (Kennedy, J., dissenting).

126. *Golden State*, 493 U.S. at 106.

127. *Id.*

128. *Id.* at 108-09.

129. *Id.* at 109. Justice Stevens was referring to Congress' decision to regulate affirmatively, and thereby preempt, the subject. See *id.*

130. See *id.*

131. *Id.* at 109-10.

132. *Id.* at 112.

133. *Id.* at 112-13.

Although the initial focus of the statute was to ensure a right of action to enforce the protections of the Fourteenth Amendment, the *Dennis* Court announced that it has "never restricted the section's scope to the effectuation of that goal."¹³⁴ The majority neglected to explain fully why this expansive reading was proper, even as it reaffirmed its previous broad reading of section 1983.¹³⁵ In addition, the opinion criticized the dissent for creating a "cut and paste" version of history to support its arguments to the contrary,¹³⁶ but dismissed the dissent's attempt to ascertain the intent of the statute's drafters by reference to their comments in a different, but related, context.¹³⁷

Apparently dismissing as irrelevant any distinction between rights conferred by constitutional provisions and those conferred by statutory provisions, and ignoring two prongs of *Golden State*'s first test,¹³⁸ the *Dennis* majority applied only the *Golden State* test's troublesome individual benefits analysis: was the Commerce Clause designed to benefit individuals and thus vest them with "rights" within the scope of section 1983?¹³⁹ The State argued in *Dennis* that the Commerce Clause was not designed to benefit individuals, but rather to "promote national economic and political union" by allocating power.¹⁴⁰ Justice White rejected this argument, reasoning that since plaintiff, as a participant in interstate commerce, fell within the "zone of interest" protected by the Commerce Clause, he had a right secured by the Constitution within the purview of

134. *Dennis*, 111 S. Ct. at 869.

135. *See id.* at 868-70.

136. *Id.* at 869 n.4.

137. *See id.* at 875 n.1 (Kennedy, J., dissenting). Justice Kennedy did not rely upon the comments of Representative Shellabarger as definitive evidence of the scope of § 1983. *Id.* If such an argument was made, the majority's dismissal of it would be appropriate because the comments Justice Kennedy quoted did not specifically address § 1983. *See supra* note 63. Rather, Justice Kennedy drew an inference from the comments made during debate on the section of the Act of 1871 that followed § 1983 that the sponsors of § 1983 understood and recognized a distinction between the power-allocating and rights-securing provisions of the Constitution. *Dennis*, 111 S. Ct. at 875 n.1 (Kennedy, J., dissenting). The majority rejected Justice Kennedy's inference, arguing that if Congress recognized such a distinction "it would have made [it] explicit." *Id.* at 869 n.4. But their rejection ignores Justice Kennedy's position that the distinction was so obvious to the drafters that there was no need to make it explicit.

138. The first two prongs of the *Golden State* test were acknowledged by the *Dennis* Court, but were not analyzed, as they were not disputed by the respondent. *Dennis*, 111 S. Ct. at 869 n.4. The first two elements of the *Golden State* test are: "[1.] whether the provision in question creates obligations binding on the governmental unit . . . [and 2. whether t]he interest the plaintiff asserts . . . [is] 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431-32 (1987)). For a discussion of the entire *Golden State* test, see *supra* notes 121-27 and accompanying text.

139. *Dennis*, 111 S. Ct. at 871-72.

140. *Id.* at 872.

section 1983.¹⁴¹ The Court left unexplained how the plaintiff's status within the "zone of interest" of the Commerce Clause conferred an individual right of constitutional stature.

In dissent, Justice Kennedy relied upon the same historical arguments that had failed to persuade the *Golden State* majority,¹⁴² but in *Dennis* his position was stronger because the case involved a constitutional provision. In Justice Kennedy's view, constitutional provisions that allocate power between the states and the federal government differ fundamentally from those that create individual rights.¹⁴³ The evidence he offered that the drafters of section 1983 understood this distinction and simply did not intend the statute to embrace incidental benefits arising from the constitutional division of regulatory power¹⁴⁴ is convincing.¹⁴⁵ As Justice Kennedy adroitly observed, the Court had no need to develop an "ahistorical test"¹⁴⁶ to determine whether a limited number of constitutional provisions give rise to a right within the scope of section 1983 because "[t]he sponsors of § 1983 . . . gave us a straightforward answer to the question of which constitutional violations give rise to a § 1983 action, and told us that violations of power-allocating provisions such as the Commerce Clause do not."¹⁴⁷

Perhaps the most significant ramification of *Dennis* is the availability of the extraordinary attorney's fees provision of section 1988¹⁴⁸ to a class of plaintiffs that Congress never envisioned having access.¹⁴⁹ Although

141. *Id.*

142. *See id.* at 873-79 (Kennedy, J., dissenting).

143. *Id.* at 873 (Kennedy, J., dissenting). Alexander Hamilton likely would have agreed with Justice Kennedy. In *The Federalist Papers*, Hamilton responded to those who opposed the Constitution because it lacked a bill of rights. He argued that a bill of rights would be redundant given the individual rights already secured by various provisions of the Constitution. THE FEDERALIST NO. 84, at 510-11 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (citing U.S. CONST. art. I, § 9, cl. 2 (guaranteeing the writ of habeas corpus); *id.* art. I, § 9, cl. 3 (prohibiting bills of attainder and ex post facto laws); *id.* art. I, § 9, cl. 7 (forbidding titles of nobility); *id.* art. III, § 2, cl. 3 (providing the right to trial by jury)). Hamilton described these provisions as "[i]ndependent of those which relate to the structure of the government." *Id.* (emphasis added).

144. *Dennis*, 111 S. Ct. at 874-77 (Kennedy, J., dissenting).

145. *See supra* note 137.

146. *Dennis*, 111 S. Ct. at 873 (Kennedy, J., dissenting).

147. *Id.* at 876 (Kennedy, J., dissenting).

148. Section 1988 gives a court discretion to grant "reasonable" attorney's fees to the prevailing party in any action brought under 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 (1988). *See also infra* note 150 (pointing out that this type of additional remedy traditionally has not been available for dormant Commerce Clause claims).

149. Courts historically have treated dormant Commerce Clause claims as suits that arise under federal law and that are thus actionable in federal district court under 28 U.S.C. § 1331 (1988). *See Collins, supra* note 10, at 1551 (citing *Scott v. Donald*, 165 U.S. 58, 72-73, 101 (1897) (upholding plaintiff's dormant Commerce Clause claim under federal question jurisdiction)).

the majority ignored the fee-shifting implications of its decision, the dissent dealt with them in detail.¹⁵⁰ The usual candidates for fee-shifting are victims of civil rights violations, who are unlikely to seek judicial remedy because of limited economic resources. In contrast, the typical dormant Commerce Clause plaintiff is a business person or entity engaged in a substantial enterprise.¹⁵¹ Clearly, the risk that Commerce Clause violations may go unchecked because of the inability of these plaintiffs to afford counsel is minimal. Yet *Dennis* ensures that they will receive the same fee incentives as any impoverished victim of civil rights violations arising from state action. This amounts to a federally sponsored financial incentive to challenge state commercial regulations.

As Justice Kennedy observed, states' traditional reliance upon commercial transaction taxes and usage fees mean that attacks of this nature could threaten their fiscal integrity.¹⁵² States may respond by avoiding these sources of revenue, even if the possibility of successful challenge is remote. Such avoidance, however, will inhibit efforts by the states to respond creatively to the substantial reduction in federal funding that occurred during the Reagan Administration. Moreover, this phenomenon is not limited to taxation; state environmental, labor, and safety regulations also affect interstate commerce. Reduced federal regulation in these areas has, in some cases, resulted in more vigorous regulation at the state level.¹⁵³ Motivated by the possibility of recovering attorney's fees,

tion); *Bowman v. Chicago & N.W. Ry.*, 115 U.S. 611, 615-16 (1885) (dormant Commerce Clause claim arose under Constitution for purposes of appeals statute, but did not involve right secured by the Constitution); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146-47 (8th Cir.) (providing no entitlement to attorney's fees for prevailing party in a dormant Commerce Clause suit), *cert. denied*, 469 U.S. 834 (1984)). Section 1331 has no fee-shifting feature.

150. Justice Kennedy observed that:

In the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988, Congress authorized the award of attorney's fees to prevailing parties in, *inter alia*, § 1983 litigation. The award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced because of the plaintiffs' lack of resources and the small size of any expected monetary recovery. Congress was reassured that § 1988 would be "limited to cases arising under our civil rights laws, a category of cases in which attorneys [sic] fees have been traditionally regarded as appropriate."

Dennis, 111 S. Ct. at 879-80 (Kennedy, J., dissenting) (quoting S. REP. No. 1001, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.A.N. 5912).

151. For example, the plaintiff in *Dennis* was a motor carrier operating in several states. *Id.* at 867.

152. *Id.* at 880 (Kennedy, J., dissenting).

153. Compare Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675 (1988 & Supp. 1989) (establishing a strict, joint and several liability scheme for landowners whose property is contaminated by hazardous substances, but excluding in § 9601(14) petroleum discharges from definition of "hazardous sub-

affected businesses may seek to dampen this vigor with Commerce Clause challenges to objectionable state regulations.

Dennis may enkindle section 1983 litigation on other structural provisions of the Constitution. The Commerce Clause appears in Article I of the Constitution, which defines the powers of Congress and limits the powers of the states.¹⁵⁴ After *Dennis*, any violation of the Article I limitations on state powers conceivably could give rise to a section 1983 action.¹⁵⁵ Thus, an individual could bring a section 1983 action when a state interferes with the federal power over foreign relations,¹⁵⁶ applies an unauthorized import duty,¹⁵⁷ disrupts federal immigration powers,¹⁵⁸ or attempts to tax a federal obligation.¹⁵⁹ As long as the prospective plaintiff is an incidental beneficiary of the constitutional provision in question, there is little to stop him from filing a section 1983 claim.

The Court's expansion of section 1983's scope may prompt a congressional response. Three options present themselves. One is to limit the statute's scope by amending it. Either a specific prohibition against its use in actions based upon the Commerce Clause or a broader limitation upon its use to enforce claims based upon the structural constitutional provisions would be effective. Another option is to amend the fee-shifting provision in section 1988. Although the statute makes fee awards discretionary, most courts have found the plaintiff's ability to pay an irrelevant factor in making such awards.¹⁶⁰ Here, Congress could explicitly authorize consideration of a plaintiff's ability to pay. The third option is to make section 1988 available only in section 1983 cases involving civil rights claims. Eliminating the availability of attorney's fees would substantially reduce the incentive for pursuing Commerce Clause claims under section 1983. Plaintiffs would still be able to proceed under section 1331, which gives federal district courts jurisdiction to hear cases

stances") with N.C. GEN. STAT. §§ 143-215.75 to 215.104 (1990 & Supp. 1991) (establishing a similar scheme of liability for discharges of hazardous substances, and specifically including in § 143-215.94A(7) petroleum discharges in its definitions).

154. See U.S. CONST. art. I.

155. See *Dennis*, 111 S. Ct. at 879 (Kennedy, J., dissenting).

156. Article I, § 10 of the Constitution sets out a prohibition, inter alia, on the entry by states into agreements with foreign powers. U.S. CONST. art. I, § 10, cl. 3.

157. See *id.* The limitations on states' powers extend to "lay[ing] any Duty of Tonnage" without congressional consent. *Id.*

158. See *id.* art. I, § 8, cl. 4 (granting Congress the power to "establish a Uniform Rule of Naturalization").

159. See *id.* art. I, § 8, cl. 2 (granting Congress the power to "borrow money on the credit of the United States").

160. See Collins, *supra* note 10, at 1563 (citing *DiFilippo v. Morizio*, 759 F.2d 231, 233 n.1 (2d Cir. 1985); *Kirchberg v. Feenstra*, 708 F.2d 991, 999 n.7 (5th Cir. 1983); and *Metcalf v. Borba*, 681 F.2d 1183, 1189 (9th Cir. 1982)).

arising under federal law.¹⁶¹

In *Dennis* the Court put a new gloss on a century-old statute. Granted, there was a need for a framework to identify the *statutes* that secured a right within the meaning of section 1983. *Golden State* provided it. Use of this framework was inappropriate in *Dennis*, however, because the Commerce Clause was not intended to secure “rights.” It was meant to allocate power. The Court’s holding to the contrary is perplexing, and its explanation unconvincing. Perhaps it felt constrained by the line of twentieth-century cases that have steadily broadened the scope of the statute. But where is the limit? Any allocation of power will cause the incidental benefits arising from it to ebb and flow as Congress exercises its power. That is precisely why the *Golden State* framework is an unreliable mechanism to identify the interests section 1983 was intended to protect. Clearly, Congress can no longer rely upon the Court to clarify the boundaries of section 1983.

BRIAN THOMAS ATKINSON

161. 28 U.S.C. § 1331 (1988).