

In the

ORIGINAL

Supreme Court of the United States

CONSOLIDATED FREIGHTWAYS CORPORATION)
OF DELAWARE,)

Petitioner,)

v.)

RAYMOND KASSEL ET AL)

NO. 79-1618

Washington, D. C.

November 9, 1981

Pages 1 thru 48

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -:
3 CONSOLIDATED FREIGHTWAYS CORPORATION :
4 OF DELAWARE, :
5 Petitioner, :
6 v. : No. 79-1618
7 RAYMOND KASSEL ET AL. :

8 - - - - -:
9 Washington, D. C.
10 November 9, 1981

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:05 o'clock p.m.

14 APPEARANCES:

15 JOHN H. LEDERER, ESQ., Madison, Wisconsin;
16 on behalf of the Petitioner.
17 MARK E. SCHANTZ, ESQ., Solicitor General of
18 Iowa, Des Moines, Iowa; on behalf of the
19 Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Consolidated Freightways Corporation against Kassel.

Mr. Lederer, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN H. LEDERER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEDERER: Mr. Chief Justice, and may it please the Court, there is only one issue which is properly before this Court, and that is the issue of whether or not the Eighth Circuit Court of Appeals, in denying attorney's fees under 1988 should have given reasons for its denial.

The facts and procedural posture of this case are this. In 1978, Consolidated Freightways brought suit against a number of officials of the state of Iowa, alleging that Iowa's statutes and the enforcement of it, which banned 65-foot twin trailers in Iowa, was unconstitutional. The complaint alleged that the actions of the Iowa officials in enforcing that statute were a violation of 42 USC 1983, but no damages were requested. The complaint did, however, request attorneys' fees under 42 USC 1988.

The district court bifurcated the trial, and took the case in chief, putting aside the question of attorneys' fees. The district court found for Consolidated Freightways on the case in chief. The result was appealed to the Eighth

1 Circuit. The Eighth Circuit affirmed and returned. It was
2 brought before this Court, and this Court affirmed also.

3 QUESTION: But you are asking for your attorneys's
4 fees in the Eighth Circuit.

5 MR. LEDERER: That is correct. At the conclusion
6 of the appeal in the Eighth Circuit, pursuant to the Federal
7 Rules of Appellate Procedure, the clerk of the Eighth
8 Circuit sent a letter directing Consolidated Freightways to
9 file a bill of cost itemizing therein all costs which they
10 desired to have awarded to them, and a warning of waiver if
11 they did not provide all costs.

12 42 USC 1988 provides for the award of attorneys'
13 fees as cost. To avoid waiver, we filed a bill of cost with
14 the Eighth Circuit that laid out as a separate item
15 attorneys' fees under 1988, and we filed with the bill of
16 cost a letter to the Eighth Circuit informing them that the
17 case below had been bifurcated, and suggesting that remand
18 to the district court would certainly serve judicial economy.

19 There was no briefing of the issue of attorneys'
20 fees. The Iowa officials filed in response as is provided
21 for in the rule, a simple statement that they were in
22 opposition, citing no law or no way constituting a brief.
23 The Eighth Circuit chose not to remand to the district
24 court, nor to request briefs. Instead, it denied attorneys'
25 fees, and the substance of their decision is simply one line

1 stating that the motion for attorneys' fees is denied.

2 QUESTION: And you say they do not have the
3 discretion to do that?

4 MR. LEDERER: We say that they do not have the
5 discretion to deny attorneys' fees without stating the
6 reason for the denial. That is correct.

7 Immediately after the denial, Consolidated
8 Freightways filed a motion to vacate, requesting either an
9 opportunity to brief the issue, or in the alternative, that
10 the Eighth Circuit vacate its order denying attorneys' fees
11 and remand the case to the district court. Very short
12 summary briefs supporting that motion were filed, but no
13 extensive briefs were filed on the issue of attorneys'
14 fees. The Eighth Circuit chose not to vacate its order,
15 denied the motion to vacate, and --

16 QUESTION: On how many different grounds do you
17 suppose they might have rested their denial?

18 MR. LEDERER: Your Honor, I guess I don't really
19 know a number. There are three that perhaps seem most
20 likely to be. In our brief, we went through and itemized
21 ten.

22 QUESTION: That is a number. That is three.

23 MR. LEDERER: Well, you know, I don't pretend to
24 understand the process --

25 QUESTION: Well, which ones do you think they

1 might have rested the denial on?

2 MR. LEDERER: I think they might have rested it on
3 the Eleventh Amendment, although I think there is law to the
4 opposite in that case.

5 QUESTION: That is one.

6 MR. LEDERER: I think they may have rested it on
7 the argument that 1983 does not particularly cover this
8 situation.

9 QUESTION: That is two.

10 MR. LEDERER: I think they may have in fact
11 intended in an oblique way to simply send the matter, have
12 the district court decide it initially, and rather than
13 remand the --

14 QUESTION: Well, could they have rested it on any
15 ground that -- well, 1988 applies that as a matter of
16 discretion we are not going to allow it.

17 MR. LEDERER: Yes, they could have. They could
18 have rested it on the ground that 1988 applies, but that
19 there were special circumstances in this case that would have
20 prevented an award of attorneys' fees.

21 QUESTION: Well, what was the argument made by the
22 other side in support of the judgment of law?

23 MR. LEDERER: Iowa --

24 QUESTION: I mean, before that court.

25 MR. LEDERER: No argument was made prior to the

1 Eighth Circuit's decision.

2 QUESTION: To the Eighth Circuit at all?

3 MR. LEDERER: No argument was made to the Eighth
4 Circuit at all.

5 QUESTION: Not even briefed?

6 MR. LEDERER: No briefs. The appendix contains
7 the sum and substance. It was a bill of cost, simply
8 itemizing the cost, and a simple statement from Iowa that
9 they were opposed to the allowance of cost.

10 QUESTION: Not saying on what ground?

11 MR. LEDERER: Not saying on what grounds. There
12 were briefs filed in the Eighth Circuit on the motion to
13 vacate --

14 QUESTION: Yes.

15 MR. LEDERER: -- after the Eighth Circuit had
16 already rendered its decision, but there were no briefs
17 filed before the initial decision.

18 QUESTION: And what was the position taken by Iowa
19 on the motion to vacate?

20 MR. LEDERER: Iowa opposed the motion to vacate.

21 QUESTION: On what grounds?

22 MR. LEDERER: On the grounds that 1983 did not
23 apply, and if I recall correctly, on the grounds that -- I
24 am not sure whether they raised the Eleventh Amendment
25 grounds in their brief or not.

1 QUESTION: Well, did you meet those grounds of
2 objection at all?

3 MR. LEDERER: No, we --

4 QUESTION: In briefing before the Eighth Circuit
5 on the motion?

6 MR. LEDERER: No, we filed a simple brief
7 supporting the motion to vacate. They filed a brief
8 opposing the motion to vacate, and the Eighth Circuit
9 decided on those two briefs.

10 QUESTION: Well, what I am trying to get at, what
11 issues did you -- on what grounds did you oppose the motion
12 to vacate?

13 MR. LEDERER: Did I oppose the motion --

14 QUESTION: Or support it. I am sorry.

15 MR. LEDERER: We supported it on the grounds that
16 42 USC 1988 was applicable, and that no special
17 circumstances existed here.

18 QUESTION: And did you address the 1983 question?

19 MR. LEDERER: We did very summarily, yes. I
20 should make it clear the brief was intended as a brief to
21 support the motion to vacate.

22 QUESTION: Yes.

23 MR. LEDERER: The motion to vacate requested that
24 the Eighth Circuit, if it desired to decide this issue
25 itself, set up a briefing schedule, permit us to file briefs

1 and affidavits on it. It was not a brief on the issue of
2 whether or not attorneys' fees should be awarded. It did
3 cover that issue to the extent of trying to point out to the
4 Eighth Circuit this is a real issue and not something --

5 QUESTION: Well, did the motion request the Eighth
6 Circuit to state the grounds of its denial?

7 MR. LEDERER: Yes, it did.

8 QUESTION: But you must have taken the position
9 that 1983 covered this action.

10 MR. LEDERER: Yes, we did.

11 QUESTION: And that under 1988, the Court of
12 Appeals or the District Court did not possess sufficient
13 discretion to deny your motion for your bill of costs even
14 though it was covered, your substantive action was covered
15 by 1983.

16 MR. LEDERER: That's correct, Your Honor. We
17 certainly -- you know, we certainly took the position
18 consistently throughout that 1983 applied, and that
19 attorneys' fees were due us under 42 USC 1988. The problem
20 or difficulty --

21 QUESTION: Was your action originally brought in
22 the district court as a 1983 action?

23 MR. LEDERER: Yes, Your Honor. The complaint, as
24 one of the causes of action, alleged 1983 and specifically
25 asked for attorneys' fees.

1 QUESTION: Do you think under the statute the
2 problem would have been satisfied if the Court simply
3 recited in the exercise of our discretion fees are denied,
4 or do they have to say A, B, C, D, what guided their
5 decision?

6 MR. LEDERER: No. I should make clear I don't
7 think the courts necessarily have to write erudite opinions
8 on each matter that comes before them. All that was
9 necessary here could have been disposed of in one or two
10 sentences.

11 QUESTION: What about the one sentence I just gave
12 you, in the exercise of our discretion, fees are denied?

13 MR. LEDERER: That would have been a closer
14 question, but yes, I think that would have been adequate.
15 It would have at least provided the parties the idea that
16 what the problem was here was a factual problem, that it was
17 the court exercising its discretion and not making a legal
18 decision that 1983 doesn't apply.

19 The reason why I think a reason -- the reason why
20 I think some statement of reason is required by the Eighth
21 Circuit Court of Appeals is perhaps well illustrated by this
22 case. The common practice in most circuit court of appeals
23 for attorneys' fees on the appeal is to have that decided by
24 the district court. That is the practice that this Court
25 originally encouraged in antitrust cases, Perkins v.

1 Standard Oil, and has been followed fairly consistently by
2 all of the circuits, though I think all of the circuits
3 recognize that they have the power to decide attorneys' fees
4 themselves.

5 The Eighth Circuit has not been consistent with
6 the other circuits. It frequently decides attorneys' fees
7 itself, setting both the amount of the fees and making the
8 initial decision as to whether or not fees should be
9 granted. That makes this Court the initial court of review.
10 There is no other court to which an appeal can be taken.

11 QUESTION: Well, does that not then demonstrate
12 that they acknowledge that it is a discretionary matter?
13 The practice you have just described. Doesn't that suggest
14 that they acknowledge that they had the legal authority
15 under 1988 -

16 MR. LEDERER: Oh, yes. Well, I think --

17 QUESTION: -- but that as a matter of discretion,
18 they were not going to give the fees?

19 MR. LEDERER: That's right. That is difficult to
20 square with the statute. The statute provides for an award
21 of fees, and under this Court's interpretation and other
22 courts' interpretations --

23 QUESTION: But you have just told me that if they
24 had recited in the exercise of discretion --

25 MR. LEDERER: Right.

1 QUESTION: -- the court hereby denies the fees.

2 MR. LEDERER: If the court exercised discretion,
3 then under the interpretation of the statute they would have
4 found special circumstances, and I think a statement that
5 they exercised discretion logically means that they found
6 special circumstances, which are the instances in which the
7 statute permits attorneys' fees not to be awarded, and that
8 would have been enough of a guidance to both this Court and
9 to us as attorneys so that we could have at least determined
10 what the issue was on appeal.

11 QUESTION: Aren't you saying in effect that you
12 are willing to lose this case but you just want the Eighth
13 Circuit to write a couple more sentences?

14 MR. LEDERER: Well, the difficulty is -- I don't
15 know that I would say that I am willing to lose this case,
16 but what the issue here is, as I see it, is, we need to know
17 why it was denied, so that we can determine, is this an
18 issue that should be appealed? Is this an issue where the
19 Eighth Circuit was wrong? Perhaps the Eighth Circuit is
20 right, and on reflection and reviewing the opinion we may
21 conclude that yes, we lost, and we lost fairly.

22 The difficulty with this Court standing as the
23 only court of appeal, the initial court of review, this
24 Court has to pick and choose what cases it is going to hear,
25 and for it to pick and choose what cases it is going to

1 hear, it has to look at petitioners for certiorari. We
2 can't determine --

3 QUESTION: Let me try it this way, Mr. Lederer.
4 What specifically can you point me to which says that a
5 court has to give reasons?

6 MR. LEDERER: Almost uniformly, every circuit
7 court in reviewing district court decisions on attorneys'
8 fees has laid down as an absolute rule that the district
9 court --

10 QUESTION: What rule is it that requires this
11 court here involved --

12 MR. LEDERER: This court has --

13 QUESTION: -- the Eighth Circuit, to do it?

14 MR. LEDERER: This court has previously, in a
15 closely analogous case, North Cross versus Memphis Board of
16 Education, reversed the Sixth Circuit and remanded to it on
17 the grounds that the Sixth Circuit had failed to give
18 reasons for denying attorneys' fees --

19 QUESTION: Was that a 1988 case?

20 MR. LEDERER: It was not a 1988 case. It was the
21 Emergency School Aid Act, but they are very closely
22 analogous statutes. The Sixth Circuit had failed to give
23 reasons.

24 QUESTION: That was a 1983 case, wasn't it? If it
25 involved a school, it must have been.

1 MR. LEDERER: It involved a school. I am not sure
2 if 1983 or if there may have been other statutory bases, but
3 the statute awarding attorneys' fees in that case or
4 providing for the award of attorneys' fees is --

5 QUESTION: But do you agree that 1988 provides for
6 attorneys' fees only in 1983 cases?

7 MR. LEDERER: Yes.

8 QUESTION: You agree on that?

9 MR. LEDERER: With -- there are some minor other
10 statutes, yes.

11 QUESTION: You agree with that. And your case
12 involves only 1983.

13 MR. LEDERER: That's correct. Our case involves
14 only 1983.

15 QUESTION: I thought you said it involved several
16 questions.

17 MR. LEDERER: Well, no. There are underlying -- I
18 think that the only issue properly before this Court is
19 whether the Eighth Circuit should have given a statement of
20 reasons.

21 QUESTION: Well, why?

22 MR. LEDERER: There are -- because without a
23 statement of reasons, it is impossible for this Court to
24 adequately review what the Eighth Circuit did.

25 QUESTION: Do you know how many cases come from

1 New York, where no opinions are written at all, and this
2 Court decides them?

3 MR. LEDERER: Yes, but at least --

4 QUESTION: Do you know? Quite a few of them.

5 MR. LEDERER: But at least --

6 QUESTION: Do you think we have to have an opinion
7 in every case in order to decide it?

8 MR. LEDERER: I think that it is important to have
9 an opinion in a case --

10 QUESTION: I didn't say important. I said
11 necessary. That we can't rule without it.

12 MR. LEDERER: Certainly you can rule without it.
13 This Court certainly has the power to do so.

14 QUESTION: So why do we have to have it in this
15 case? What makes this one so special?

16 MR. LEDERER: Well, I think what makes it so
17 special in part is that you are dealing with a federal
18 court, and in part, one of the powers that this Court has is
19 supervisory powers over the federal courts. This Court
20 properly should determine how it wants cases presented to it.

21 QUESTION: What about the Fifth Circuit's rule
22 where they simply affirm by order on the merits, not on
23 costs, without any opinion or any explanation of reasons?

24 MR. LEDERER: You can perhaps justify no opinion
25 where you have a district court opinion below, and the

1 typical abbreviated opinion that I have seen, for the
2 reasons stated below, we affirm. You can -- and the Eighth
3 Circuit even has a rule providing for the disposal of
4 frivolous cases that merely says, we reverse, or pardon me,
5 we affirm, and cites the rule. That at least tells the
6 attorney on what basis his case was decided.

7 Here, we have no way of determining what the basis
8 was for the decision.

9 QUESTION: Since you have just told us, counsel,
10 that the Eighth Circuit practice is -- recognizes that it is
11 a discretionary power, and sometimes they allow and
12 sometimes they do not allow fees, and you have also said, I
13 think, in precisely these words, that it would have
14 satisfied the statute if they had recited, in the exercise
15 of our discretion, the application for fees is denied.

16 Now, doesn't the word "deny" embrace that just as
17 a denial of cert up here --

18 MR. LEDERER: Well, Your Honor, I perhaps --

19 QUESTION: -- states -- when we deny cert, we
20 don't explain it. We deny, and the -- I think it is
21 accepted that that is an exercise of our discretion.

22 MR. LEDERER: I perhaps put too much emphasis on
23 the words "in the exercise of our discretion", because I
24 immediately put that in the framework of the statute. The
25 statute as interpreted requires an award of attorneys' fees

1 unless some very narrow factual circumstances exist. So, if
2 the Court says, in the exercise of our discretion, we deny
3 attorneys' fees, that means they have gotten past the legal
4 question of whether or not the statute applies, and as soon
5 as they say, we are exercising discretion, you immediately
6 know this must be the reason why they are denying.

7 So, in this particular circumstance, exercise of
8 discretion, because the discretion is so narrow as to the
9 award, granted, very large as to the amount of the award,
10 but very narrow as to whether or not you do award, it tells
11 you what the court is doing.

12 QUESTION: I thought I heard you answer my Brother
13 Marshal that if you have no 1983 cause of action, then you
14 have no claim under 1988 for attorneys's fees. Is that
15 right?

16 MR. LEDERER: That's correct. In this case, that
17 is correct.

18 QUESTION: Well, may we not then see what you have
19 pleaded in the way of cause of action, and if we hold there
20 was no 1983 cause of action pleaded, can't we affirm without
21 more?

22 MR. LEDERER: This Court certainly can. It has
23 the power to do so.

24 QUESTION: Is there any reason we shouldn't?

25 MR. LEDERER: Yes. I think the reason that you

1 shouldn't comes precisely to the point that I was making
2 before. What you should do is establish by what procedure
3 do you want these cases to come before you. If you want
4 circuit courts to decide attorneys' fees initially, and do
5 so without an opinion, you are going to be continually
6 presented as the only available court of review with
7 petitions for certiorari that are unable to tell you what
8 the issues are. They will be unable to tell you why the
9 lower court decided. They will be unable to tell you what
10 was wrong with the lower court's decision. You will in
11 effect be presented again and again with de novo cases,
12 starting out with, we need to prove these things in order to
13 be entitled to attorneys' fees, and we think we have proven
14 them all, and go through, and the parties can argue about
15 each one of the things that need to be proven, and every
16 issue under the sun.

17 The point is, if you want to establish a
18 procedure, it is desirable to have the circuit court of
19 appeals state its reasons so that this Court can properly
20 exercise its appellate review authority, be able to look at
21 the petition for certiorari, and determine whether this is a
22 case that it should hear or a case that lacks importance to
23 be heard.

24 QUESTION: Do you think 1983 embraces the inverse
25 side of the commerce clause?

1 MR. LEDERER: Yes, Your Honor, I do. I perhaps
2 should frame it a little bit more clearly. I think that
3 there is a right to engage in interstate commerce, and I
4 think that that is a fundamental right. I think it was
5 recognized as a fundamental right at the time of the
6 Constitution, and that the Constitution secures that right
7 by putting a provision in it providing, in effect, to at
8 least some degree, exclusive jurisdiction in Congress to
9 regulate interstate commerce, because the drafters
10 recognized that state regulation was inimical to the right
11 to engage in interstate commerce.

12 QUESTION: But Cooley against Board of Wardens,
13 before the Civil War, established that Congress's right to
14 regulate interstate commerce was not exclusive.

15 MR. LEDERER: This Court has always held that
16 there are some areas where Congress can regulate, some sets
17 of circumstances where Congress can regulate but the states
18 cannot. Now, what the definition is of what the states
19 cannot regulate has changed through the 200 years, but there
20 have always been areas where the states can't regulate,
21 because they impose an unconstitutional burden or perhaps
22 because it is direct-indirect regulation, depending upon
23 which commerce clause test you use, but there has always
24 been held to be an area that is exempt from state
25 regulations, and that is precisely what the drafters

1 intended.

2 The reason the Constitutional Convention was
3 called was because of state regulation of interstate
4 commerce, and the destruction of interstate commerce it was
5 causing. That was the original reason, the protection --

6 QUESTION: And the answer the Framers gave was to
7 give Congress the power to regulate interstate commerce.

8 MR. LEDERER: That's correct.

9 QUESTION: It did not certainly in haec verba say
10 that the states were divested of their authority to regulate
11 interstate commerce, only that if Congress superseded state
12 regulation by Congressional action, the state regulation --

13 MR. LEDERER: No. Perhaps as an example this
14 Court itself in Consolidated Freightways v. Kassel -- or,
15 pardon me, Kassel v. Consolidated Freightways, the case in
16 chief, held that even though Congress had not acted on the
17 regulation of truck length, there was an area where the
18 state could not act.

19 QUESTION: Well, that is why I said the Framers in
20 haec verba did not say that --

21 MR. LEDERER: That's right.

22 QUESTION: -- that this Court has developed the --

23 MR. LEDERER: That's right. I think the Framers
24 certainly intended it, though. There was no great outcry
25 that this Court was broadening the Constitution or

1 unreasonably interpreting it, because, as I say, part of the
2 reason for the original Constitutional Convention was the
3 recognition that the state regulation was causing problems,
4 and part of the reason for granting the power to Congress
5 was to remove it from the states.

6 QUESTION: You certainly find several instances of
7 this Court referring to the right to engage in interstate
8 commerce free from the wrong kind of state regulation.

9 MR. LEDERER: That's correct. That's correct.
10 The original Gibbons v. Ogden, Justice Marshal referred to a
11 right to engage in interstate commerce as a natural right of
12 man. This Court in its commerce clause cases has frequently
13 spoken of a right to be free of improper state regulation.
14 Now, what constitutes improper state regulation, I think, in
15 any given case can be debated, but that there is an area
16 where the Constitution by its own words removes from the
17 states the power to regulate, whether it be for improper
18 regulation, or only certain subject matter, or whatever,
19 there is an area that is removed from state regulation.

20 That is the protection, the securing of the right
21 to engage in interstate commerce that we think was violated
22 by Iowa. We had a right, the right to engage in interstate
23 commerce, repeatedly recognized by this Court, recognized as
24 a natural and inalienable right. It was secured by the
25 Constitution because one of the purposes of the commerce

1 clause is to remove from the state the power to regulate
2 interstate commerce in certain instances, and this is one of
3 those instances. The right was violated. Consequently,
4 1983 was violated.

5 QUESTION: Mr. Lederer, would you agree that if
6 the Court did not agree with that analysis and felt that
7 this really was not a 1983 case and therefore 1988 was not
8 intended to authorize the award of fees in this case, then
9 there would be no duty in the court of appeals to give you a
10 statement of reasons? If the law is, you are not entitled
11 to fees, why do they have to give you a statement of reasons?

12 MR. LEDERER: No, if what you are saying is the
13 court of appeals may have decided --

14 QUESTION: But that may be the law. Maybe we
15 think Congress did not intend to authorize fees here. Don't
16 you have to persuade us that Congress authorized fees before
17 there would be any duty at all on the court of appeals to
18 give a statement of reasons?

19 MR. LEDERER: I think it would at least have to
20 state the reason that you haven't persuaded us.

21 QUESTION: Well, supposing we had a case last year
22 in which we said 1988 doesn't apply to a case like this.
23 Then your fee request was presented to the court of
24 appeals. Couldn't they simply deny it without an opinion?

25 MR. LEDERER: I think they could deny it because

1 frivolous, and that's a simple --

2 QUESTION: Would they have to say it is frivolous
3 when it would be obvious that it was?

4 MR. LEDERER: Yes, Your Honor. The problem --

5 QUESTION: Well, you just agreed before that if
6 they said denied in exercise of discretion, that would be
7 enough.

8 MR. LEDERER: Denied in exercise of discretion I
9 think would be enough, because it says in this context --

10 QUESTION: That is, if you get over the first hump
11 that Justice Brennan and Justice Stevens have been talking
12 to you about, the first hump, the 1983 hump.

13 MR. LEDERER: Yes. If it is denied in discretion,
14 then obviously we got over the 1983 hump.

15 QUESTION: No, I am not suggesting -- I am
16 suggesting the statute said, in so many words, no fee shall
17 be allowed in commerce clause litigation. Would they still
18 have to give you a statement of reasons?

19 MR. LEDERER: I think they could do what is their
20 practice, and simply say, denied, Rule 19.

21 QUESTION: They couldn't do what they did here?

22 MR. LEDERER: But, yes, they need --

23 QUESTION: Supposing you had asked them not for
24 fees, but supposing you had asked them for a \$400 million
25 judgment on the theory that you don't like your opponent,

1 and they just said, denied. Would they have to give you a
2 statement of reasons?

3 MR. LEDERER: Yes. Let me -- you say that --

4 QUESTION: Would they, or would they not?

5 MR. LEDERER: -- they have to give me a statement
6 of reasons. I am not so concerned, and I am not resting my
7 case on my need for a statement of reasons. I think the
8 reason that they give --

9 QUESTION: You are arguing our cause for us?

10 MR. LEDERER: Pardon me?

11 QUESTION: You say we need it?

12 MR. LEDERER: You need it. That's correct.
13 That's precisely correct, and you need it particularly
14 where, as here, the Eighth Circuit is acting as that initial
15 court, acting as --

16 QUESTION: Why do we need it if we think the law
17 in effect says, you don't get fees in a case like this? Why
18 would we need it?

19 MR. LEDERER: That is perhaps begging the question.

20 QUESTION: Well, it seems to me you have got the
21 burden of convincing us that there is an authorization of
22 fees before you can persuade me, at least, that there is any
23 reason to give us a statement for denial. If the law
24 doesn't authorize fees, I don't care what reason, whether
25 the court of appeals gives reasons or not.

1 MR. LEDERER: That's right, but the point perhaps
2 is, if the law doesn't authorize them, no, you don't need to
3 care what reason the Eighth Circuit did, because that is
4 sort of an initial foreclosing question, just as if you had
5 concluded that there were no jurisdiction --

6 QUESTION: And I suggest you are the party who is
7 asking for the fee, so it seems to me you have the burden of
8 demonstrating that the statute authorizes fees for you.

9 MR. LEDERER: Well, that may be correct, but you
10 can think of a number of additional factors and additional
11 issues that could foreclose the question, and we very
12 quickly would be back to the original situation of, here are
13 ten issues which may have been determinative, we need to
14 argue all ten to persuade you that we should be awarded fees.

15 QUESTION: Mr. Lederer --

16 MR. LEDERER: You know, that may be the case, but
17 it is not a very comfortable way of handling cases, and I
18 suggest one that is going to make this Court's task of
19 review a very difficult task.

20 QUESTION: Do I understand you correctly that if
21 we say the Court has to give you reasons, and we send it
22 back saying that, and the court says, our reason is, we have
23 exercised our discretion, that is the end. Is that your
24 position?

25 MR. LEDERER: Under the peculiar terms of this

1 statute --

2 QUESTION: Is that your position?

3 MR. LEDERER: Yes, sir.

4 QUESTION: Well, what are we doing?

5 MR. LEDERER: Under the peculiar terms --

6 QUESTION: What are we sitting here for? Why
7 don't we just do it that way?

8 MR. LEDERER: Under the peculiar terms of this
9 statute, if you say, under the exercise of our discretion,
10 you have immediately told everyone concerned what the reason
11 is. It is because the statute as interpreted means you have
12 got to award attorneys' fees unless A exists.

13 QUESTION: For what reason if a court doesn't do
14 something is it -- it is within their discretion not to do
15 it. Isn't that automatic?

16 MR. LEDERER: No, Your Honor.

17 QUESTION: Do you want the court to say, we don't
18 grant your tax because we don't like it?

19 MR. LEDERER: There are certain statutes that give
20 very limited discretionary powers to the court. There are
21 certain things the courts must do. 1988 is very close to
22 being one of those statutes, because --

23 QUESTION: Well, is it?

24 MR. LEDERER: Pardon me?

25 QUESTION: You say close to. Is it?

1 MR. LEDERER: It is not under one circumstance,
2 and that is

3 QUESTION: Well, if it is not, then what are you
4 doing here?

5 MR. LEDERER: -- the court need not award
6 attorneys' fees if it finds special circumstances. Special
7 circumstances are very narrowly defined. If the court says
8 we are not awarding in our discretion, they are saying, we
9 found the special circumstance that the statute speaks of.

10 I would like to reserve the rest of my time.
11 Thank you.

12 CHIEF JUSTICE BURGER: Very well.

13 Mr. Solicitor General.

14 ORAL ARGUMENT OF MARK E. SCHANTZ, ESQ.,

15 ON BEHALF OF THE RESPONDENT

16 MR. SCHANTZ: Mr. Chief Justice, and may it please
17 the Court, the Eighth Circuit Court of Appeals held below
18 that Consolidated Freightways was not entitled to attorneys'
19 fees for the appeal part of the litigation in the case in
20 chief with which this Court is previously familiar.

21 QUESTION: Was that, Mr. Schantz, for the appeal
22 part in that court or also here?

23 MR. SCHANTZ: Only before the Eighth Circuit, and
24 it was -- the bill of costs in question was filed before the
25 case came up here.

1 QUESTION: I see.

2 MR. SCHANTZ: Iowa has consistently taken the
3 position that dormant commerce clause case litigation is not
4 within 1983. We took that position in our answer. We took
5 that position with counsel, as the letter to the clerk to
6 which he referred makes clear. We have indicated that we
7 were going to oppose any award of fees. We resisted the
8 bill of costs, indicating that we objected to any award of
9 fees. When they moved to vacate, we made very explicit that
10 it was our contention that 1983 was not applicable, and in
11 our brief in resistance to the motion to vacate, we
12 developed, admittedly in skeletal form, the contention which
13 is developed in our brief, namely, that commerce clause
14 cases involve the allocation of governmental power, and do
15 not secure individual rights.

16 So, we believe that issue was clearly presented to
17 the court below, and we believe, we think it is clearly
18 implicit in the course of the proceeding that that was the
19 basis for the Eighth Circuit's action. But even if it is
20 not, we think it is clear that this Court may and would need
21 to address the -- may affirm on the ground that we presented
22 below, namely, that it was not a 1983 case.

23 QUESTION: This is on the ground that you may
24 defend your judgment in your favor on any ground that you
25 raise for it.

1 MR. SCHANTZ: Exactly. The rule of Langnes versus
2 Green and Dandridge versus Williams, and so on.

3 Congress -- the general rule, of course, is that
4 -- American rule is that fee shifting is not permitted.
5 Congress has authorized fee shifting in certain civil rights
6 statutes under 42 United States Code Section 1988. The
7 only such statute invoked here is 42 USC Section 1983, and
8 thus the question becomes whether Section 1983 provides a
9 remedy for dormant commerce clause cases.

10 Section 1983 provides a remedy in the language of
11 the statute when there has been a deprivation of a right,
12 privilege, or immunity secured by the Constitution, and the
13 particular question before this Court then is whether that
14 language should be construed to reach commerce clause cases.

15 Iowa's contention that 1983 does not reach dormant
16 commerce clause litigation can loosely be divided into two
17 propositions. The first is that the reach of Section 1983 is
18 not coextensive with the Constitution. Not every lawsuit in
19 which a constitutional claim is asserted against a state or
20 a state official involves the deprivation of any rights,
21 privileges, or immunities secured by the Constitution.

22 The second proposition is that -- the minor
23 premise, if you will, is that the commerce clause should be
24 understood as a provision allocating authority, structuring
25 governmental power, and not as a provision securing rights

1 against government.

2 I think the first proposition, the proposition
3 that the reach of 1983 is not co-extensive with the
4 Constitution, is what must be regarded as well established.
5 In Chapman versus Houston Welfare Rights Organization, this
6 Court held, and, I believe, without dissent on this point,
7 that litigation against state officials which invokes the
8 supremacy clause without more cannot be brought pursuant to
9 28 USC Section 1343(3).

10 Now, the language of 1343(3) is completely
11 identical to the language of 1983 as it relates to the
12 Constitution.

13 QUESTION: It certainly didn't say there that
14 because you can't bring it under 1943, you can't bring it
15 under 1331 either.

16 MR. SCHANTZ: If I understand your question, we
17 would certainly concede that this case can be brought under
18 1331.

19 QUESTION: Well, and 1983 too.

20 MR. SCHANTZ: Well, 1983 -

21 QUESTION: 1343 just, among other things, it
22 removed the amount in controversy.

23 MR. SCHANTZ: That's correct.

24 QUESTION: That has all been done away with now
25 anyway.

1 MR. SCHANTZ: That's correct. In operational
2 consequence, Justice White, I think the only thing at stake
3 here is whether or not attorneys' fees are to be awarded in
4 commerce clause cases.

5 QUESTION: And if we were to conclude that 1983
6 doesn't reach it, that would be the end of the case,
7 wouldn't it?

8 MR. SCHANTZ: Exactly right.

9 QUESTION: Or even if we concluded that 1983 did
10 reach it, it would be the end of the case if we thought that
11 it was presumptively an exercise of discretion, an
12 unexplained denial.

13 MR. SCHANTZ: This Court certainly could affirm on
14 that ground.

15 QUESTION: Well, you don't want us to reverse if
16 we disagree with you on 1983.

17 MR. SCHANTZ: Certainly not. Certainly not.

18 QUESTION: General Schantz, let me go back to your
19 reference to Chapman. That held, as I recall, that the
20 jurisdictional statute, 1343, is not as broad in its
21 coverage as 1983.

22 MR. SCHANTZ: That's correct.

23 QUESTION: How is that support for the proposition
24 that 1983 doesn't reach this claim?

25 MR. SCHANTZ: 1343 speaks in terms of rights

1 secured by the Constitution.

2 QUESTION: And that does not include supremacy
3 clause rights.

4 MR. SCHANTZ: Right, and from then on, 1343, when
5 it refers to laws, refers to civil rights laws. That is
6 what this Court held in Houston Welfare Right. But with
7 respect to the Constitution, rights secured by the
8 Constitution, the language is identical, and in Lynch versus
9 Household Finance, this Court said clearly that with respect
10 to constitutional rights, the reach of 1343, the reach of
11 1983 are the same.

12 QUESTION: Right, and so if this is -- but how
13 does that answer the question whether there is a right to
14 engage in interstate commerce, or that is a way of phrasing
15 it, or whether 1983 was the cause of action statute in this
16 case?

17 MR. SCHANTZ: One of the arguments advanced in
18 Chapman was that this was a case involving rights secured by
19 the Constitution --

20 QUESTION: Right.

21 MR. SCHANTZ: -- because it was a case premised on
22 the supremacy clause --

23 QUESTION: Right.

24 MR. SCHANTZ: -- a constitutional provision.

25 QUESTION: Correct.

1 MR. SCHANTZ: And this Court rejected that, I
2 believe, unanimously, saying that -- saying that that
3 language, rights secured by the Constitution, doesn't
4 include every constitutional --

5 QUESTION: Did not include the supremacy clause;
6 rather, that was in the nature of a statutory claim, rather
7 than a constitutional claim, a violation of the federal
8 statute. But here, there is a violation -- there is
9 alleged, and I guess we held in the case that was here
10 before, that there was a violation of a constitutional
11 provision.

12 MR. SCHANTZ: We certainly don't mean to contend
13 that Chapman literally controls because it does not reach
14 the second proposition, but we think it is square authority
15 for the major premise, which is that 1983 is not
16 co-extensive with the Constitution, not every --

17 QUESTION: At least to the extent that it rejects
18 the claim that the supremacy clause is a constitutional
19 claim. I don't really see that it sheds light one way or
20 the other on the question whether a commerce clause claim is
21 a constitutional claim.

22 MR. SCHANTZ: Well --

23 QUESTION: See, in that case, there were two ways
24 to characterize the claim, one as a violation of a federal
25 statute, or as a violation of a federal statute and hence

1 also a violation of the Constitution, and we said, well,
2 really, that was a statutory -- but here you have no basis
3 other than the constitutional provision itself, so it seems
4 to me it is quite different.

5 MR. SCHANTZ: Well, the supremacy clause is a
6 relational clause rather than a grant of substantive power,
7 and I won't press the analogy to the end. I think we have
8 something more to establish, if you will, but I understood
9 Petitioner to argue in his brief essentially that any
10 constitutional claim doesn't have to involve rights, can be
11 brought within 1983, and we believe that that -- a supremacy
12 clause case is in a sense a constitutional claim, not
13 necessarily in the same sense as is involved here.

14 QUESTION: You would say that your opponent did
15 not have a right to drive these big long trucks over your
16 highways without being -- without complying with your truck
17 length regulation. That is not a right, in your view.

18 MR. SCHANTZ: That is not a right, as that term
19 has been employed -- was employed under 1983.

20 I would just add one more point on the first
21 point. In drafting 1983, the 42nd Congress did not employ
22 the language of Article III, cases arising under the
23 Constitution. Only four years later, when they passed a
24 predecessor, Section 1331, they did use the language,
25 arising under. We don't believe that is an accident. We do

1 not think that that was a general federal question
2 jurisdiction for all actions against -- where the defendant
3 is a state or a state official, and we think Chapman, at
4 least with respect to the major premise, is important
5 support for that.

6 QUESTION: Mr. Schantz, take the equal footing
7 clause of the Constitution that talks about new states being
8 admitted only on equal footing with the original states. Do
9 you think 1983 would cover a private action seeking to
10 enforce the equal footing clause as against a state?

11 MR. SCHANTZ: I think there would be some standing
12 questions as well, and I am perhaps more prepared to address
13 some other provisions of the Constitution. Article I,
14 Section 10, contains some other limitations on the state.
15 They are not supposed to coin money. They are not supposed
16 to make treaties. They are not supposed to impose export
17 duties for raising revenue purposes, at least.

18 It is difficult to articulate the notion that
19 those -- that kind of a provision confers an individual
20 right. We have -- What we have in Article I, Section 8, and
21 Article I, Section 10, are clauses that say this belongs to
22 the federal government, this belongs to the states, and this
23 Court has properly assumed the role of refereeing in the
24 ambiguities among those clauses, of which ambiguities in the
25 commerce clause, of course, are substantial.

1 If I may move to the second proposition, and
2 elaborate further on the claim that the commerce clause does
3 not guarantee rights, we do not mean to demean the
4 importance of the commerce clause. Obviously, it has been
5 of enormous significance politically, in terms of shaping
6 this country into a nation. It has been of enormous
7 importance economically, in terms of establishing a free
8 trade unit, but those are general benefits to the public as
9 a whole. They are not of the stuff of which individual
10 rights against government concern themselves.

11 Provisions involving individual rights typically
12 are of a different character. They rest upon principles of
13 political theory about the proper relationship between the
14 state and the individual generally, principles of moral
15 philosophy, and to be sure, they include property rights as
16 well as personal rights. We in no way are, as Petitioner
17 suggests, asking any reconsideration of Lynch versus
18 Household Finance.

19 QUESTION: May I just interrupt again? You are
20 not contending it is limited to Fourteenth Amendment claims,
21 I mean, discrimination claims?

22 MR. SCHANTZ: No, I am not.

23 QUESTION: So you would agree it would include
24 First Amendment claims?

25 MR. SCHANTZ: We would agree that it includes

1 claims that -- for which it is difficult to find an
2 expressed textual ground, like the freedom of association,
3 the right to privacy, the right to personal mobility.

4 QUESTION: Under your test, what about the right
5 to, say, object to state subsidy of a religious school, or
6 something like that, an establishment clause claim. Under
7 your test, how would you decide that?

8 MR. SCHANTZ: I think it is clearly established
9 that the establishment clause has an individual rights
10 aspect to it, that the standing question which this Court
11 wrestled with in *Flast v. Cohen*, I think, sharpens that and
12 suggests that that would be a hard case, but I think it is a
13 hard case that has already been decided in favor of
14 including establishment cases, treating them as rights.

15 QUESTION: So you would say that 1988 would apply
16 to that kind of a claim under the test you are proposing?

17 MR. SCHANTZ: Absolutely. It certainly includes
18 all of the Bill of Rights and everything that is brought in
19 some way or another under the umbrella of substantive due
20 process --

21 QUESTION: Do you need to go that far for this
22 case?

23 MR. SCHANTZ: All this Court needs to say in this
24 case is that dormant commerce clause cases do not involve
25 rights within the meaning of 1983.

1 QUESTION: I just wondered where you were going to
2 end up.

3 QUESTION: Is there any aspect, Mr. Schantz, of
4 laws involved here under 1983, in the Maine and Thiboutot
5 sense?

6 MR. SCHANTZ: Not at all. I think Maine versus
7 Thiboutot assumed that the statutes -- and correctly assumed
8 that the statutes involved conferred rights. This
9 contention was not at all --

10 QUESTION: And there is no contention here that
11 there is any statute, federal statute.

12 MR. SCHANTZ: Not at all. Not at all.

13 The important sense in which the commerce clause
14 does not grant rights, and the important sense in which we
15 do not believe Petitioner had a right to drive 65-foot
16 vehicles as we usually employ that term and as the Framers
17 or as the Drafters of 1983 employed that term, is that
18 Congress could have -- I don't think it is likely that they
19 will, but Congress may turn around tomorrow and say, the
20 limit for all the country is 55 feet, or they may set up a
21 local option system and restore, if you will, Iowa's
22 authority. They may redress that balance, and in that sense
23 we do not have a claim of individual rights against
24 government, because a true claim of individual right in some
25 sense --

1 QUESTION: Well, supposing Congress did that and
2 then your opponent, or then say Iowa said, we still are
3 going to insist on a shorter limit. We are just going to
4 pay no attention to the federal statute, and they had to sue
5 you under the federal statute, and then could they have a
6 claim under federal law under 1983?

7 MR. SCHANTZ: I would not, if I understand your
8 hypothetical, I would not think that a federal statute that
9 simply imposed a length limit --

10 QUESTION: Say the federal statute said that they
11 shall be allowed to drive trucks at least 60 feet long, and
12 you said no, in Iowa they've got to be no more than 50 feet,
13 and then they sued you to invalidate your statute under the
14 supremacy clause.

15 QUESTION: For violation of the federal statute.

16 QUESTION: And then you would not have
17 jurisdiction under Chapman, but would you not have a 1983
18 claim?

19 MR. SCHANTZ: If -- this Court would then have to
20 construe that statute in --

21 QUESTION: That would be a Maine and Thiboutot
22 problem, would it not?

23 MR. SCHANTZ: That would be a Maine verus
24 Thiboutot problem, a Penhurst problem --

25 QUESTION: yes.

1 MR. SCHANTZ: -- of addressing whether Congress
2 intended to confer rights under that statute, and if this
3 Court concluded that, and it is not a -- would not be an
4 implausible suggestion, that -- then they could be back
5 under 1983.

6 Congress in many respects can expand or contract
7 the scope of 1983 with respect to the Maine versus Thiboutot
8 aspect. But it is not, just to sum up that point, a true
9 constitutional right if Congress can simply say, no, you are
10 not going to drive those trucks that length any longer. And
11 I think that generalization will more -- although the Court,
12 this Court may apply a somewhat different standard review to
13 some -- when a Congressional action is challenged in certain
14 areas than with the states. I think that generalization
15 holds across the whole range of what constitutional law case
16 book authors and so on treat as individual rights.

17 QUESTION: Why would you say then that there would
18 be 1331 jurisdiction?

19 MR. SCHANTZ: I think it is a claim arising under
20 the Constitution.

21 QUESTION: It is a claim to be free from state
22 regulation.

23 MR. SCHANTZ: It is an ultra vires claim. It's a
24 claim that the state has exceeded --

25 QUESTION: Well, then you have a right not to be

1 regulated by the state in this area.

2 MR. SCHANTZ: We would not deny that one
3 occasionally -- maybe more than occasionally --

4 QUESTION: Suppose a Congressional statute based
5 on the commerce power subjects an area to regulation and the
6 bottom line of it is, state laws in this area will be
7 foreclosed or pre-empted.

8 MR. SCHANTZ: That certainly gives one a federal
9 claim to go to --

10 QUESTION: And if the state then threatens to
11 enforce its -- a statute in that area against a person, he
12 may resort to federal court, claiming that he has a right to
13 be free of that state regulation.

14 MR. SCHANTZ: That the court should direct the
15 state to do it. There is no question that as a matter of
16 speech we occasionally use the term "right" to -- in the
17 sense of any claim that has been vindicated by legal
18 process. I wouldn't deny that, but --

19 QUESTION: Well, 1983 doesn't require that the
20 right be created by the Constitution. It just requires that
21 it be secured.

22 MR. SCHANTZ: Nothing about our argument, I
23 believe, challenges that proposition. If by that -- What I
24 meant to respond to Justice Stevens' question a while ago
25 was that you can go beyond the text of the Constitution,

1 where that is appropriate, and that under the Maine versus
2 Thiboutot aspect, what -- you can look to see what Congress
3 had done. Whether a bare pre-emption --

4 QUESTION: Would you -- You wouldn't suggest that
5 you might have a 1983 suit where there has been a
6 Congressional occupation of the field by statute, and yet
7 not have a 1983 suit when the claim is just based on the
8 commerce clause itself?

9 MR. SCHANTZ: It would seem to me that a
10 pre-emption claim without --

11 QUESTION: It always has to be based in part on
12 the commerce clause.

13 MR. SCHANTZ: The underlying Congressional
14 authority, certainly.

15 QUESTION: Why, sure, and then the supremacy
16 clause.

17 MR. SCHANTZ: That's correct. I am not -- I think
18 unless it is fair to say that Congress intended to create
19 rights, that that would not -- that would not come within
20 1983, within the language of 1983.

21 QUESTION: Congress just said that state
22 regulation in this area will be invalid.

23 MR. SCHANTZ: That's correct. Perhaps I can give
24 another example. We assume an art lover who commissions a
25 sculptor to build a major project for his front lawn, and

1 along comes the city zoning inspector and says, that is out
2 of conformity with our esthetic requirements. The person
3 challenging -- and they say you must take it down, you
4 cannot have it there. The person challenging that might
5 have at least two different claims.

6 One would be that the city did not have the
7 authority under state law to zone for esthetic purposes.
8 They might also have a claim that this constituted a taking
9 of property without due process of law. The latter claim is
10 a claim of individual right. It is a claim that no
11 government, no government can take my property without
12 compensating me for it.

13 The other claim is an ultra vires claim. It is
14 defeasible in the sense that the Iowa legislature could in
15 the next session turn around and authorize zoning for
16 esthetic purposes. I think that distinction is basic to our
17 constitutional jurisprudence, despite the fact that the
18 admittedly abstract term "right" is occasionally used to
19 announce a result, if you will, rather than as here, as a
20 starting point for analysis.

21 QUESTION: Mr. Schantz, your opponent places a
22 good bit of reliance, as I read his brief, on the Northcross
23 case. You don't cite it. Do you have any comment to make
24 about that?

25 MR. SCHANTZ: Petitioner cites Northcross for the

1 proposition that this Court required, I believe it was the
2 Sixth Circuit, to state reasons. I do not read the case
3 that way, with all respect. What happened there was that it
4 was an application for fees under Section 718 of the
5 Emergency School Aid Act of 1972, which is worded somewhat
6 similarly to 1988. The Sixth Circuit denied without
7 elaboration. The Petitioner sought review by this Court.
8 This Court held that, yes, this case fell within Section
9 718. Attorneys' fees were authorized.

10 This Petitioner was -- They addressed that
11 question, as we are asking this Court to address that
12 question, resolved it, and then said, but perhaps the Sixth
13 Circuit was denying fees in the exercise of its discretion.
14 It did not inform us of that, so we will remand for further
15 proceedings, where they can express the discretionary
16 reasons for denying fees.

17 So, at least in terms of addressing this issue,
18 Northcross would support this Court affirming on the basis
19 that commerce clause cases do not -- are not within 1983.
20 And it also does not --

21 QUESTION: But the Northcross case also held that
22 this Court had in two other cases prior to that said that
23 normally under that section you get counsel fees.

24 MR. SCHANTZ: That's right.

25 QUESTION: But that is not true in this case.

1 MR. SCHANTZ: If you are within 1983, you normally
2 get attorneys' fees, but our position is, they are not
3 within 1983.

4 QUESTION: But this didn't involve 1988, the
5 Northcross case.

6 MR. SCHANTZ: No, that was a separate fee shifting
7 case.

8 Unless the Court has further questions, I think
9 that concludes my argument. Thank you.

10 CHIEF JUSTICE BURGER: Mr. Lederer, you have two
11 minutes remaining.

12 ORAL ARGUMENT OF JOHN H. LEDERER, ESQ.,

13 ON BEHALF OF THE PETITIONER - REBUTTAL

14 MR. LEDERER: The question which I think has been
15 addressed in several different ways of whether or not there
16 is a right present, in several cases has been addressed as
17 whether or not the Constitution creates a right. We do not
18 assert that the Constitution creates a right to engage in
19 interstate commerce. What we assert is that there predated
20 and pre-existed the Constitution a right to engage in
21 commerce, a subspecies of the right to possess property, or
22 as stated in many of the colonial constitutions, to acquire,
23 possess, and protect property, and that the Constitution
24 secured that right, not that it created it, but it secured
25 it, and the way it secured it was by removing from the

1 states and giving to Congress the power to regulate the
2 right.

3 Mr. Schantz suggested that there could be no right
4 because obviously Congress had the power to take away the
5 ability of my client to use 65-foot twin trailers if it
6 chose to pass the bill. Yes, Congress could do that. The
7 fact that you can pass regulations regulating the right does
8 not mean that the right does not exist, any more than the
9 fact, as was addressed before this Court this morning, that
10 we may put limits on the right of lawyers to speak in
11 advertisements means that there is no right to engage in
12 free speech.

13 QUESTION: Mr. Lederer, I wonder if you mean what
14 I understand you to be arguing. You are saying that before
15 the federal Constitution was adopted, there was a right,
16 say, in Massachusetts to go into Connecticut and engage in
17 commerce --

18 MR. LEDERER: That's correct.

19 QUESTION: And if Connecticut said, we won't let
20 you in?

21 MR. LEDERER: There was a right to engage in
22 commerce, and further --

23 QUESTION: Across what were then international
24 lines?

25 MR. LEDERER: -- some recognition of a right to

1 engage in foreign commerce.

2 QUESTION: That Massachusetts had a right to
3 engage in commerce in a foreign state?

4 MR. LEDERER: Within -- subject to regulation,
5 yes. I don't think that that would surprise the Court if
6 you reflect for one moment on the fact that one of the
7 causes of the Revolution were the Navigation Acts, which
8 limited the right of colonials to engage in commerce and
9 were regarded as a grave affront by a colony that in effect
10 -- or by a series of colonies that relied very heavily on
11 commerce for their livelihood.

12 QUESTION: But wasn't that one of the reasons for
13 the calling of the Annapolis Convention that led to the
14 Philadelphia Convention? The fact that prior to the
15 Constitution the states could impose barriers, and many
16 residents felt that it was time to have a constitution that
17 empowered a central government to regulate that?

18 MR. LEDERER: That's right. That it was time to
19 empower a central government, and in so doing partially
20 remove the power from the state, because the right needed
21 protection. The right in fact was --

22 QUESTION: But it wasn't a right until it was put
23 in the Constitution.

24 MR. LEDERER: It was a natural right and regarded
25 as such by the Framers. In fact, it was listed as a

1 specific right in the Articles of Confederation.

2 QUESTION: Would you say anything in John Locke's
3 text said was a natural right is secured by the Constitution
4 under 1983?

5 MR. LEDERER: No, Your Honor, but this Court has
6 repeatedly recognized it not only as a right secured by the
7 Constitution but as a natural right. My reference, of
8 course, is to Justice Marshal in Gibbons v. Ogden.

9 QUESTION: I didn't say anything about natural
10 rights.

11 (General laughter.)

12 QUESTION: I didn't say anything about natural
13 rights. I am sure I didn't.

14 MR. LEDERER: I am sorry, Your Honor.

15 Thank you.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
17 case is submitted.

18 (Whereupon, at 2:03 o'clock p.m., the case in the
19 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE v. RAYMOND KASSEL ET AL
NO. 79-1618

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Lynn Connelly

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