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PROCEEDINGS BEFORE

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WASHINGTON, D.C. 20543

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARK DENNIS, Petitioner v. MARGARET L. HIGGINS,
DIRECTOR NEBRASKA DEPARTMENT OF MOTOR
VEHICLES, ET AL.

CASE NO: 89-1555

PLACE: Washington, D.C.

DATE: October 31, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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MARK E. DENNIS, :
Petitioner :
v. : No. 89-1555
MARGARET L. HIGGINS, DIRECTOR :
NEBRASKA DEPARTMENT OF :
MOTOR VEHICLES, ET AL. :
- - - - - X

Washington, D.C.
Wednesday, October 31, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:
RICHARD A. ALLEN, ESQ., Washington, D.C.; on behalf of the Petitioner.
L. JAY BARTEL, ESQ., Assistant Attorney General of Nebraska, Lincoln, Nebraska; on behalf of the Respondents.

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1 because it concluded that a State official's violation of
2 the commerce clause did not deprive petitioner of any
3 rights, privileges, or immunities secured by the
4 Constitution.

5 The court relied mainly on the 1978 decision of
6 the Eight Circuit in Consolidated Freightways v. Kassel,
7 which held that the commerce clause does not establish
8 individual rights against Government but instead allocates
9 powers between the State and Federal Governments.

10 The conclusion that the commerce clause does not
11 secure individual rights, privileges, or immunities is, I
12 submit, squarely at odds with many decisions of this Court.

13 QUESTION: Well, there's language in decisions
14 that talk about individuals benefiting from it as indeed
15 they do, of course, by the Court's application of it. But
16 it's a little hard to find in the language of the
17 constitutional provision that we call the commerce clause
18 any intent to benefit individuals in any direct sense?
19 Wouldn't you acknowledge that?

20 MR. ALLEN: It's true, Justice O'Connor, that the
21 commerce clause itself is merely a -- states an affirmative
22 grant of power to the Federal Congress to regulate
23 interstate commerce. But it's been a fundamental precept
24 of this Court's jurisprudence, at least since 1851 when it
25 decided Cooley v. Board of Wardens, that the commerce clause

1 in addition to granting power to the Federal Congress to
2 regulate interstate commerce imposes specific obligations
3 and restraints upon the State Governments of its own force.

4 QUESTION: Which can be raised without the benefit
5 of 1983 which was not in existence at the time of Cooley v.
6 Board of Wardens.

7 MR. ALLEN: It's true, Justice Kennedy, that they
8 can be raised of their own force. But that's true of many
9 constitutional and statutory provisions which this Court has
10 held section 1983 applies to.

11 QUESTION: Well, have we ever held that 1983
12 applies to any constitutional provision other than the
13 reconstruction amendments in the Bill of Rights?

14 MR. ALLEN: Uh --

15 QUESTION: I think the answer is no.

16 MR. ALLEN: I think the answer is no. But --

17 QUESTION: In Carter v. -- the Carter v. Greenhow
18 contracts clause case would, would be contrary to your
19 position on this point, would it not?

20 MR. ALLEN: I don't think so, Justice Kennedy.
21 I think Carter v. Greenhow is, is -- does not support the
22 decision below for a number of reasons. First of all, it
23 was a -- it involved, if anything, the contracts clause and
24 not the commerce clause.

25 But second, the court in that case, contrary to

1 what respondents have argued, did not hold that the
2 contracts clause does not secure any rights under the
3 Constitution. In fact, it held the opposite. It said that
4 the contracts clause does secure rights under the
5 Constitution. But what it specifically held was that the
6 plaintiff in that case had not asserted that violation of
7 the contracts clause. And as this Court has subsequently
8 noted in Chapman v. Houston Welfare Rights Organization and
9 in Hague v. CIO, Carter v. Greenhow was really -- the result
10 in that case was really based on the deficiencies in the
11 plaintiff's pleading.

12 In any event I submit that the decision below is
13 inconsistent with this Court's decisions in at least three
14 areas: in its decisions under the commerce clause; in its
15 decisions under section 1983; and more broadly in its
16 decisions under other provisions of the Constitution which
17 allocate governmental powers but which this Court has held
18 also secure individual protections enforceable by
19 individuals.

20 QUESTION: What do you think the implications of
21 Golden State Transit are in this case?

22 MR. ALLEN: I think Golden State Transit, Your
23 Honor, squarely supports our submission. The -- in that
24 case -- in that case the court summarized the test that this
25 Court has specifically fashioned to determine what

1 constitutes a right, privilege, or immunity that's
2 enforceable under section 1983.

3 It identified three factors, three considerations,
4 that are relevant to that, to that inquiry, all of which I
5 submit support the conclusion that the commerce clause
6 creates constitutional rights.

7 First, the court stated in deciding whether a
8 Federal right has been violated we've considered whether the
9 provision in question creates obligations binding on the
10 governmental unit or rather does no more than express a
11 congressional preference for certain kinds of treatment.

12 Second it stated that the interest that the
13 plaintiff asserts must not be too vague or amorphous to be
14 beyond the competence of the judiciary to enforce. And
15 third, the court has said we've also asked whether the
16 provision in question was intended to benefit the punitive
17 plaintiff. Under these criteria I submit that there can be
18 no serious question that the commerce clause secures rights,
19 privileges, and immunities enforceable under section 1983.

20 QUESTION: Well, certainly the last inquiry raises
21 a very credible inquiry in my view.

22 MR. ALLEN: Well, I can only respectfully
23 disagree, Justice O'Connor. I think there's no merit to
24 the suggestion that the commerce clause was not intended to
25 benefit individuals. But, let me just -- go through these

1 --

2 QUESTION: Well, didn't it, didn't it really go
3 to the structure of government and the authority to be given
4 to the new Federal Government and the relationship between
5 the Federal Government and the States that made up the
6 union. Do you really think that it gives any evidence of
7 an intent to directly benefit individuals?

8 MR. ALLEN: I think it does, Your Honor. It is
9 true that the commerce clause is a fundamental structuring
10 provision of the Federal Constitution, indeed, may have been
11 one of the principal causes for the Federal Constitution,
12 and it allocates governmental powers. But that is not to
13 say, or that is not consistent -- inconsistent with the
14 proposition that it was also intended to benefit
15 individuals.

16 In fact, the proposition that the commerce clause
17 -- the contention that the commerce clause was not designed
18 to benefit individuals was perhaps the most dramatically and
19 clearly refuted by this Court's decision in Morgan v.
20 Virginia. And that was a case in which this Court upheld
21 the claim of an interstate bus passenger challenging a State
22 statute requiring segregation on interstate buses under the
23 commerce clause. The Court struck down that statute, and
24 it rejected the claim by the State that the plaintiff had
25 no enforceable rights under the commerce clause and the

1 Court said constitutional protection against burden on --
2 burdens on commerce is for her benefit.

3 QUESTION: Well, is it analytically -- is the case
4 any different for commerce clause purposes than Gibbons v.
5 Ogden?

6 MR. ALLEN: Well, this case, unlike Gibbons v.
7 Ogden is a dormant commerce clause case. In this case
8 Gibbons v. Ogden really went off on Congress' power under
9 the commerce clause and this is -- this is a straight
10 dormant commerce clause case. But the Court in case after
11 case under the dormant commerce clause has upheld the rights
12 of individuals to enforce individual personal protections
13 under the commerce clause. And perhaps more importantly in
14 those cases the Court has used the term rights to describe
15 the protections that the commerce clause gives.

16 For example, in Boston Stock Exchange v. State
17 Tax Commission, the Court upheld the claim of certain tax
18 commissions that a New York statute violated the commerce
19 clause, and it rejected the contention that those -- that
20 the plaintiffs were not entitled to raise those claims by
21 saying that plaintiffs are asserting their right under the
22 commerce clause to engage in interstate commerce free of
23 discriminatory State taxation.

24 QUESTION: Under your theory is there any
25 violation of the Constitution by a State actor that does

1 not give rise to a 1983 suit?

2 MR. ALLEN: I can't think of any, Your Honor.
3 The respondents and the court below attempt to analogize
4 the commerce clause to the supremacy clause, which of course
5 this Court last term in Golden State Transit said was not
6 itself a, a source of rights actionable under section 1983.

7 But the supremacy clause is very different from
8 the commerce clause or really from any other provision of
9 the Constitution. Supremacy clause is merely a declaration
10 of the supremacy of Federal law. It does not of itself
11 impose any specific restraints or obligations on the States
12 or on the Federal Government.

13 The commerce clause in contrast is a source of
14 Federal rights and of -- and of specific obligations that
15 are imposed in the States. And indeed in this very case,
16 the court below imposed those obligations on the State of
17 Nebraska, and they did so at the behest of petitioner in
18 order to protect his interests. It is I submit a
19 contradiction in terms for the court below to conclude that
20 the petitioner has an enforceable protection and yet has no
21 right.

22 But again I think the -- this Court's decisions
23 that perhaps are clearest on this point are the decisions
24 in Morgan v. Virginia and mostly clearly refute the decision
25 of the court below that the commerce clause doesn't protect

1 individual rights are Morgan v. Virginia, Boston Stock
2 Exchange, and also United States v. Guest. In United States
3 v. Guest the Court upheld an indictment under the criminal
4 counterpart to section 1983, which alleged that the
5 defendants had violated the constitutional rights of certain
6 black citizens to travel freely to and from the State of
7 Georgia. The Court upheld that indictment and it said that
8 the constitutional right to travel was based on the commerce
9 clause.

10 I submit that -- that this Court could not affirm
11 the decision below without effectively overruling all of
12 those decisions or at least calling them seriously into
13 question.

14 Now, respondents have argued that those cases are
15 not important because they didn't involve section 1983 and
16 because they didn't involve the precise of what section 1983
17 means by rights, privileges, and immunities. But there's
18 no basis for the supposition that section 1983 intended the
19 words rights, privileges, or immunities to have any
20 different meaning from their commonly understood meaning or
21 from their meaning in usage in other context. Respondents
22 in effect would have this Court employ a special vocabulary
23 for section 1983 that's at odds with its ordinary meaning.

24 As I -- furthermore, as I've said respondents'
25 contention that the commerce clause does not secure

1 individual rights is inconsistent with the specific test
2 that this Court fashioned and summarized in Golden State
3 Transit v. Los Angeles for determining what constitutes a
4 right, privilege, or immunity enforceable under section
5 1983.

6 QUESTION: Is there any claim in this case that,
7 that, that this action could not have been brought under
8 ordinary jurisdictional provisions?

9 MR. ALLEN: No.

10 QUESTION: The Federal question?

11 MR. ALLEN: It could not have been brought in
12 Federal court under Federal jurisdictional statutes. Or it
13 could not have been brought into Federal court for several
14 reasons. First, it sought an injunction against the State
15 tax and the Federal Tax Injunction Act prohibits Federal
16 courts from entertaining such actions.

17 QUESTION: Uh-huh.

18 MR. ALLEN: And second of all, it sought monetary
19 relief and the Eleventh Amendment prohibits Federal courts
20 from entertaining such actions. So as a factual matter, the
21 only place this claim, with or without section 1983, can be
22 brought is in section -- is in State court --

23 QUESTION: Well, if a tax -- suppose a State tax
24 weren't at issue and suppose only an injunction is sought,
25 you can bring a Federal question suit in them --

1 MR. ALLEN: You can, yes, you can --

2 QUESTION: -- and claiming -- claiming that
3 there's been a --

4 MR. ALLEN: If there was a State regulation, Your
5 Honor, such as a truck tax -- a truck length law or
6 something, you could have Federal question jurisdiction and
7 now without --

8 QUESTION: And rely on the dormant commerce
9 clause?

10 MR. ALLEN: Yes, you could.

11 QUESTION: And get an injunction.

12 MR. ALLEN: Yes. The same is true -- but the same
13 -- I think the point that I would stress is the same is true
14 of other provisions of the Constitution and of Federal
15 statutes this Court has held are enforceable under section
16 1983.

17 QUESTION: Well, I know, but if you could get an
18 injunction in such a Federal question case, I suppose it's
19 based on the fact that you have a right to it.

20 MR. ALLEN: That's absolutely correct. And indeed
21 this Court has -- has stated that in Davis v. Passman. The
22 Court said the essence of a cause of action is the ability
23 to enforce a right. Again it's a contradiction in terms.

24 QUESTION: That's true. But I don't suppose any
25 -- the other side doesn't disagree with that, do they? Or

1 do they say it's no right, it's just a standing question?

2 MR. ALLEN: I think what they say is that if it's
3 a right in other contexts, it's not a right in the context
4 of section 1983.

5 QUESTION: Okay.

6 QUESTION: Mr. Allen, help me on something I don't
7 quite understand. You could not have brought this action
8 into Federal court because the defendants are protected by
9 the Eleventh Amendment. Are not those defendants held not
10 to be persons within the meaning of 1983 for that reason?

11 MR. ALLEN: No, Justice Stevens, they are persons
12 for these purposes. In *Will v. Michigan Department of State*
13 *Police* --

14 QUESTION: Right.

15 MR. ALLEN: -- I think last term or the term
16 before, the Court held that States themselves were not
17 persons within the meaning of section 1983.

18 QUESTION: Or officers acting in their official
19 capacities.

20 MR. ALLEN: And officers acting in their official
21 capacities when sued for monetary relief. But the Court in
22 Footnote 10 of that opinion made the clear distinction that
23 officials sued in their official capacity for injunctive
24 relief are persons who are subject to suit under section
25 1983.

1 QUESTION: So insofar as you sought monetary
2 relief it clearly is not a 1983 claim?

3 MR. ALLEN: That's correct.

4 QUESTION: So you're claiming the injunctive
5 aspect is the 1983 claim?

6 MR. ALLEN: That's correct.

7 Respondents don't deny that -- going back to the
8 Golden State test --

9 QUESTION: Let me pursue that one step further.
10 Do you think that the Tax Injunction Act modifies 1983 in
11 any respect? Is it possible if you construed those two
12 cases -- two statutes together, you'd say, well, you can't
13 get monetary relief because of the Eleventh Amendment and
14 you also should not construe 1983 to authorize equitable
15 relief in Federal court at least by virtue of the Tax
16 Injunction Act? I suppose that would be true, wouldn't it?

17 MR. ALLEN: Yes.

18 QUESTION: But then there's this very narrow area
19 that 1983 provides a cause of action in State court only
20 even though if you're right on the merits you clearly have
21 a State remedy and it's 1983 action is totally superfluous
22 except for the provision for attorneys' fees, is that right?

23 MR. ALLEN: Essentially that's correct. It's not
24 totally superfluous except for attorney's fees because there
25 may be instances in which the State officials are violating

1 constitutional rights in bad faith. For example, if State
2 officials adopted a practice of harassing people coming into
3 their State because they were from the State of Ohio,
4 because they didn't like Ohio, and did so in bad faith and
5 violation of the commerce clause, I think that in those
6 circumstances someone would have a cause of action for
7 damages against the individuals.

8 But in this case, we've not --

9 QUESTION: But not if their State acting in --
10 well, I see what you're -- yeah.

11 MR. ALLEN: But if they're acting in bad faith
12 they would not have a qualified immunity. And I think
13 that's an important consideration with respect to the issue
14 in this case and that's an important reason I think that
15 section 1983 needs to be given the full scope that its
16 language suggests.

17 QUESTION: You wouldn't need the commerce clause
18 in that situation if they were -- if they were using State
19 law to exclude people in bad faith without any good State
20 reason for it, you'd have a cause of action, I would assume
21 anyway, without the commerce clause, wouldn't you? Once you
22 posit bad faith, which is what makes them not state -- not
23 States being sued for damages.

24 QUESTION: I think I can -- Justice Scalia, I
25 think one could conceive of a circumstance where such

1 discrimination might not violate the equal protection clause
2 but yet be a bad faith violation of the commerce clause.
3 For instance, this Court has held that the equal protection
4 clause does not prohibit retaliatory State actions, but the
5 commerce clause I think clearly does as all the cases have
6 held.

7 QUESTION: Well, in the Morgan case they
8 deliberately left out the Fourteenth Amendment. It wasn't
9 in there at all. It strictly commerce clause.

10 MR. ALLEN: It was strictly commerce. I don't
11 know why they left it out, but it was strictly a commerce
12 clause case.

13 QUESTION: Ask me sometime, I'll tell you.

14 MR. ALLEN: The respondents -- getting back to
15 the Golden State test -- the respondents don't really
16 dispute that this -- the commerce clause satisfies at least
17 the first two considerations in Golden State but they hang
18 their argument on the third consideration, which they claim
19 the commerce clause doesn't meet. That is, that it has a
20 intent -- it allegedly has no intent to benefit individuals.
21 And I submit that that's simply not true, that Morgan and
22 other cases indicate that it does, it does have that intent.

23 But furthermore, the, the dichotomy that the
24 respondents and the court below seek to draw between, one
25 the one hand the purpose of the commerce clause to allocate

1 government powers and to serve national and broad societal
2 interests, and on the other hand a purpose to benefit
3 individuals is I submit a false dichotomy. The fact that
4 a constitutional provision my allocate powers and have a
5 purpose to serve broad national interest does not mean that
6 it is -- does not also intend to serve and secure liberty
7 for individuals.

8 And in fact this Court has consistently rejected
9 that dichotomy in cases involving provisions of the
10 Constitution which allocate powers among the branches of
11 the Government. And perhaps for purposes of the issue in
12 this case, that is, the question whether such provisions
13 give rise to individual rights, the most telling decision
14 is this Court's decision last term in United States v.
15 Munoz-Flores where the Court rejected the Government's
16 argument that the origination clause, which requires revenue
17 measures to originate in the House of Representatives --
18 rejected the Government's argument that that clause doesn't
19 involve individual rights.

20 The Court -- excuse me -- the Court specifically
21 stated that the Government's contention that the origination
22 clause does not involve individual rights is erroneous and
23 the Court said it had -- it has repeatedly upheld provisions
24 separating -- in separation of powers cases, repeatedly
25 upheld the claims of individuals seeking to enforce their

1 own protections based on those provisions.

2 I'd like to briefly address respondents'
3 contention that the legislative history of section 1983
4 supports the decision below. The court of -- the Supreme
5 Court of Nebraska made no reference to the legislative
6 history. Respondents, however, have relied on it and
7 they've relied primarily on certain remarks of
8 Representative Shellabarger which appear to draw a
9 distinction between provisions of the Constitution which
10 relate to the division of powers between the State and
11 Federal Government and provisions which secure the rights
12 of individuals within the States. And I think three things
13 should be said about those remarks.

14 First, there's nothing in those remarks that
15 indicate that Congressman -- Representative Shellabarger
16 was expressing any view about the scope of the legislation
17 that would become section 1983. The thrust of his remarks
18 appeared to be that remedial legislation was particularly
19 necessary in the case of the latter-type provisions. But
20 he did not say and he did not suggest that the legislation
21 that he was supporting did not encompass all of the
22 provisions of the Constitution. And, indeed, the absence
23 of any limiting or qualifying language refute any such
24 suggestion.

25 Second, it's not clear what provisions Congressman

1 -- exactly what provisions Congressman Shellabarger would
2 have put into which category. The examples he gave of
3 power-providing provisions were the provisions providing
4 that the States shall enter into no treaties, that they
5 shall not coin money and they shall not emit letters of
6 credit. The examples that he gave of the latter-type
7 provisions were the fugitive-from-justice provision of the
8 Constitution, the fugitive slave provision, and the
9 privileges and immunities clause.

10 Most importantly, nothing in his remarks made any
11 reference to the commerce clause, and there's simply no
12 basis for the supposition that Congressman Shellabarger
13 would have concluded that the dormant commerce clause did
14 not create rights

15 And, in fact, this Court's decisions -- numerous
16 decisions of this Court establish that the dormant commerce
17 clause does establish rights with respect to individuals as
18 between them and the States.

19 QUESTION: I suppose you could say the same thing
20 in a sense about the treaty clause. Conceivably an
21 individual could challenge an agreement that was made, say,
22 between the State of California and Mexico on the grounds
23 that it was actually a treaty that needed to be approved by
24 Congress and they were trying to do some of this person
25 under the treaty. They, they would at least have standing

1 to do that.

2 MR. ALLEN: They would have standing and if the
3 question of whether or not the treaty provision gave rise
4 to section 1983, cause of action, I think that would be a
5 -- an interesting and perhaps difficult question.

6 QUESTION: More difficult than this one you
7 (inaudible).

8 MR. ALLEN: Certainly more difficult than this
9 one.

10 In sum, Your Honor, in sum the section 1983
11 provides a Federal cause of action for the deprivation of
12 any rights, privileges, and immunities secured by the
13 Constitution without any limitation or qualification. This
14 Court's decisions have repeatedly held that the coverage of
15 section 1983 must be broadly construed, and it has
16 consistently rejected efforts to limit the scope of rights
17 that are covered by section 1983.

18 Now if it were for some reason appropriate to
19 carve out the commerce clause from the protections that
20 section 1983 provides, Congress is free to do so. But
21 there's simply no warrant for this Court to do so on the
22 basis respondents' strained and unnatural reading of the
23 statute.

24 If there are no further questions, I'd like to
25 reserve the balance of my time for rebuttal.

1 QUESTION: Thank you, Mr. Allen.

2 Mr. Bartel, we'll hear now from you.

3 ORAL ARGUMENT OF L. JAY BARTEL

4 ON BEHALF OF THE RESPONDENTS

5 MR. BARTEL: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 Respondents maintain the decision below was
8 correctly decided for three basic reasons. First, under
9 the test set forth by this Court last term in Golden State,
10 a right that's secured by the Constitution under section
11 1983 only where the constitutional provision at issue is
12 intended to benefit the plaintiff, asserting the existence
13 of a right actionable under section 1983.

14 Second, the nature and purpose of the commerce
15 clause, as interpreted and applied by this Court,
16 demonstrates the clause was intended to allocate power
17 between the States and the Federal Government. In order to
18 preserve the national interest in maintaining political and
19 economic union, the clause was not intended to benefit
20 individuals or participants in the interstate market place
21 and thus secures no right to petitioner actionable under
22 section 1983.

23 Third, the legislative history of section 1983 --

24 QUESTION: (Inaudible) otherwise?

25 MR. BARTEL: Certainly there are causes of action

1 but not one under section 1983.

2 QUESTION: Well, that was a cause of action in
3 this case.

4 MR. BARTEL: In State court, that's correct.

5 QUESTION: Yes, and based on the commerce clause.

6 MR. BARTEL: Yes, petitioner had standing to raise
7 his claim in State court.

8 QUESTION: Well, they not only raised it, they --
9 he won on that claim.

10 MR. BARTEL: He received declaratory injunctive
11 relief, that's correct.

12 QUESTION: Yes, and did he get an injunction
13 against the tax?

14 MR. BARTEL: Yes, he received prospective
15 injunction.

16 QUESTION: And that he -- but he has no right --
17 he had no right. What was he just a private attorney
18 general or what?

19 MR. BARTEL: He has -- he has no right within the
20 special meaning of section 1983, a right secured by the
21 Constitution under this test -- under the test set forth by
22 the Court in Golden State. In Golden State the Court
23 specifically stated that one of the standards for
24 determining whether a constitutional provision secures a
25 right within the meaning of that -- of that statute is that

1 the provision in question must be one which is intended to
2 benefit the plaintiff. We submit the commerce clause is
3 not such a constitutional provision.

4 QUESTION: Well, in this case if they've been
5 paying illegal -- what they claim to be illegal taxes and
6 the State courts said, yes, the statutes -- those taxes are
7 unconstitutional and the question then might be about a
8 refund. And suppose the State court says, yeah, you can
9 get a refund of past taxes. Still no right?

10 MR. BARTEL: Within the meaning of section 1983,
11 no. There is a distinction there that we need to make
12 between a general version or a general understanding of a
13 right. For example, a right to bring a case into court and
14 the special meaning of a right under section 1983. And
15 while the petitioner seems to say that there is a common
16 understanding of what word right means under section 1983,
17 obviously the test set forth in Golden State indicates that
18 there are limitations on that and that one of the
19 limitations is the express requirement that it be intended
20 to benefit the plaintiff. And we submit the commerce
21 clause, if that is the basis for the claim --

22 QUESTION: Mr. Bartel, why don't you slow down
23 just a little bit. I think we could understand you a bit.

24 MR. BARTEL: Certainly, Your Honor.

25 The parties here agree that the standard to be

1 employed in determining whether a constitutional provision
2 secures a right under section 1983 is set forth in the
3 Court's decision in Golden State. The disagreement here is
4 based on the application of the Golden State standard to
5 claims of violation of the dormant commerce clause.

6 The crucial element and first part of the Golden
7 State test at issue here is whether the commerce clause was
8 intended -- is intended to benefit the plaintiff. We submit
9 the ultimate question which must be -- to answer is whether
10 Dennis' standing to sue as a person affected by a State law.

11 QUESTION: Let me just -- may I just interrupt.
12 Are you saying -- obviously back at the time the clause was
13 drafted, the plaintiff wasn't around. But the people who
14 were engaged in the business of transporting goods and
15 people across State lines from one State to another, you say
16 that the interstate commerce clause was not intended to
17 benefit people engaged in that sort of activity?

18 MR. BARTEL: The history and background of the
19 commerce clause demonstrate that its purpose was to allocate
20 power between the State and Federal Governments.

21 QUESTION: Well, I understand, but you were
22 talking about the people whom it was intended to benefit.
23 And aren't these the very quintessential examples of people
24 who are intended to be benefited by, by having interstate
25 commerce free of, of discriminatory restrictions and the

1 like?

2 MR. BARTEL: The basis for the commerce clause
3 was not the basis of conferring benefits on individuals per
4 se. The protections to be afforded by the commerce clause
5 are national in scope -- the interests of preserving
6 national interest and economic unity. The historical
7 background of the clause was obviously to, to illuminate the
8 type of commercial warfare and economic rivalries --

9 QUESTION: But are you saying there are no
10 individuals who are intended to be benefited -- it was just
11 a structural provision that didn't benefit anyone except to
12 form the basis for the way the Government was put together?
13 Is that your point?

14 MR. BARTEL: It's our position that whatever
15 benefits may be derived to individuals as a result of the
16 existence of the commerce clause and the dormant commerce
17 clause doctrine are merely incidental to the clause's main
18 purpose, that purpose being, again, to preserve the national
19 interest in political and economic union.

20 QUESTION: So really what you're saying is with
21 respect to the first of the three points you're making --
22 I don't understand some that you want -- there really are
23 no individual businesses or persons who would fit the, the
24 requirement of being intended beneficiaries of the clause?

25 MR. BARTEL: That's correct. And this Court's

1 decisions have in commerce clause cases confirmed the notion
2 that the interests involved in being resolved in those cases
3 are not individual interests but national interests.

4 QUESTION: Does your analysis on that point turn
5 on the proposition that Congress could permit the States to
6 regulate if it chose? Is that what makes this right one
7 that's it not a right given directly to the person?

8 MR. BARTEL: It's a part of it I think, Your
9 Honor, because it indicates that perhaps it is certainly
10 not -- whatever they're claiming is not -- is certainly
11 subject to qualification. Congress can remove it -- any
12 individual's ability to act entirely or it can give the
13 States the authority to restrict or prohibit and enact
14 legislation that they otherwise could not do, for example,
15 under application of the dormant commerce clause. But the
16 key focus is, as the Court has recognized in several
17 decisions, that the clause itself protects only the
18 interstate marketplace and not particular participants in
19 the marketplace or firms operating in commerce -- in Exxon
20 v. Maryland and Minnesota v. Cloverleaf Creamery.

21 QUESTION: And, and what you do with a case
22 arising out of a contract clause?

23 MR. BARTEL: Well, as you indicated, Justice
24 Kennedy, in questioning counsel here, the contracts clause
25 in Carter v. Greenhow was held not to secure right within

1 the meaning of section 1983. It was not rights secured by.

2 QUESTION: Well, let's assume you can explain the
3 case away as a pleaded case so that the issue came back
4 before us to know, but would you distinguish between the
5 commerce clause and the contract clause?

6 MR. BARTEL: Perhaps under the Golden State test
7 of intent to benefit one might view the specific nature of
8 the contracts clause. By referencing contracts themselves,
9 it seems to -- an argument could certainly be made that that
10 reference relates directly to perhaps individual rights
11 because contracts obviously relate to the rights of
12 individuals, vested rights there, and that might arguably
13 present a little different analysis than you would. But
14 clearly the commerce clause is different, much different
15 than the contracts clause in the sense that it doesn't
16 support any type of civil (inaudible). It is an allocation
17 clearly in distribution of powers between the States and the
18 national Government. So the clauses really are different
19 in nature even if one were to reexamine Carter.

20 QUESTION: Do you think there's a right to engage
21 in interstate commerce?

22 MR. BARTEL: Not as that term is used in section
23 1983, no.

24 QUESTION: But there is a right nevertheless.

25 MR. BARTEL: Only if you use the term in the sense

1 that perhaps the individuals --

2 QUESTION: Well, the State says -- says no
3 imported natural gas shall be allowed in this State and the
4 people who are excluded sue and win. Do you think they had
5 a right or not?

6 MR. BARTEL: They certainly have standing to in
7 essence vindicate the national interest in holding that kind
8 of legislation unconstitutional, that's correct. But it's
9 not based on an individual right secured by the Constitution
10 under 1983.

11 Perhaps I think the distinction was recognized --

12 QUESTION: How do you explain again cases like
13 United States v. Guest and Morgan which speak in terms of
14 individual rights and purported to give relief at least for
15 a violation for the right to travel that the court said was
16 covered by the commerce clause?

17 MR. BARTEL: Well, first we take issue with
18 petitioner's assertion that the decision in Guest was based
19 strictly on the commerce clause. We, we read Guest as not
20 being specifically based. They're basing the constitutional
21 right to travel on the commerce clause. In subsequent
22 opinions of the Court, Shapiro v. Thompson and Attorney
23 General v. Soto-Lopez, the Court has declined to locate the
24 right to travel in any specific provision of the
25 Constitution. Furthermore, we think there is a distinction

1 that should be drawn between petitioner's alleged right to
2 engage in an interstate trade, and that's an interest that
3 should be viewed as fundamentally different from the right
4 of -- the personal right to travel at issue in these cases.

5 As for Morgan -- we view Morgan as simply a
6 consistent application of this Court of vindicating a
7 national interest in State commerce as opposed to the
8 recognition of any individual right.

9 QUESTION: Well, I don't know why in the answer
10 you gave me why you just didn't repeat the same answer,
11 that's just not the kind of right that 1983 is talking
12 about.

13 MR. BARTEL: Well, because I wanted to distinguish
14 -- Morgan in particular I think since they rely so heavily
15 on it I'd like to emphasize that this case was not an
16 individual right-type case at all and that the actual
17 holding in the case was based solely on the national
18 interest served by the commerce clause.

19 The Court there stated that the reason the statute
20 was invalid not that it was based on the violation of
21 individual right but rather because the statute unduly
22 burdened interstate commerce because seating arrangements
23 for the different races in interstate motor travel require
24 a single uniform rule to protect and promote national
25 travel. Again, this is consistent with the -- consistent

1 recognition by the Court that the -- anything -- the
2 decision in commerce clause cases is not based on an
3 individual right, rather it is a national interest being
4 vindicated. And that is the basis for the Court's
5 decisions.

6 QUESTION: What about the right conferred upon a,
7 a businessman to be free from predatory practices by another
8 businessman? Is that a -- under the Sherman Act -- is that
9 an individual right or is that just a national interest?

10 MR. BARTEL: Well, of course, we're dealing here
11 with section 1983 --

12 QUESTION: I understand, but I -- I'm -- I don't
13 grasp the distinction. You draw a dichotomy between those
14 statutes and those provisions that seek to prevent --
15 protect private interests and those that seek to protect
16 national interests. But in fact, I thought every time
17 Congress passes a statute or the people enact a
18 constitutional provision, they're not doing it for the
19 selfish benefit of some individuals. Isn't there a national
20 interest behind every right that's conferred? I mean, you
21 always have some further good government objective to it,
22 don't they?

23 MR. BARTEL: Certainly, the Court has recognized
24 that the Constitution after all as a whole was designed to
25 be --

1 QUESTION: Sure. So -- so --

2 MR. BARTEL: (Inaudible) nation itself --

3 QUESTION: The commerce clause does indeed have
4 in mind free travel and what not, but in order to assure
5 that national interest it gives rights to particular
6 individuals to assert the right --

7 MR. BARTEL: But it --

8 QUESTION: -- just as the Sherman Act, in order
9 to get lower prices for all consumers, gives rights to
10 businessmen to sue for predatory practices.

11 QUESTION: But the critical question here though
12 is we're dealing with the interpretation of a statute passed
13 by Congress. And what did Congress mean when it used the
14 words "rights, privileges, or immunities secured by the
15 Constitution under section 1983," and we think that the
16 legislative history is revealed as to what Congress intended
17 when it enacted the 1871 Civil Rights Act.

18 QUESTION: Well, what you're saying is that they
19 intended some shadowy distinction between rights that have
20 a national interest and rights that don't have a national
21 interest and I'm just trying to fathom whether that
22 distinction makes enough sense that any rational person
23 could have had it in mind. I don't see the two.

24 What about -- what about the -- is there a private
25 right in the origination clause? Does that -- the

1 origination of the Constitution, does that confer a private
2 right which requires tax bills to be originated in the House
3 and we have allowed suits to be brought alleging taxes to
4 be unconstitutional when they are imposed under a taxing
5 statute that did not originate in the House but originated
6 in the Senate. Is that a private right in your mind or a
7 national right?

8 MR. BARTEL: Well, of course Munoz-Flores, as
9 cited by petitioner here, involved I believe the origination
10 clause and the precise question of whether the person there
11 had a right to bring the action. That of course revolves
12 on a consideration of separation of powers in that instance.
13 Now, perhaps because the separation of powers doctrine was
14 primarily designed as a prevention against tyranny, you
15 know, for individuals, then perhaps the Government --

16 QUESTION: You consider that a national right
17 then? That would be a national right, not a 1983-type
18 right?

19 MR. BARTEL: Certainly. It would not implicate
20 1983, but your question is is there some individual right
21 nevertheless, you know, obviously outside of 1983 because
22 it involves Federal action.

23 Again, to give -- to recognize the right of
24 individuals to challenge that kind of an action is based,
25 as I said, on probably a recognition that that type of

1 constitutional protection, separation of powers, serves a
2 very important function in the prevention of tyranny within
3 the branches of government, and it of course represents a
4 concern fundamentally different than the one we're raising
5 here simply is the -- the meaning of section 1983 again as
6 set forth in the legislative history of the act by its
7 principal sponsor and others and an understanding that not
8 all constitutional provisions were covered by the act's
9 rights, privileges, or immunities language.

10 In addition to Representative Shellabarger, who
11 I think's comments are highly relevant, we've also pointed
12 out that other Representatives and even -- and Senators at
13 the time of the passage of the act recognized the same
14 distinction between constitutional provisions that serves
15 to deal with the relationship between individuals and the
16 States, which were to be covered by the act, and the
17 constitutional provisions recognizing distinction between
18 the political powers between the States and the general
19 Government.

20 Now, clearly it would appear that the commerce
21 clause, although not specifically mentioned by
22 Representative Shellabarger, falls in the category of a
23 rights or a power-allocating provisions. And Representative
24 Hoar specifically mentioned the commerce clause in his
25 comments as we cited in your brief at page 36 and 37 in

1 distinguishing those from the types of personal rights to
2 be covered by the 1871 act. Senator Trumbull recognized the
3 same distinction, including a reference to interstate
4 commerce being a, a provision dealing with national
5 authority as opposed to an individual rights-granting
6 provision. We do not think that legislative history should
7 be lightly dismissed as petitioner would ask us to do here.

8 In addition to the Morgan case petitioner has also
9 relied almost heavily on Boston Stock Exchange v. State Tax
10 Commission. We submit that the reference in Boston Stock
11 exchange to a right to engage in interstate commerce it is
12 included within a discussion of the standing of the
13 exchanges to bring the act and talks about the adverse
14 effect, injury in fact, requirements that deal simply with
15 their standing to bring the action. And if you look at the
16 decision on the merits you will see that the actual basis
17 for the Court's finding the tax unconstitutional in that
18 case is an undue burden on interstate commerce focused on
19 the free-trade purpose, in other words the national interest
20 served by the, by the commerce clause and not the
21 recognition of any individual right possessed by the
22 exchanges.

23 The non-application of section 1983 to claims of
24 this nature we think is, is also demonstrated by some cases
25 decided by the Court shortly after the passage of the Civil

1 Rights Act in 1871. In 1885 again, the Carter v. Greenhow
2 case in which the Court distinguished between the language
3 and the Federal question statute, the broader arising under
4 the constitution language as opposed to the more limited
5 "rights secured by" language in section 1983. T h e
6 significance of that I think is that it recognized that
7 shortly after the act that not all constitutional violations
8 were intended to be within the scope of section 1983.

9 Again, Bowman v. Chicago and Northwestern Railway
10 Company, another 1885 decision, involved the claim on
11 commerce clause grounds that a State statute restricting
12 interstate delivery liquor violated the plaintiff's right
13 to engage in interstate commerce. The Court there indicated
14 that while that claim may be one arising under the
15 Constitution, it did not State a claim for the deprivation
16 of any rights secured by the Constitution.

17 We believe that there are additional
18 considerations that would militate against the Court's
19 expanding section 1983 to commerce clause litigation. The
20 major impact of section 1983 here would be simply to permit
21 a recovery of attorneys' fees. When Congress enacted the
22 attorney fee statute in 1976 to ensure effective access to
23 the courts, we find it difficult to believe that commerce
24 clause litigation was among the type of cases that Congress
25 was concerned was being denied effective access to the

1 courts, given the long history of commerce clause litigation
2 in the country.

3 QUESTION: Mr. Bartel, I think you suggest that,
4 because you really can't say Congress' purpose or that the
5 purpose of the Constitution was to confer private rights,
6 1983 doesn't cover it even if -- even if in order to affect
7 that purpose private individuals must be given a cause of
8 action.

9 MR. BARTEL: Well, again the basic premise is that
10 --

11 QUESTION: So it's the purpose, the purpose of
12 the clause, whether you can say that it's -- the purpose was
13 to give private rights or really just to vindicate a
14 national interest.

15 MR. BARTEL: You're saying the purpose of the
16 commerce clause?

17 QUESTION: Yes.

18 MR. BARTEL: The purpose we think indicates that
19 under the Golden State test that the constitutional
20 provision which they claim secures their right here was not
21 intended to confirm the type of specific benefit on
22 individuals participating in the marketplace recognizing
23 under section 1983.

24 QUESTION: Well, even if -- you can say -- even
25 if in order to effect the purpose that the, that the clause

1 has, you must allow individuals to sue and recover.

2 MR. BARTEL: Certainly, and individuals have
3 throughout the history of the Nation -- have done so.

4 QUESTION: Yes.

5 MR. BARTEL: And that indeed in this case, the
6 courts of Nebraska were open to them. It was not a
7 situation where they were being denied their remedy. The
8 question was whether their cause of action would be one
9 under section 1983 or whether they would have to pursue
10 their remedy under some other claim.

11 We've also suggested to the Court that if it
12 should find that claims under the dormant commerce clause
13 are actionable under section 1983 that a remand would be
14 appropriate because we feel that the implications of the
15 Tax Injunction Act have not been addressed here and that
16 they should be because they indicate that perhaps Congress
17 has established an alternative remedial scheme which has
18 precluded availability of sections 1983 and 1988 in this
19 particular class of cases.

20 In 1987 the Court in *Arkansas Writers' Project v.*
21 *Ragland* indicated that the question of whether State courts
22 must entertain section 1983 claims and State tax challenges
23 had not been decided. And 3 years -- 2 years prior to that
24 in *Spencer v. South Carolina Tax Commission* the Court had
25 affirmed on a 4-4 vote without opinion that a decision of

1 the South Carolina Supreme Court which denied attorneys'
2 fees in a claim in a State tax case based on the privileges
3 and immunities clause, we submit that perhaps that in the
4 event the Court should find that there is a cause of action
5 under section 1983 here, that a remand would be appropriate
6 to address the effect of the impact of section 1983 and 1988
7 in a State tax challenge.

8 If there are not further question, I have no
9 argument.

10 QUESTION: Thank you, Mr. Bartel.

11 Mr. Allen, do you have rebuttal?

12 REBUTTAL ARGUMENT OF RICHARD A. ALLEN

13 ON BEHALF OF THE PETITIONER

14 MR. ALLEN: Thank you, Mr. Chief Justice.

15 First, I'd like to respond to the contention that
16 United States v. Guest did not base the decision there on
17 the commerce clause. That's simply incorrect. Guest
18 squarely rested the violation, the alleged violation, of the
19 identical statutory language on the commerce clause at 383
20 U.S. at 758 the Court said, in Edwards v. the People of the
21 State of California invalidating a California law which
22 impeded the free interstate passage of an indigent, the
23 Court based its reaffirmation of the Federal right of
24 interstate travel upon the commerce clause. This ground of
25 decision was consistent with precedents firmly establishing

1 that the Federal commerce power surely encompasses the
2 movement in interstate commerce of persons as well as
3 commodities. And for that reason they upheld count four of
4 that indictment.

5 Second, with respect to the contention that Bowman
6 v. Chicago Northwestern Railroads somehow supports
7 petitioner, that's simply incorrect. Again, Bowman did not
8 -- did not hold that the commerce clause did not secure
9 rights under the Constitution. What the Court in Bowman
10 held was that the plaintiff's claim in the case against the
11 railroad was simply a State law claim. In other words, a
12 claim that the railroad was obliged by the State law of
13 common carriage to carry his commodities, and that's why the
14 Court rejected his claim and found that it did not fall
15 within the jurisdictional statute.

16 And an interesting contrast of Bowman, I think,
17 is a case around the same period which is one of the early
18 cases enforcing the dormant commerce clause against a
19 discriminatory State tax, and that's Guy v. Baltimore in 19
20 -- in 1879. And in that case, the Court struck down a
21 Baltimore worthage fee that was imposed only on ships that
22 came into Baltimore carrying out-of-State commodities. And
23 the court said if the prohibition against discriminatory
24 taxation were not in the commerce clause, "It is easy to
25 perceive how the power of Congress to regulate commerce with

1 foreign nations and among the several States could be
2 practically annulled" -- and this is the important part --
3 "and the equality of commercial privileges secured by the
4 Federal Constitution to citizens of the several States
5 materially abridged and impaired." Clearly the Court at
6 that time viewed the commerce clause as securing privileges
7 to the citizens of the several States.

8 Reference was made to remarks of other Congressmen
9 and particularly Congressman Hoar during the debates on
10 section -- on 1883. If you read Congressman Hoar's remarks,
11 basically he was engaging in a dissertation on the
12 Constitution and explaining how there were different types
13 of provisions, but there's nothing in his remarks that
14 suggest that he understood the proposed legislation as not
15 including rights under the commerce clause.

16 Finally I'd like to address briefly the
17 respondents' argument that if this Court recognizes that --

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Allen.
19 Your time has expired.

20 The case is submitted.

21 (Whereupon, at 11:53 a.m., the case in the above-
22 entitled matter was submitted.)
23
24
25

CERTIFICATION

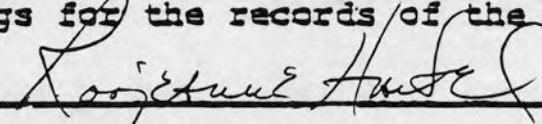
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#89-1555 - MARK DENNIS, Petitioner v. MARGARET L. HIGGINS, DIRECTOR

NEBRASKA DEPARTMENT OF MOTOR VEHIVLES, ET AL.

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