Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel

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NINE-HEADED CAESAR: THE SUPREME COURT'S THUMBS-UP APPROACH TO THE RIGHT TO TRAVEL

The requirement that [the Court's holdings make sense] is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.¹

—Justice Antonin Scalia

INTRODUCTION

In response to the Supreme Court's most recent episode in the continually changing Miranda doctrine, Justice Scalia compared the Court to an authoritarian ruler. That case, Dickerson v. United States,² declared a federal statute³ unconstitutional and affirmed Miranda v. Arizona⁴ by way of elevating Miranda to a constitutional rule. This despite the fact that, in the thirty-four years following Miranda, numerous cases have undermined Miranda's rationale by finding Miranda violations without finding constitutional violations.⁵ Faced with this situation, where Miranda could not be reconciled with its progeny, Justice Scalia could not join the Court in deciding "that incoherence is [a] lesser evil" than upholding a democratically enacted federal statute and harmonizing the Miranda doctrine.⁶ In the aftermath of Dickerson, the Miranda doctrine makes less sense than it did before.

The Miranda doctrine does not corner the market on doctrinal incoherence. Saenz v. Roe⁷ is the latest installment in the Court's highly confused right-to-travel jurisprudence. Over the last 130 years, the Court has consistently struck down state statutes infringing

² 120 S. Ct. 2326 (2000).
⁴ 384 U.S. 436 (1966) (holding, as a precondition to admissibility, that Miranda warnings must be read to a suspect before any incriminating statement given in custodial interrogation).
⁵ See Dickerson, 120 S. Ct. at 2340-42 (Scalia, J., dissenting) (discussing post-Miranda cases that carved out exceptions to Miranda).
⁶ Id. at 2343.
the right to travel. Although the Court has stated numerous times that the "right finds no explicit mention in the Constitution," the Constitution's omission of the term "travel" has not posed such a tremendous intellectual challenge that the right has not received protection. The challenge has been great enough, however, that the Court has continually equivocated as to the textual source for the right. Throughout the Court's right-to-travel jurisprudence, various Justices have embraced no less than ten different clauses of the Constitution, each with its own distinct method of analysis, as protecting the right to travel. In fact, some Justices have, at times, implied that the search for a textual source is superfluous. Such continuous equivocation by the Court has amounted to a dereliction of its duty to properly interpret the Constitution.

Out of this morass of the right to travel, constitutional clauses, and shifting justifications came Saenz v. Roe. Saenz involved a California statute limiting welfare benefits to residents of less than twelve months. As the Court attempted to align all of its Commerce Clause jurisprudence in United States v. Lopez, Justice Stevens similarly attempted in Saenz concerning the right-to-travel cases. The Court held that the right to travel is composed of three separate aspects, each protected by a different constitutional theory or clause. Therefore, Saenz represents the Court's first thorough attempt to reconcile the right to travel with the text of the Constitution. In numerous preceding cases, the Court had simply stated that the right exists with little or no explanation of why the Constitution protects the right to travel. What is more surprising is that the Court's conclusory protection of the right has not been uniform—that is, many different clauses have been advanced as the source of the right. Unfortunately, the Saenz Court was unable or unwilling to fully deal with the right to travel and the Constitution's text. Instead, the Court muddled the already murky waters of right-to-travel jurisprudence.

This Note examines the right to travel as the Supreme Court has interpreted it and argues that the privileges and immunities clauses of

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9 See Zobel v. Williams, 457 U.S. 55, 66 (1982) (Brennan, J., concurring) ("[T]he frequent attempts to assign the right to travel some textual source in the Constitution seem . . . to have proved both inconclusive and unnecessary."). Judge Bork is highly critical of such judicial nonchalance regarding the text of the Constitution:

The only accountability these "robed masters" should have is to the meaning of the Constitution, a meaning discerned by study of its text, structure, and history. If justices ignore those constraints, as many of them do, they govern according to their own tastes, and we have no way of resisting or altering the ukases they hand down. .

. . . [T]he rule of judges without any plausible reference to the Constitution can hardly be called legitimate in a nation that was designed to be basically democratic.
10 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").
the Comity Clause and the Fourteenth Amendment protect an overarching right to travel. Section I traces the Court’s right-to-travel jurisprudence and the evolution of that right through the Court’s decision in Saenz. Section II examines and rejects a variety of constitutional provisions that have been put forward as sources of the right to travel. Section III examines the origins and meaning of the Comity Clause and the Privileges and Immunities Clause of the Fourteenth Amendment and argues that these clauses protect the right to travel. Additionally, Section III offers a test for determining whether the right to travel has been abridged. Finally, this Note concludes by urging the Supreme Court to reexamine its right-to-travel jurisprudence. The Court must place the right within the appropriate constitutional provisions and fashion an analysis in conformity with those provisions. Until that time, the Court will continue as a nine-headed Caesar, employing convoluted analyses to strike down state laws as abridgements of the right to travel.

I. THE SUPREME COURT’S RIGHT-TO-TRAVEL JURISPRUDENCE

A. The Right Recognized

Initially, the Supreme Court viewed the right to travel as an implied general principle of the Constitution. In Crandall v. Nevada, the Court passed judgment on the constitutionality of a state tax upon persons leaving or passing through Nevada by public conveyance. In declaring the Nevada law unconstitutional, Justice Miller, writing for the Court, was less than clear as to whether the law abridged congressional power to regulate commerce. The Court was equally equivocal on whether the state had violated Article I, section 10 by laying a duty on an export.

Instead of relying on any specific constitutional language, the Crandall Court relied on the general principles of the Constitution to strike down the Nevada law. Justice Miller characterized the people of the United States as “one nation... [with] a government in which all of them are deeply interested.” As one nation, each citizen

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12 73 U.S. (6 Wall.) 35 (1867).
13 See id.
14 See id. at 41-43 (“Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain... that it violates the [Commerce] clause...”).
15 See id. at 40-41 (“The application of this provision of the Constitution to the proposition which we have stated in regard to the citizen, is still less satisfactory than it would be to the case of foreigners migrating to the United States.”). See also U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws...”).
16 Crandall, 73 U.S. (6 Wall.) at 43.
has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. [Each] has a right to free access to its sea-ports . . . to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States.\textsuperscript{17}

Justice Miller emphasized, as the final declaration of a general principle to travel, that the right to engage in the aforementioned activities was “independent of the will of any State over whose soil he must pass in the exercise of it.”\textsuperscript{18}

Similarly, the Court struck down a California statute limiting individuals’ right to cross state lines in \textit{Edwards v. California}.\textsuperscript{19} California had imposed a criminal penalty for knowingly bringing or assisting an indigent non-resident person into the state.\textsuperscript{20} With little discussion, the Court held that the prohibition was not within the police powers of the state and that it posed an unconstitutional barrier to interstate commerce.\textsuperscript{21} In support of this conclusion, the Court quoted Justice Cardozo: “The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”\textsuperscript{22}

In separate concurring opinions, Justices Douglas and Jackson expressed disdain for the Court’s reliance on the Commerce Clause, arguing that the Commerce Clause relates only to goods, not persons, and that the right to move freely from state to state is “fundamental.”\textsuperscript{23} Citing \textit{Crandall}, Justice Douglas contended that the right to move freely throughout the nation was an implied right of national citizenship, emphasizing that the right’s implied nature “did not make it any the less ‘guaranteed’ by the Constitution.”\textsuperscript{24} Justice Jackson argued that the right was incident to a person’s citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment.\textsuperscript{25}

\textsuperscript{17} Id. at 44.
\textsuperscript{18} Id.
\textsuperscript{19} 314 U.S. 160 (1941).
\textsuperscript{20} See id. at 165-66.
\textsuperscript{21} See id. at 172-73.
\textsuperscript{22} Id. at 173-74 (quoting Baldwin v. Seelig, 294 U.S. 511, 523 (1935)).
\textsuperscript{23} See id. at 177 (Douglas, J., concurring); id. at 182 (Jackson, J., concurring).
\textsuperscript{24} Id. at 178.
\textsuperscript{25} See id. at 182 (Jackson, J., concurring). The Fourteenth Amendment states, in relevant part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.
The Court reasserted the fundamental nature of the right to travel in *United States v. Guest*.

*Guest* involved a private conspiracy to prevent black citizens from using the state highways. The Court held that the district court had erred in dismissing part of the indictment, as it alleged that the right to travel to use highway facilities had been infringed. Justice Stewart, writing for the Court, stated that "[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union." Justice Stewart relied on *Crandall* and *Edwards* to support the Court's protection of a right unmentioned in the Constitution, arguing that the "right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.

Thus, by 1966, the Court had confronted the fundamental problem with a "constitutional" right to travel—namely, that it is nowhere mentioned in the Constitution. The Court solved this problem by declaring the right fundamental, finding that the Constitution's framers had implied the right. The inadequacy of this solution was soon demonstrated when the Court altered its approach to the right to travel.

**B. The Right Reevaluated**

Shortly after *Guest*, the Court altered its approach to the right to travel while simultaneously reaffirming the right's fundamental nature. *Shapiro v. Thompson* involved several states' complete denial of welfare assistance to persons residing in those states for less than one year. In determining what constitutional right was implicated by the denials, Justice Brennan focused on the distinction the statutes drew between two types of residents, those of more than one year and those of less. Such distinctions, he reasoned, denied equal protection of the laws by creating a "chilling effect on the right to travel." Justice Brennan refrained from finding a textual source for the right to travel and quoted *Guest* to the effect that the right was necessarily implied. Despite the lack of a textual source for the right and the right's fundamental nature, the Court altered its right-to-travel analysis. The Court analyzed the statutes under the Equal Protection Clause of the Fourteenth Amendment. This analysis, however, did

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27 See id. at 757.
28 Id.
29 Id. at 758.
31 See id. at 627.
32 Id. at 623.
33 See supra text accompanying note 28.
not employ traditional equal protection analysis, which focuses on classifications created by statutes. Instead, the Court applied the fundamental rights analysis first espoused in *Skinner v. Oklahoma*.

This fundamental rights analysis, a relatively new addition to the Court's equal protection jurisprudence, consists of three questions. First, is there a fundamental right at issue? Second, does the state law penalize the exercise of that fundamental right? Third, does the state have a compelling interest in penalizing the exercise of the fundamental right? If the first two questions are answered affirmatively, but the answer to the third question is negative, the statute must be deemed unconstitutional.

In answering these questions, the Court struck down the statutes at issue in *Shapiro*. In addressing the first question, Justice Brennan concluded that the Court's precedent had consistently held that the right to travel is fundamental, notwithstanding the Constitution's silence on the issue. By denying welfare assistance to new residents, the statutes served to penalize those who were considering exercising the right or who had done so in the previous twelve months. At this point, precedent dictated that the Court declare the statutes unconstitutional. Fundamental rights analysis, however, allows states to justify the penalty as long as the penalty served a compelling interest. Several justifications were offered for the challenged statutes, namely that they: (1) served as a protective device to preserve the fiscal integrity of the public assistance program; (2) facilitated efficient welfare budget planning; (3) provided an objective test of residency; (4) protected against recipients who received benefits from more than one state; and (5) encouraged new residents to enter the job market. The Court dismissed all of the justifications as unfounded or illegitimate, essentially because the need for subsistence welfare was more important. The Court held that public assistance benefits, because they implicate the very means to subsist, were a right and not merely a

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34 See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the incarceration and dispossession of all persons of Japanese ancestry on the West Coast).
35 316 U.S. 535 (1942) (holding that the right to procreate was fundamental and therefore a state statute authorizing the sterilization of certain criminals was unconstitutional).
36 See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 640-44 (1997) (analyzing each of the three questions raised by fundamental rights analysis).
37 See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (collecting cases consistent with this principle).
38 See id. at 629 (noting statute's purpose of "inhibiting migration of needy persons into the State is constitutionally impermissible").
39 See id. at 627. This compelling governmental interest test is otherwise known as strict scrutiny. The *Shapiro* Court failed to address the rationale for the strict scrutiny test other than by finding that the right affected was fundamental. See Stewart Abercrombie Baker, Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1136 (1975) ("The Court did not reveal why this waiting period invoked strict scrutiny.").
40 See *Shapiro*, 394 U.S. at 627-34.
In the end, statutes penalizing the right could not be justified because the right was fundamental.

In his dissent, Justice Harlan declared this new fundamental rights branch of the Equal Protection Clause "particularly unfortunate and unnecessary." The approach was untenable because extending protection to rights not enumerated in the Constitution threatened to transform the Court into a "super-legislature." Furthermore, because fundamental rights are protected by the Due Process Clause of the Fourteenth Amendment, resort to the Equal Protection Clause is unnecessary. Justice Harlan’s criticism was prescient because, for some time following, the Court’s application of fundamental rights analysis would "swallow" the standard equal protection rule with regards to the right to travel.

The analysis began to swallow not only the standard equal protection rule, but the entire Constitution in Dunn v. Blumstein. In Dunn, the Court was faced with a Tennessee state law establishing a durational residency requirement for voting. While the Fifteenth Amendment concerns the right to vote, the Amendment’s protection is limited to prohibiting classifications based on race, color, or previous condition of servitude, and is not implicated by a simple durational residency requirement. Therefore, the Court employed a fundamental rights analysis to examine the law. The Court summarily held that the opportunity to vote and the right to travel were both fundamental rights. Since the classification distinguished between new and old residents, it denied individuals the opportunity to vote, and thereby penalized the right to travel. The State argued that there was no showing that the residency requirement deterred the right to travel. Speaking for the Court, Justice Marshall rebuffed the State’s argument by claiming that Shapiro did not rest upon a finding of ac-

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41 See id. at 627.
42 Id. at 661 (Harlan, J., dissenting).
43 Id. Cf. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); Poe v. Ullman, 367 U.S. 497, 506 (1961) ("It never was the thought that... a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.") (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 344-45 (1957)).
44 See Shapiro, 394 U.S. at 661-62 (noting the Court's tendency to characterize activities as fundamental and hold them to a stricter standard).
46 See U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
47 See Dunn, 405 U.S. at 335 (holding that both "the opportunity to vote" and "recent interstate travel" can only be restricted when justified by a compelling state interest).
48 See id. at 334-35.
49 See id. at 339.
Rather, Shapiro stood for the proposition that "any classification which serves to penalize the exercise of that right [to travel]" would require the state to justify the classification by a compelling governmental interest. Hence, the statute would be declared unconstitutional unless Tennessee offered a compelling governmental interest for penalizing the right.

Tennessee asserted two justifications for its durational residency requirement, namely to ensure purity of the ballot box and to ensure that voters were knowledgeable regarding their community. The Court found neither justification persuasive. Justice Marshall reasoned that voter registration accompanied by an oath of allegiance would be sufficient to insure the purity of the ballot box. As to ensuring knowledgeable voters, Justice Marshall reasoned that the State's attempt to create a common interest in the community was impermissible because a difference of opinion was not a legitimate basis for excluding voters. Thus, Tennessee's durational residency requirement was an unconstitutional penalty of the right to travel.

The Court continued its expansive protection of the right to travel in Memorial Hospital v. Maricopa County. In that case, an Arizona statute required residents to live in a county for one year before becoming eligible for free non-emergency hospitalization or medical care. The Court held that the right to receive free medical care was a basic life necessity and therefore fundamental. Because temporarily withholding the right to medical care penalized the right to travel, Arizona was required to delineate a compelling governmental interest served by the statute.

In previous cases, the Court had rejected, as either unfounded or illegitimate, the justifications being asserted by Arizona. Edwards held that inhibiting indigent immigration was impermissible. Dunn declared durational residency requirements overinclusive when employed as convenient tests for bona fide residency. Finally, Shapiro rejected the justifications of protecting the fiscal integrity of public

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50 See id.
51 Id. at 339–40 (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).
52 See id.
53 See id. at 345–46.
54 See id. at 346, 358 (dismissing the requirement as unnecessary to achieve either justification).
55 See id. at 346.
56 See id. at 355.
58 See id. at 252-53.
59 See id. at 259 ("[G]overnmental privileges or benefits necessary to basic sustenance have... greater constitutional significance.").
60 See id. at 258-59.
assistance programs, preventing fraud, and rewarding contributions made by longtime residents.\(^{63}\)

In his dissent in *Memorial Hospital*, Justice Rehnquist stated that the Court's characterization of the case as a penalty on the right to travel was preposterous.\(^{64}\) He argued that there was no constitutional right to non-emergency medical care and hospitalization—the real issue in the case.\(^{65}\) Instead, the Court, by claiming that a person's right to travel is burdened by such legislation, required that states who extend services to anyone must extend those services to everyone.\(^{66}\) This right—"insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents"—did not have a textual basis in the Constitution.\(^{67}\) Instead, the Court simply asserted that "[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom."\(^{68}\)

### C. The Right Revised

By 1974, it seemed as though no state law distinguishing between new and old residents could satisfy the Court's exacting analysis regarding the right to travel. Nevertheless, the post-*Memorial Hospital* Court appeared to treat such distinctions more tolerantly, thereby allowing some state restrictions to stand. This appearance, however, proved to be deceiving in that right-to-travel analysis continued to nullify many state laws. Regardless, the post-*Memorial Hospital* cases demonstrated three changes in the Court's analysis. First, the Court lowered its standard of review from strict scrutiny to mere rationality, thus allowing a few laws to survive. Second and thereafter, the Court's application of mere rationality became erratic. Third, some members of the Court reinvigorated the search for a textual source of the right.

*Sosna v. Iowa*\(^{69}\) first signaled the Court's changing analysis. In *Sosna*, Justice Rehnquist, writing for the Court, upheld a one-year Iowa residency requirement before residents could file for divorce. Under the *Shapiro* line of cases, the statute would have been declared unconstitutional.\(^{70}\) Instead, Rehnquist reasoned that domestic rela-


\(^{65}\) See *id.* at 282-83.

\(^{66}\) See *id.* at 278.

\(^{67}\) Id. at 280.

\(^{68}\) Id. at 254.

\(^{69}\) 419 U.S. 393 (1975).

\(^{70}\) Justice Marshall said as much in his dissent: "The Court omits altogether what should be the first inquiry: whether the right to obtain a divorce is of sufficient importance that its
tions had always been within the exclusive province of state governments and that the requirements regarding domestic relations were beyond the Court’s scope of inquiry.\footnote{See id. at 404 ("[S]tatutory regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states.").}

Not only did the Court defer to the Iowa legislature’s exclusive domain over domestic relations, the Court preferred not to characterize the statute as a penalty on the right to travel. In analyzing the right-to-travel precedents, Justice Rehnquist declared that “none of those cases intimated that the states might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed.”\footnote{Id. at 406.} Because the waiting period only delayed access to the courts, which was seen as a benefit rather than a fundamental right,\footnote{See id.} the statute could be justified by a showing of mere rationality.

Iowa’s three justifications were all accepted by the Court, including a justification the Court had previously determined illegitimate. First, delaying the benefit kept Iowa from intermeddling in matters in which another state had a paramount interest.\footnote{See id. at 407.} Second, delaying the benefit minimized the susceptibility of Iowa’s divorce proceedings to collateral attack.\footnote{See id. at 408.} Third, the delay served budgetary considerations and administrative convenience.\footnote{See id. at 409.} The Court’s acceptance of budgetary concern and administrative ease signaled the Court’s newfound toleration of state statutes affecting the right to travel and a possible rejection of Shapiro’s fundamental rights analysis. Sosna, however, would prove to be the exception to the old right-to-travel rule.

In Sosna, the Court had signaled a departure from Shapiro and a newfound interest in entertaining state justifications for laws distinguishing between residents. The Court lowered the standard of review from the seemingly insurmountable “compelling state interest” test to mere rationality. In Zobel v. Williams,\footnote{457 U.S. 55 (1982).} the Court affirmed the departure but showed that the application of mere rationality would be erratic. Additionally, one member of the Court attempted to place the right to travel within the text of the Constitution.\footnote{See id. at 73 (O'Connor, J., concurring).}

The state law struck down in Zobel distributed income to Alaska residents based upon their length of residency. The statute was distinguishable from those previously confronted by the Court in three denial to recent immigrants constitutes a penalty on interstate travel. In my view, it clearly meets that standard.” Id. at 419 (Marshall, J., dissenting).
respects. First, instead of creating two classes of residents, new and old, the Alaska statute created numerous classes by distributing the benefit according to the number of years a person had been an Alaska resident. Second, newer residents could never achieve equal status with older residents but would always be classified as newer residents because the level of benefits was graduated according to years of residency. Third, the statute did not penalize travel, in that it benefited those who had traveled earlier or had never traveled at all by increasing their yearly benefit.

The Court declared the law unconstitutional even though the third distinguishing factor—that the statute did not penalize the right to travel—probably would have allowed the statute to withstand mere rationality scrutiny under Sosna. Instead, Chief Justice Burger began the Court’s analysis by stating, “[w]hen a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.” Chief Justice Burger reasoned that because the unequal benefits are based on distinctions made between newcomers and longer-term residents, the right to travel is penalized. Even though the Court’s opinion mentioned the right to travel only in a footnote, Justice O’Connor’s concurring opinion stated that the Court’s analysis was based on the abridgement of the right to “interstate travel or migration.”

Under mere rationality, Alaska only needed to show that the distinctions were rationally related to a legitimate state purpose. Alaska put forth three justifications: (1) the distinction created a financial incentive for existing residents to remain and for non-residents to become residents; (2) the distinction was based on the prudent financial management of the fund responsible for distributing the benefit; and (3) benefits were apportioned in accordance with past contributions made during the years of residency. The Court held that the first two justifications were not rationally related to any governmental objective since they were belied by the fact that persons residing in the state twenty-one years prior to the statute’s enactment were given higher benefits. Until the statute went into effect, those residents had no incentive to remain and prudent management was not a factor. The third justification, apportioning benefits to past contributions, had already been rejected by the Court in Shapiro. In this context, the Chief Justice asked: “Could states impose different taxes based on length of residence? Alaska’s reasoning could open the door to state

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79 Id. at 60.
80 See id. at 60 n.6.
81 Id. at 72 (O’Connor, J., concurring).
82 See id. at 61.
83 See id. at 61-62.
apportionment of other rights, benefits, and services according to length of residency.85

Although Chief Justice Burger stated that Alaska needed to show mere rationality to justify the distinctions, the application of the standard appeared more stringent. For example, creating an incentive to remain a resident is rationally related to the distinction between those who were residents in 1959 and those who became residents thereafter. Alaska made the statute retroactive giving larger benefits to those who were residents in 1959, the first year of Alaska’s statehood.86 Granting larger benefits to those residing in the state at the time of and since its admission to the Union is more rationally related to their remaining residents than lumping residents from 1959 with residents as of 1980, the year of the statute’s enactment. Lumping pre-statehood residents together with new residents twenty-one years later disregards the entire history of the state and of those who helped Alaska become a state.

In a concurring opinion, Justice O’Connor criticized the Court’s application of the Equal Protection Clause of the Fourteenth Amendment to the statute. She argued that “[t]he Court’s task . . . should be (1) to articulate this constitutional principle, explaining its textual sources and (2) to test the strength of Alaska’s objective against the constitutional imperative.”87 Attempting to articulate the constitutional principle, Justice O’Connor characterized the Alaska statute as denying newly arrived Alaska residents the same privileges granted to longer-term residents.88 Therefore, the statute implicated the Privileges and Immunities Clause of Article IV, section 2 of the Constitution—the Comity Clause.89 Justice O’Connor maintained that this textual source should be the basis for all right-to-travel claims.90

The Comity Clause “‘insure[s] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.’”91 Under this clause, the Court engages in a three-part test. First, the Court will inquire into whether the “nonresident sought to engage in an essential activity or exercise a basic right.”92 Second, the state statute must be aimed at eradicating a particular source of

85 Zobel, 457 U.S. at 64 (1982).
86 See id. at 57.
87 Id. at 73 (O’Connor, J., concurring).
88 See id.
89 U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
90 See Zobel, 457 U.S. at 74 (O’Connor, J., concurring) (“[T]his analysis supplies a needed foundation for many of the ‘right to travel’ claims discussed in the Court’s prior opinions.”).
91 Id. at 74 (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).
evil posed by the nonresident's activity in the state. Third, the evil
must be substantially related to the discrimination practiced against
the nonresident.

Applying this test to Alaska's statute, Justice O'Connor deemed the
Alaska statute unconstitutional. First, the right at issue was funda-
mental, the right of nonresidents to choose to settle in Alaska. Second, the statute was not aimed at nonresidents as a source of evil; rather, the statute was aimed at encouraging nonresidents to become
new residents and remain. Third, because the statute was not aimed
at a source of evil, there was no substantial relationship between the
statute and the discrimination. Therefore, O'Connor concurred in
the judgment because she believed that the statute violated the Com-
ity Clause rather than the Equal Protection Clause of the Fourteenth
Amendment.

Justice O'Connor's attempt to place the right to travel within the text
of the Constitution was not joined by any other members of the Court.
Justice Rehnquist, the only other member of the Court who did not
join Zobel's rationale, dissented, arguing that the Alaska statute
passed mere rationality under the Equal Protection Clause. Addition-
ally, he argued that the Comity Clause was not applicable to distinc-
tions drawn between current residents of a state. It was clear that no
member of the Court was sympathetic to O'Connor's attempt to re-
invigorate the search for the right's constitutional home.

In Hooper v. Bernalillo County Assessor, the Court was given
the opportunity to adopt O'Connor's textual rationale for right-to-
travel cases or adopt an equally persuasive one of its own. Instead,
the Court reverted to Shapiro and reaffirmed its equal protection
analysis regarding the right. In Hooper, a New Mexico statute
granted a tax exemption to Vietnam veterans residing in the state be-
fore May 1976. The statute did not employ a durational residency
requirement before new residents could receive the benefit. Instead,
the statute created a fixed, permanent distinction between Viet-

93 See, e.g., Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978) (finding no peculiar source of
evil to Alaska's high unemployment posed by non-residents).
94 See id. at 527 (finding no relationship between Alaska's high unemployment and a
legislatively mandated hiring preference for Alaska residents, whether employed or not).
95 See Zobel, 457 U.S. at 76-77 (O'Connor, J., concurring) ('It is difficult to imagine a
right more essential to the Nation as a whole than the right to establish residence in a new
State.
96 See id. at 77-78.
97 See id. at 78.
98 See id. at 81-83 (Rehnquist, J., dissenting) ("[T]he [Comity] Clause has no application
to a citizen of the State whose laws are complained of.") (citing The Slaughter-House Cases, 83
U.S. (16 Wall.) 36, 77 (1873)).
100 See id. at 614.
101 See id. at 616-17.
nam veterans who established residency in the state prior to May 1976 and all other residents.\textsuperscript{102}

Accordingly, the Court examined the statute under the mere rationality test of the Equal Protection Clause.\textsuperscript{103} The Court found no legitimate state goal rationally related to the distinction between veterans residing in the state as of May 1976 and all others.\textsuperscript{104} The major flaw of the statute was its service as a "continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life."\textsuperscript{105} This continuing bounty justification closely mirrors the past contribution justifications rejected by the Court in \textit{Zobel}.\textsuperscript{106} According to the statute, those who served the country by military service during the Vietnam War and resided in New Mexico as of May 1976 were granted permanent tax exemptions because of their service. Those veterans who resided in New Mexico after May 1976 were denied the exemption presumably because their military service contributed less to New Mexico than did the service of those who were residents as of May 1976.\textsuperscript{107} Because the statute was not rationally related to any legitimate governmental interest, the law was unconstitutional.

\textit{Hooper} dispelled any hope sparked by Justice O'Connor's concurring opinion in \textit{Zobel} that the Court would attempt to place the right to travel within the text of the Constitution. The Court firmly relied on equal protection analysis without declaring or explaining the source of the right,\textsuperscript{108} while Justice O'Connor simply joined in Justice Stevens's dissent.\textsuperscript{109} In dissent, Justice Stevens did not urge the Court to adopt a different test, but merely argued that New Mexico's statute passed the mere rationality test and therefore should have been upheld as constitutional.\textsuperscript{110}

\textsuperscript{102} See id. at 618 n.6.
\textsuperscript{103} As in \textit{Zobel}, the Court did not explicitly denote this case as a right-to-travel case except in a footnote. See id. ("[R]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents. This case involves a distinction between residents based on when they first established residence in the State. Following \textit{Zobel}, we subject this case to equal protection analysis.") (citations and internal quotation marks omitted).
\textsuperscript{104} See id. at 619-22.
\textsuperscript{105} Id. at 621.
\textsuperscript{106} See \textit{Zobel} v. Williams, 457 U.S. 55, 64 (1982) ("Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.").
\textsuperscript{107} See \textit{Hooper}, 472 U.S. at 622-23 ("The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for the 'past contributions' toward our Nation's military effort in Vietnam.").
\textsuperscript{108} See id. at 618 ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").
\textsuperscript{109} See id. at 624 (Stevens, J., dissenting).
\textsuperscript{110} See id. at 624-33.
D. The Right Retooled

Beginning with Shapiro, the right to travel appeared firmly embedded in the Equal Protection Clause of the Fourteenth Amendment. The future of state laws drawing distinctions among residents by their length of residence seemed clear. The Court would apply equal protection analysis, thereby requiring states to show that the statute was rationally related to a legitimate government interest. Even though mere rationality is a low standard of scrutiny, most state laws would fail under the Court’s analysis.

Nevertheless, the Court changed everything in Saenz v. Roe by completely altering its right-to-travel analysis. Saenz involved a California statute limiting welfare benefits to residents of less than twelve months. The maximum amount new residents could receive was the amount they would have received in their prior state of residence. The statute was distinguishable from previous unconstitutional statutes in two respects. First, the statute did not completely deny benefits during the durational residency requirement as did the statutes in Shapiro, Dunn, and Blumstein. Second, the statute did not create fixed, permanent distinctions between new and established residents as did the statutes at issue in Zobel and Hooper.

These distinctions did not prove dispositive, however, as the Court declared the statute unconstitutional. Justice Stevens, writing for the Court, began the analysis by stating: “The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” Stevens continued, stating that the right is “a virtually unconditional personal right, guaranteed by the Constitution to us all.”

After affirming the right’s fundamental nature, Justice Stevens radically altered the right-to-travel analysis by conforming the conflicting cases into three categories of constitutional protection. The first category of the right to travel was “the right of a citizen of one State to enter and to leave another State.” This right, the right to pass through a state, was expressed and protected in Edwards and Guest. Stevens denied the need to “identify the source of that particular right in the text of the Constitution.” The second category

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112 See id. at 492.
113 See id.
114 Id. at 498 (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).
115 Id. (quoting Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)).
117 Saenz, 526 U.S. at 500.
118 Id. at 501.
of the right to travel was "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State."119 This second component of the right to travel, the right to visit another state, was held to be expressly protected by the Comity Clause.120 The Court affirmed this right in Baldwin v. Fish & Game Commission121 and in Vlandis v. Kline.122

The third component of the right to travel was "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."123 In finding a textual source for this component of the right to travel, the right to migrate to another state, Stevens claimed that the right was protected by the newly arrived citizen's status as a citizen of the United States.124 The Citizenship Clause125 and Privileges or Immunities Clause126 of the Fourteenth Amendment work in conjunction to protect this aspect of the right to travel.127 Justice Stevens claimed that "it has always been common ground that [the Privileges or Immunities] Clause protects the third component of the right to travel."128 In support of this claim, he cited the Slaughter-House Cases.129 Because a newly arrived citizen is doubly protected under the Privileges or Immunities Clause, the result of state and national citizenship, the Court would apply strict scrutiny similar to that applied in Shapiro.130

119 Id.
120 See id.
121 436 U.S. 371, 390-91 (1978) (upholding a state law requiring nonresidents to pay more than residents for a hunting license).
122 412 U.S. 441, 445 (1973) (upholding a state law requiring nonresidents to pay more than residents for college tuition).
123 Saenz, 526 U.S. at 502.
124 See id.
125 U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").
126 U.S. CONST. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").
127 See Saenz, 526 U.S. at 502 n.15 ("The [Fourteenth] Amendment's Privileges or Immunities Clause . . . guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.").
128 Id. at 503.
129 83 U.S. (16 Wall.) 36 (1873). Stevens's reliance on Slaughter-House is peculiar, in that Slaughter-House interpreted the Privileges or Immunities Clause as protecting rights already in the Constitution, and therefore, adding no new protections. See id. at 71. See also ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 37 (1990) ("The privileges and immunities clause, whose intended meaning remains largely unknown, was given a limited construction by the Supreme Court and has since remained dormant."). Bork argues that the clause "has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter." Id. at 166. Bork's viewpoint on the Privileges or Immunities Clause, however, is not the only position taken in legal scholarship. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 22 (1980) ("[T]here is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless.").
130 See Saenz, 526 U.S. at 504.
California attempted to save the statute by offering an entirely fiscal justification. By capping welfare benefits for a new resident’s first year, California would save millions of dollars annually.\footnote{See id. at 506.} Resorting to strict scrutiny, however, the Court did not ask whether this fiscal savings justification was legitimate but rather whether California may accomplish such savings by discriminating against new residents. The Court held the discriminatory means impermissible under the Citizenship Clause.\footnote{See id. at 506.} Accordingly, the California statute was held unconstitutional.\footnote{See id. at 507-08.}

After Saenz, the Constitution still does not explicitly mention the right to travel. Notwithstanding this constitutional silence, current Supreme Court jurisprudence protects three newly-styled components of the claimed right. The Court has conceded that one component is not comprehended by the Constitution’s language, and the other two are protected by, as the Court understands them, distinct clauses. Even though the Comity Clause has always been in the text of the Constitution, it was not recognized as a source of the right until 1982, and then only by one member of the Court.\footnote{See Zobel v. Williams, 457 U.S. 55, 69 (1982).} The Privileges or Immunities Clause was ratified in 1868 and asserted as the source in 1941, and then only by one member of the Court.\footnote{See Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring) (“I do not ignore or belittle the difficulties of what has been characterized by this Court as an ‘almost forgotten’ clause.”).} It was not until 1999 that a majority of the Court asserted the clause as a source of the right.\footnote{See United States v. Guest, 383 U.S. 745 (1966); Edwards, 314 U.S. at 160.} Even more alarming, the third component is not protected by the text of the Constitution, but by the Court’s precedent only.\footnote{See Saenz, 526 U.S. at 489.}

Has the Court honored its duty to interpret the Constitution in a way that makes sense in creating an intricate and unclear right-to-travel analysis? It has not. But this is not to say that the Constitution does not protect a right to travel. Rather, this is to say only that the Court should clearly and logically spell out how the Constitution protects this right. If it is unable to do so, the Court risks the appearance of being motivated to substitute its own will for that of state legislatures. It is that appearance—the Court as “nine-headed Caesar”—that threatens to subvert the very nature of our democratic system.

\footnote{See Zobel v. Williams, 457 U.S. 55, 73 (1982) (O’Connor, J., concurring).}

\footnote{See id. at 507-08. The Court further considered whether congressional approval of the California statute restored the constitutionality of the statute by way of Congress’s power under Section 5 of the Fourteenth Amendment, which states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5. The Court held that Congress did not have the power to “validate a law that denies the rights guaranteed by the Fourteenth Amendment.” Saenz, 526 U.S. at 508.}
II. FRUITLESS SEARCHES FOR THE RIGHT TO TRAVEL

It is not surprising that scholars, like the Court, have struggled with the right to travel and its constitutional source. In all, the Court and scholars have asserted no less than ten possible sources for the right: the Commerce Clause, the Comity Clause, the First Amendment, the Due Process Clause of the Fifth Amendment, the Ninth Amendment, Implied Fundamental Rights, and the Citizenship, Privileges or Immunities, Equal Protection and Due Process Clauses of the Fourteenth Amendment. Justice Douglas, the most outspoken member of the Court in support of the right to travel, is representative of the controversy. Throughout the years, Douglas traced the right to a variety of sources: the Privileges or Immunities Clause of the Fourteenth Amendment,138 the Due Process Clause of the Fifth Amendment,139 the penumbra of the First Amendment,140 and, as a matter of inference, from a combination of the Comity Clause, the Privileges or Immunities Clause of the Fourteenth Amendment, the Commerce Clause, the Due Process Clauses of the Fifth and Fourteenth Amendment, and from the very nature of the Federal Union.141 This Section discusses many of these clauses and the arguments supporting them as a source for the right to travel. It concludes that the arguments are historically incorrect, unpersuasive, or ambiguous at best.

A. The Commerce Clause

The Commerce Clause states that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."142 This clause has never been relied upon as the exclusive source for the right to travel. Instead, on those occasions where the Court has searched for the right's source, the Commerce Clause has been cited, though never definitively, in support of a right to travel.143

The use of the Commerce Clause as the source for the right to travel, no matter which aspect of travel is at issue, suffers from several critical defects. First and foremost, commerce, understood as intercourse in commodities, is vastly different from the movement of

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142 U.S. CONST. art. I, § 8, cl. 3.
143 See Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43 (1867) (discussing the applicability of the Commerce Clause as a source for the right to travel, but ultimately finding that "we do not concede that the question before us is to be determined" by the Commerce Clause). See also Edwards, 314 U.S. at 177 (Douglas, J., concurring) ("[T]he right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.").
human beings. Even if it could be said that the movement of commercial goods and persons are both commerce, not all travel of persons is commercial in nature. While it is redundant to say that the interstate movement of commercial goods is commercial in nature, it is overinclusive to say that the movement of persons is commercial in nature. Some travel is commercial while other travel is not, and to allow all travel to be protected by the Commerce Clause is intellectually dishonest.

Perhaps the most fatal defect in using the Commerce Clause as the source of the right is that the Commerce Clause does not confer personal rights. Instead, it grants Congress power to regulate commerce. Assuming that persons are commerce or that travel is commercial in nature, the right to travel would be subject to the regulatory whims of Congress, and in the absence of Congressional regulation, states, under the Dormant Commerce Clause doctrine. In contrast, modern cases have held that both federal and state interference with the right to travel will be declared unconstitutional. Nevertheless, the Commerce Clause does not confer rights; rather, it defines the power of Congress. Hence, the right to travel would not be a constitutional right, but a right dependent on state or federal legislative creation. If so, the right to travel is no right at all. Accordingly, the Commerce Clause is a poor textual provision for grounding the right to travel within the text of the Constitution.

B. The First Amendment

The First Amendment has been proposed as a source for the right to travel in a few cases. In *Aptheker v. Secretary of State*, the

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144 Justice Jackson stated as much in his concurring opinion in *Edwards*: "To hold that the measure of [a migrant's rights] is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights." *Edwards*, 314 U.S. at 182 (Jackson, J., concurring).


146 See Karin Fromson Segall, *It's Not Black and White: Spencer v. Casavilla and the Use of the Right of Intrastate Travel in Section 1985(3)*, 57 BROOK. L REV. 473, 491-92 (1991) ("[T]he Commerce Clause is a grant of power to the Congress, [and therefore] it cannot be a grant of power to the people to travel freely.").

147 Felix Frankfurter explained the Dormant Commerce Clause doctrine thusly: "'[T]he doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority.'" CHEMERINSKY, *supra* note 36, at 307 (quoting FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE 18 (1937)). Under the doctrine, state and local laws may regulate interstate commerce only as long as the laws do not place an undue burden on interstate commerce. See id.

148 See Baker, *supra* note 39, at 1140-41 n.63 ("'[T]he modern right to travel cannot be grounded in the commerce clause . . . because many recent decisions forbid federal government action restricting travel.").

149 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
Supreme Court struck down a ban on the use of passports by Communists. The Court held that the ban impinged on the right to travel protected by the First and Fifth Amendments. The Court's use of the First Amendment as a source for the right to travel, however, was short-lived. In Zemel v. Rusk, decided just one year after Aptheker, the Court placed the right to travel solely in the Due Process Clause of the Fifth Amendment, expressly rejecting the First Amendment as a source of the right.

The Court's quick retreat was hastened by Aptheker's extremely attenuated argument in support of the First Amendment as the source for the right to travel. None of the First Amendment's clauses directly relate to any aspect of travel. It is true that under some circumstances, as in Aptheker, a limitation that violates the First Amendment will indirectly affect the right to travel. The real issue in Aptheker, however, was not the right to travel, but rather the freedom of individuals to openly declare themselves to be Communists. Since federal law banned professed Communists from using their passports, their freedom of speech had been violated. Because the First Amendment, by its very terms, does not directly deal with the right to travel, it is an improper textual source for the right.

C. The Due Process Clause of the Fifth Amendment

In a handful of cases, the Supreme Court has proposed that the right to travel is either completely within the purview of the Due Process Clause of the Fifth Amendment or is protected by it in combination with other clauses. When claiming that the Due Process Clause of the Fifth Amendment protects the right to travel, the Court has limited the protection of the right to international travel, an aspect not mentioned in Saenz. In Kent v. Dulles, the Court held that the Due Process Clause protected a federal right of United States citi-

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151 See id. at 505 ("[T]he right to travel abroad is an important aspect of the citizen's 'liberty' guaranteed in the Due Process Clause of the Fifth Amendment."); id. at 516-17 ("[F]reedom of travel is a constitutional liberty closely related to the rights of free speech and association ... "); id. at 520 ("Freedom of movement is kin to the right of assembly and to the right of association.").
152 381 U.S. 1 (1965).
153 See id. at 16.
154 In Shapiro, Justice Harlan urged the Court to locate the right to travel in the Due Process Clause of the Fifth Amendment. See Shapiro v. Thompson, 394 U.S. 618, 669-71 (1969) (Harlan, J., dissenting). See also Segall, supra note 146, at 487-88 ("[T]he Fifth Amendment has not been used outside the context of international travel and is not a restriction on state power.").
155 See Saenz v. Roe, 526 U.S. 489, 500-04 (1999) (affirming the right to pass through, to visit and to migrate to another state).
zens to travel internationally. As discussed previously, the Zemel Court held that a ban on travel to Cuba did not impinge the right to travel located solely in the Fifth Amendment. Also in Aptheker, the Court held that the right was protected by a combination of the First and Fifth Amendments. Because Saenz did not mention the right to international travel, the Court may no longer consider the right deserving of constitutional protection.

More importantly, the Fifth Amendment's Due Process Clause is a poor choice as the source for the right to travel for several reasons. First and foremost, the Due Process Clause has traditionally ensured only that "citizens receive adequate process when the federal government is interfering with personal liberty." Therefore, so long as a person received adequate process before they were deprived of their right to travel, there would be no Fifth Amendment violation. Secondly, the Fifth Amendment applies only against the federal government, leaving states free to deprive persons of the right to travel, at least until the adoption of the Fourteenth Amendment, which includes its own Due Process Clause applicable against states. Finally, the subject matter of the Fifth Amendment is primarily concerned with criminal proceedings: requiring a grand jury indictment in capital or other serious crimes, prohibiting double jeopardy, prohibiting self-incrimination, and forbidding the deprivation of life, liberty, or property, without due process of law. Broadening the clause's reach to protect the right to travel goes far beyond rights implicated in any judicial proceeding, criminal or otherwise. Within the apparently narrow scope of the Fifth Amendment, whether the scope is concerned solely with criminal proceedings, or more generally with fair procedures in all cases, it is unlikely and unpersuasive to argue that the Due Process Clause of the Fifth Amendment protects the right to travel.

See id. at 125. The question whether there is a right to international travel is outside the scope of this Note. If such a constitutional right exists, some argue that the Due Process Clause of the Fifth Amendment is the most likely source of that right. See Segall, supra note 146, at 487-88.

See supra text accompanying notes 152-53.


See supra note 151.

The right to international travel was not before the Court in Saenz, but neither were the rights to travel through or to visit another state, and the Court still felt compelled to discuss those rights in protecting a general right to travel. See Saenz v. Roe, 526 U.S. 489, 500-02 (1999).

Segall, supra note 146, at 488.

See infra notes 210-28 and accompanying text.

See U.S. CONST. amend. V. The last clause of the Fifth Amendment prohibits the taking of private property for public use without just compensation, and accordingly does not fit into the criminal proceeding category.
D. The Ninth Amendment

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people."¹⁶⁵ Of any in the Bill of Rights, this amendment provides the least direction as to its import, protection, and enforceability—so little that some have referred to the amendment as a "constitutional joker."¹⁶⁶ No matter the amendment's moniker, scholars differ widely as to the amendment's scope. Professor Rakove argues that the language of the amendment "suggests that fundamental rights not mentioned in the Constitution can secure constitutional recognition."¹⁶⁷ Similarly, Professor Ely maintains that "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."¹⁶⁸

Others have read the amendment much more narrowly. Judge Bork, for example, contends that the amendment did not create "a mandate to invent constitutional rights" and any broader reading is counter to the ideas of the Founders.¹⁶⁹ Looking to James Madison, the amendment's drafter, Professor Berger maintains that the purpose of the amendment was "[t]o obviate the implication that nonmentioned rights 'were intended to be assigned into the hands of the general Government.'"¹⁷⁰

Due in part to the continuing debate over even the simplest questions concerning the amendment, and in part to the Court's preference for the Equal Protection Clause of the Fourteenth Amendment as the source of the right, the Court has never advocated the Ninth Amendment as the source for the right. The Ninth

¹⁶⁷ RAKOVE, supra note 166, at 289.
¹⁶⁸ ELY, supra note 129, at 38. Ely argues that the Court is in the position to declare what those unenumerated rights are and enforce them. See id. at 40. ("Surely there was nothing remotely resembling a consensus that judicial authority to review was generally to be curtailed: if anything, the consensus ran the other way.").
¹⁶⁹ BORK, supra note 129, at 183-84 ("[T]he Founders could not have contemplated both that the judiciary would play a quite insignificant role and, simultaneously, that they had delegated to judges the power to create new constitutional rights not mentioned in the Constitution.").
¹⁷⁰ RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 55 (2d. ed. 1997) (quoting I ANNALS OF CONG. 456 (1789)).
Amendment’s ambiguity makes it difficult to criticize any argument that it protects unenumerated rights. The best criticism is to place a right either outside the purview of the Constitution’s concern or within the protection of some other constitutional clause. As will be discussed below, other clauses in the Constitution may better protect the right to travel, thus negating the need to place the right under the Ninth Amendment’s highly debatable protection.

E. Implied Fundamental Right

The Supreme Court long ago decided that the Constitution contains implied powers, nowhere mentioned, but necessarily implied. In *Marbury v. Madison*, Chief Justice Marshall, writing for the Court, held that the Constitution implies the power of judicial review, requiring the judiciary to strike down laws made in contravention of the Constitution. Even though congressional powers are enumerated in the Constitution, the Court held in *McCulloch v. Maryland* that all congressional means were constitutional if the end was legitimate, and the measures were consistent with the letter and the spirit of the Constitution. Along with these implied powers of the judicial and legislative branches, the Court has embraced other governmental powers and strictures not explicitly mentioned in the Constitution, such as federalism and separation of powers. Whether these implied powers are truly implied by the text of the Constitution or were created out of whole cloth, their propriety is no longer questioned.

Notwithstanding this storied tradition of implied governmental powers, the general theory of implied fundamental rights and of specific implied rights has never been uniformly accepted. While the

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171 5 U.S. (1 Cranch) 137 (1803).
172 See id. at 178 (“The constitution is superior to any ordinary act of the legislature... [Any other doctrine] would subvert the very foundation of all written constitutions.”).
175 See id. at 421.
177 See, e.g., INS v. Chadha, 462 U.S. 919 (1983) (declaring legislative veto unconstitutional because the Presentment Clause of Article II was not complied with); Buckley v. Valeo, 424 U.S. 1, 135 (1976) (“Congress could not, merely because it concluded that such a measure was ‘necessary and proper’ to the discharge of its substantive legislative authority, ... vest in itself, or in its officers, the authority to appoint officers of the United States...”).
178 See, e.g., Printz v. United States, 521 U.S. 898 (1997) (holding that the dual sovereignty of state and federal governments does not allow state officers to be controlled by federal officials); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeering state legislatures to enact federal regulatory programs); Morrison v. Olson, 487 U.S. 654 (1988) (holding that the executive branch had sufficient oversight and control over independent counsels so as not to transgress separation of powers). Cf. id. at 705 (Scalia, J., dissenting) (asserting that anything short of complete presidential oversight of an independent counsel violates separation of powers doctrine).
Court has protected numerous implied fundamental rights, some scholars and Justices have railed against such protection. In arguing for a limited set of implied fundamental rights, Professor Graglia maintains:

Although the Constitution does not use the term, "fundamental rights," it can fairly be said that the two most fundamental rights it provides are to be governed by electorally accountable officials and to be governed primarily by local officials. Ironically, what proponents of fundamental rights are actually urging today is greater policy making by the courts and ultimately by the U.S. Supreme Court—a committee of nine lawyers, unelected and unremovable by elections, issuing decrees from Washington, D.C., for the governance of the nation as a whole. What they are urging, then, is not protection, but violation of our most fundamental constitutional rights.

Conversely, Justice William J. Brennan, Jr., argued not only that the Constitution contained implied fundamental rights but that these implied rights continually change. Justice Brennan stated: "Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers ... What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time."

The implied fundamental right rationale for the right to travel has been cited more frequently by the Court than the other potential sources for the right. In its 1867 Crandall decision, the Court held that the notion of citizenship included the right to travel. In Edwards, the majority alluded to the "theory that the peoples of the several States must sink or swim together." Justice Douglas's Edwards concurrence stated that the fact that "the right was implied did not make it any less 'guaranteed' by the Constitution." In United

179 See generally GEOFFREY R. STONE et al., CONSTITUTIONAL LAW 813-1048 (3rd ed. 1996) (discussing the Court's protection of the rights to contract, procreate, vote, access the ballot and judicial process, travel, receive welfare, education, privacy, abortion, family autonomy, and die).

180 Lino A. Graglia, The Constitution and 'Fundamental Rights', in THE FRAMERS AND FUNDAMENTAL RIGHTS 86, 87 (Robert A. Licht ed., 1991). See also ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) (describing an evolving interpretation of the Constitution as "infinitely more powerful than ... common law ... trump[ing] even the statutes of democratic legislatures").


184 Id. at 178 (Douglas, J., concurring).
States v. Guest, the right was held to "occup[y] a position fundamental to the concept of our Federal Union." In Guest, Justice Stewart continued: "[The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."

The adaptation of equal protection analysis in Shapiro did not dissuade the Court from its belief that the right was of the implied fundamental sort. Justice Brennan, writing for the majority in Shapiro, stated: "We have no occasion to ascribe the source of this right... to a particular constitutional provision." Later, Justice Brennan went a step further in his Zobel concurrence: "[T]he frequent attempts to assign the right to travel to some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary."

Evaluating the tests for and against declaring the right to travel as an implied fundamental right makes it clear that neither is conclusive. The essential question is whether the Constitution's framers vested the judiciary with the power to protect rights that are not enumerated in the Constitution's text. Justice Brennan and others have assumed that the judiciary has this power. Because modern society takes certain rights for granted, the right to travel for example, this generation may add them to the list of inherited fundamental rights.

Conversely, others would not grant the right to travel constitutional status as an implied fundamental right. Instead, those facets of travel taken for granted would be entrusted to local, politically accountable officials for protection. In the interests of democracy, the safer path seems to be that declaring the right to travel as an implied fundamental right is "antithetical to responsible judicial decision-making [allowing] [t]he Supreme Court... to act in a quasi-legislative fashion, unconstrained by the text of the Constitution."

If a textual source for the right exists, all would agree that it should be

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186 Id. at 757.
187 Id. at 758.
188 See ELY, supra note 129, at 177 (noting that "the Court has been almost smug in its refusal to provide" an explanation for the protection of the right to travel). See also Segall, supra note 146, at 494 ("Indeed it seems as if the Supreme Court has given up trying to locate a single source... Because there is such a long tradition of recognizing the right of interstate travel, perhaps courts feel it must simply exist.").
191 Of course, the next generation would reevaluate the right to travel, and may decide that the right is not fundamental, and therefore, undeserving of constitutional protection. See Brennan, supra note 181, at 27 ("[T]hat those fundamentals mean for us, our descendents will learn, cannot be the measure to the vision of their time.").
192 Baker, supra note 39, at 1142.
articulated and relied upon rather than implying the right as fundamental to the nature of the Constitution.

F. Section 1 of the Fourteenth Amendment

Although the Fourteenth Amendment has become the greatest source of constitutional change in the twentieth century, its intended significance has been the source of considerable scholarly debate. Some have argued that the scope of the amendment was limited. Others have attributed a much broader and sweeping scope to the amendment. The Supreme Court has taken the latter position, so much so that each clause has spawned its own jurisprudence protecting substantive rights. Indicative of this differing jurisprudence for each clause protecting substantive rights, the Court has held at various times that the right to travel is protected by the Citizenship Clause, the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment.

When considering the Fourteenth Amendment as a source for the right to travel, one must keep in mind problems caused by the explicit

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193 Professor Graglia, for example, maintains:

The purpose of the Fourteenth Amendment was, in any event, very limited. When reports from the South indicated that newly enacted “black codes” were denying blacks basic civil rights despite emancipation, the Radical Republicans... enacted the 1866 Civil Rights Act. The act required that blacks be treated equally with whites in regard to such basic civil rights as owning property, making contracts, and bringing lawsuits. ... The Fourteenth Amendment was proposed and adopted to constitutionalize the 1866 act in two respects: remove all doubt as to Congress’s authority to enact such a measure, which Congress then reenacted, and to raise the act’s protections to the status of constitutional rights, immune from repeal by ordinary legislation.

... All other alleged fundamental constitutional rights are the product of judicial policy making, almost always in the guise of interpreting the Fourteenth Amendment.

Graglia, supra note 180, at 92-93 (footnote omitted). Professor Berger argues:

The three clauses of § I were three facets of one and the same concern: to insure that there would be no discrimination against the freedmen in respect of “fundamental rights,” which had clearly understood and narrow compass. Roughly speaking, the substantive rights were identified by the privileges or immunities clause; the equal protection clause was to bar legislative discrimination with respect to those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States.

BERGER, supra note 170, at 17-18.

194 Though the Fourteenth Amendment neither expressly nor by implication warrants it, the Supreme Court has interpreted the Fourteenth Amendment’s Due Process Clause as selectively incorporating the Bill of Rights against the states. See CHEMERINSKY, supra note 36, at 381-84. Even if the Fourteenth Amendment does incorporate the Bill of Rights against the states, none of the Bill of Rights serve as the source of the right to travel. See supra text accompanying notes 149-170.

For a discussion of the incorporation debate, see AKHIL AMAR REED, THE BILL OF RIGHTS 137-40 (1998). See also KEYIG, supra note 166, at 168 ("[T]here was no reason for later disputes as to whether the Fourteenth Amendment incorporated the Bill of Rights into the equal protection and due process obligations of the States; it certainly did.").
language of the amendment. The Fourteenth Amendment does not limit the federal government but instead only state governments. Therefore, as a source for the right to travel, the Fourteenth Amendment suffers from the opposite defect of the First, Fifth and Ninth Amendments—the Fourteenth Amendment would allow the right to be completely obliterated by the federal government. Additionally, because the Fourteenth Amendment was not ratified until 1868, basing the right to travel in the Fourteenth Amendment concedes that the right was not constitutionally protected prior to the Fourteenth Amendment’s ratification.

1. The Citizenship Clause

The Citizenship Clause of the Fourteenth Amendment states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Professor Cohen argues that this bestowal of citizenship makes it unconstitutional for a state “to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.”

Therefore, once a newcomer makes a bona fide claim of residency, a state must grant the newcomer all benefits granted to those residing in the state for a longer duration. Once this claim of residency is made, state citizenship is immediate and any waiting period imposed would violate the Citizenship Clause as a penalty on the right to travel. Section 5 of the Fourteenth Amendment, however, might allow Congress to authorize states to discriminate against newcomers by appropriate legislation.

While the Court has never squarely accepted nor rejected Professor Cohen’s contention in a right-to-travel case, Justice Brennan has

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195 Section 1 of the Fourteenth Amendment states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

196 See id. ("No State shall . . .") (emphasis added).

197 Id.


199 Generally the claim of bona fide residency is made by swearing an oath that the swearer has lived in the state for the requisite period of time. See Dunn v. Blumstein, 405 U.S. 330, 346 (1972).

200 U.S. CONST. amend. XIV, § 5. ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

201 The Court rejected this argument in Saenz, where Congress had approved California legislation limiting welfare benefits to residents of less than twelve months. See supra note 132.
made arguments that resemble Cohen's. Justice Brennan's concurring opinion in Zobel, for example, argued that the "Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, nor does it allow for, degrees of citizenship based upon length of residence." Justice Brennan, however, consistently analyzed the right to travel under the Equal Protection Clause.

When trying to place the right to travel within the text of the Constitution, the Citizenship Clause is inadequate for several reasons. As stated previously, the Citizenship Clause would only protect one aspect of the right to travel, the right to migrate. By its very terms, the clause could only apply to the right to migrate as opposed to the rights to visit and to pass through. If the right is a part of citizenship, the only subject matter of the clause, then only those residing, i.e. migrating, in a new state receive protection. The failure to protect all aspects of the right to travel does not nullify Professor Cohen's argument, but it does leave the other aspects of the right in considerable limbo. Additionally, the fact that citizenship is conferred immediately upon bona fide residence within a state does not necessarily bestow any particular substantive rights upon a new citizen. Accordingly, the Citizenship Clause is simply a statement conferring no independent substantive rights. This statement has specific historical importance, which Professor Cohen fails to account for when interpreting the clause.

_Dred Scott v. Sandford_ is the basis of the Citizenship Clause's specific historical importance. In _Dred Scott_, Chief Justice Taney declared that persons of African descent could never be citizens of the United States and thus had no standing to sue in federal court. The Chief Justice feared "that if the Negro were recognized as a citizen under the diverse-citizenship clause, he would have a firm basis for claiming the rights of a citizen under the privileges-and-immunities clause, and there lay a more serious threat to southern security." For obvious reasons, _Dred Scott_ has been uniformly condemned.

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203 60 U.S. (19 How.) 393 (1856).

204 See id. at 426-27. See also The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1873) ("[I]t had been held by this court . . . that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States.").


206 See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1873) ("[Dred Scott] met the condemnation of some of the ablest statesmen and constitutional lawyers of the country
The Fourteenth Amendment, and specifically the Citizenship Clause, was a direct refutation and reversal of Taney's holding. According to Justice Miller in the *Slaughter-House Cases*, the clause "overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States." Any interpretation of the Citizenship Clause that goes beyond refuting *Dred Scott* and making citizens of freedmen misinterprets the language and history of the clause. Thus, the right to travel cannot be placed within the Citizenship Clause.

2. *The Due Process Clause*

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." This clause has been deemed the "most important modern development in the constitutional protection of political and civil liberties in the United States—the creation of a second bill of rights through the Due Process Clause of the Fourteenth Amendment." Unfortunately, this development was not accomplished through the "formal process of constitutional amendment... [but rather] through decisions of the United States Supreme Court interpreting the Due Process Clause of the Fourteenth Amendment over a period of a hundred years."

This informal process of constitutional amendment was perfected by the creation of two due process components, substantive and procedural. The substantive aspect of due process questions whether a purported right is "implicit in the concept of ordered liberty and deeply rooted in the Nation's history." If so, the Court will employ a balancing test, balancing the importance of the liberty interest against the governmental interest served by the statute. If, however, the purported right is fundamental (in addition to being a liberty interest), the balancing test is set aside and the statute can be justified only if there is a compelling state interest and the statute is "narrowly..."
drawn to express only the legitimate state interests at stake.\textsuperscript{215} The procedural aspect is much less stringent, requiring only that "a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case."\textsuperscript{216}

In the right-to-travel area, the Supreme Court has only analyzed one statute under the Due Process Clause, and then only under the clause's procedural aspect. In \textit{Vlandis v. Kline},\textsuperscript{217} the Court was asked to determine whether the Due Process Clause was violated where a university imposed an irrebuttable presumption of out-of-state residency when an applicant had lived outside of the state in the preceding year.\textsuperscript{218} In finding the presumption unconstitutional, Justice Stewart reasoned that the distinction in tuition rates was primarily concerned with residency and that an irrebuttable presumption against residency offended the Due Process Clause.\textsuperscript{219} The Court held that the Due Process Clause requires "that the State allow . . . an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates."\textsuperscript{220} \textit{Vlandis} demonstrates the incongruity of procedural due process with the right to travel. Procedural due process does not protect a right to travel; rather, it protects against an irrebuttable presumption against residency. In sum, procedural due process only requires that a state allow individuals the opportunity to produce evidence of residency, an issue wholly unrelated to travel.

Regarding the substantive aspect of due process, the Court has never considered substantive due process as a source for the right to travel. The Court does, however, have a long history of protecting liberty interests, notwithstanding the substantive aspect's dubious footing,\textsuperscript{221} leading several commentators to argue that the substantive aspect of the Due Process Clause is the source of the right to travel. These commentators look to the Court's substantive due process inquiry: is the right at issue "implicit in the concept of ordered liberty[\textsuperscript{222}]

\textsuperscript{216} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citation and internal quotation marks omitted). \textit{See also} Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that when the Fourteenth Amendment's protection of liberty and property are deprived, there must be an opportunity for some kind of hearing); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the deprivation of a statutory entitlement such as welfare must be preceded by a pre-termination evidentiary hearing).
\textsuperscript{217} 412 U.S. 441 (1973).
\textsuperscript{218} \textit{See id.} at 443.
\textsuperscript{219} \textit{See id.} at 446.
\textsuperscript{220} \textit{Id.} at 452.
\textsuperscript{221} \textit{See, e.g.,} BORK, supra note 129, at 31 ("[S]ubstantive due process' . . . has been used countless times . . . by judges who want to write their personal beliefs into a document that, most inconveniently, does not contain those beliefs."); ELY, supra note 129, at 18 ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").
or deeply rooted in this Nation's history? In answering this question, commentators enthusiastically contend that the right to travel is both. This contention is somewhat persuasive in light of the Court's substantive due process jurisprudence, protecting, among other things, the right of extended families to live together, the right of women to choose to have abortions, and the right of married people to use contraceptives.

Even assuming that the Constitution includes a substantive aspect of due process, such an approach is poorly suited to the right to travel. In those cases where the Court has protected a right under substantive due process, those rights have been primarily concerned with familial autonomy. The right to travel, however, does not implicate the same familial autonomy concerns. Although some right to travel cases may concern families desiring to migrate to another state, a similar number of cases may concern individuals entering other states only to conduct business, a situation analogous to 

3. The Equal Protection Clause

The Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In the annals of constitutional law, no constitutional clause "has been a more prolific source of major judicial innovations than the equal protection clause." Justice Holmes characterized equal protection

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223 See Segall, supra note 146, at 487-88 ("Because the right to travel has often been deemed a fundamental personal liberty, the Due Process Clauses of the Fifth and Fourteenth Amendments have been suggested as sources for the right of interstate travel.") (footnotes omitted); Baker, supra note 39, at 1143 ("[A] person's right to travel abroad now seems firmly established as a liberty which cannot be denied without due process."); Andrew C. Porter, Comment, Toward a Constitutional Analysis of the Right to Intrastate Travel, 86 Nw. U. L. Rev. 820, 850-51 (1992) ("Supreme Court precedent recognizes the right to travel as a liberty interest, necessarily requiring protection by the Due Process Clause.") (footnote omitted).
227 See Segall, supra note 146, at 489 n.88 ("Today, the cases that do find substantive due process rights have been primarily limited to decisions about family matters or procreation.").
228 198 U.S. 45 (1905). Lochner inferred the right of bakers to freely contract. The Supreme Court declared the right a liberty interest protected under substantive due process. The decision has been widely criticized. See Segall, supra note 146, at 489 n.87 (collecting cases).
229 U.S. CONST. amend. XIV, § 1.
230 Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Col. L. Rev. 1023, 1024 (1979). Professor Commager asserts:

What we are witnessing now is a shift, not as yet decisive but significant, of the center of gravity from the Due Process Clause to the Equal Protection Clause of [the Fourteenth] Amendment. It is highly probable that to the next generation the Equal Protection Clause will be, in constitutional and political interpretation, what the Due Process Clause was in the past.
arguments as "the usual last resort of constitutional arguments." Unfortunately, the clause has often become the first resort of the Supreme Court's analysis, especially in right-to-travel cases. Since Shapiro, the Supreme Court has primarily scrutinized legislation affecting the right to travel under equal protection analysis. In this analysis, the Court has consistently held that the Equal Protection Clause is intertwined with the right even though the clause is not the source of the right.

If the phrase "equal protection of the laws" were literally applied, almost all legislation would be declared unconstitutional. Thus, literal interpretation is impractical because "classification is an inescapable part of government. . . . Therefore, the Court must articulate some general principle or principles by which to separate constitutional from unconstitutional differentiations." Professor Berger argues that "the [amendment's] framers' intention [was] to outlaw laws which discriminated against blacks with respect to the 'coverage of the Civil Rights Act [of 1866]." Berger's protestations aside, the Court has moved beyond such a limited scope.

The genesis of the Court's expansive construction of the Equal Protection Clause is Justice Stone's Carolene Products footnote.

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232 See BORK, supra note 129, at 63 (stating that the Equal Protection Clause "became not the last but the first resort of constitutional argument").

233 See supra Part LB-C. But see Vlandis v. Kline, 412 U.S. 441 (1973) (declaring the irrebuttable presumption of non-residency was a violation of the Due Process Clause of the Fourteenth Amendment).

234 See, e.g., Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982). See also Segall, supra note 146, at 492 ("[T]he Court noted that the use of an equal protection analysis did not necessarily mean that the Equal Protection Clause was the source of the right to travel.").

While the Court has analyzed right-to-travel cases under the Equal Protection Clause, the Court has been adamant that the textual source for the right to travel is unknown and unnecessary. See United States v. Guest, 383 U.S. 745, 757 (1966) (declaring that while the right to travel is not explicitly mentioned in the Constitution, it "occupies a position fundamental to the concept of our Federal Union.").


236 BERGER, supra note 170, at 124. The coverage of the Civil Rights Act "secured to blacks the same right to contract, to hold property, and to sue, as whites enjoyed." Id. at 201. Accordingly, "[i]f no privilege was accorded to a white, a State was not required to furnish it to anyone." Id. at 219.


[Legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

. . . Nor need we enquire [sic] whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities, whether
In essence, Justice Stone stated that an equal protection problem arises whenever a "discrete and insular minority" is disadvantaged by legislation. What followed was a trifurcation of standards of review based not upon any constitutional text or principle but rather the collective fancy of the Court. If a statute classifies based upon race, the Court has uniformly applied strict scrutiny, under which the statute will be invalidated unless the government can show a compelling governmental interest served by the statute and the statute is narrowly tailored to effectuate the governmental interest. If the classification is based upon gender, the Court has applied an intermediate level of scrutiny, under which the statute will be invalidated unless it serves an important (rather than compelling) governmental interest and the statute is substantially related to accomplishing that interest. All other classifications have required only mere rationality; in other words, the statute must only be rationally related to a governmental interest in order to be held constitutional.

Accordingly, it would seem that statutes affecting the right to travel would be subject only to mere rationality review by the Court because, since Shapiro, all cases affecting the right to travel have classified persons only on the basis of durational residency, not on the basis of race or gender. Nevertheless, the Court has often subjected such statutes to strict scrutiny. Professor McCoy argues that the strict scrutiny approach is justified because, even though the Fourteenth Amendment was designed to protect black citizens, the Supreme Court has interpreted the amendment broadly and "has applied strict equal protection whenever the disadvantaged group occupies the same position with respect to state government as that occupied by blacks."

**prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.**

_Id_. (citations omitted) (emphasis added). For criticism of Justice Stone's footnote, see _Bork_, _supra_ note 129, at 58-61 (arguing that since the Constitution already protects religious, national, and racial minorities, "discrete and insular minorities" can only be those "not protected by a constitutional provision who cannot win their point in the political process because of 'prejudice'”).

238 See _Korematsu v. United States_, 323 U.S. 214, 216 (1944) (applying the "most rigid scrutiny" to a statute incarcerating persons of Japanese ancestry in internment camps during World War II).


240 See, e.g., _United States R.R. Retirement Bd. v. Fritz_, 449 U.S. 166 (1980) (finding that denying benefits to some employees based on length of service was not irrational or arbitrary).


242 Thomas R. McCoy, _Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?_, 28 _VAND. L. REV._ 987, 1017 (1975). _But see_ Donahue, _supra_ note 202, at 471 (arguing that newcomers, while a minority, cannot be characterized as "discrete and insular" and therefore are not deserving of a heightened level of scrutiny).
The Court, however, has never equated newcomers, visitors, or passers-through to the historical position of blacks, as Professor McCoy suggests. Instead, the Court has justified a heightened level of scrutiny by declaring the right to travel an implied fundamental right. Because implied fundamental rights are nowhere mentioned in the Constitution, the Court incorporated the rights into equal protection analysis in *Skinner v. Oklahoma.* In *Skinner,* the Court reviewed an Oklahoma statute authorizing the sterilization of persons convicted three times of felonies involving moral turpitude. In striking down the statute under the equal protection clause, the Court focused on the fact that the statute penalized larcenists but not embezzlers. The Court concluded that the statute failed strict scrutiny because the statute offended "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."

There are basic problems with the fundamental rights strand of equal protection. One such problem is determining which rights are truly fundamental and where those rights come from. On this point there is much disagreement. Judge Bork has argued, for example, that only those rights explicitly guaranteed by the Constitution should be understood as fundamental, and then only in the narrowest sense possible. *Skinner* rejected such a narrow interpretation of fundamental rights—"the right to procreate is not guaranteed, explicitly or implicitly, by the Constitution." Therefore, *Skinner* stands for the proposition that the Court will identify which rights are fundamental and protect those rights against violation.

In its identification and protection role, the Court has a long history of recognizing the right to travel. *Crandall* and *Edwards* protected the right after inferring its existence from the structure of the Constitution. In *Shapiro,* the Court disavowed any need to place the

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243 See supra Part I.B.
244 316 U.S. 535 (1942).
245 See id. at 541.
246 Id.
247 See BORK, supra note 129, at 63.
248 See id. at 66. Assuming that there are fundamental rights protected by the Equal Protection Clause, Bork's constrictive view is unappealing. See also Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV,* 41 STAN. L. REV. 1557, 1574 (1989) ("If a right is already substantively guaranteed in the Constitution, then the equal protection analysis becomes superfluous.").
249 See BORK, supra note 129, at 66. The Supreme Court's tendency to identify and protect fundamental rights is troubling because it poses a danger that the Court will invent new "fundamental rights," and then . . . protect them by subjecting to strict scrutiny any classification scheme affecting them. Regardless of whether the exercise of the claimed right is itself the basis of classification, or is denied or hindered as a result of a classification scheme, the problem remains the same: Where does the right come from?

Wildenthal, supra note 248, at 1575.
right within a specific constitutional provision but began analyzing statutes affecting the right under the fundamental rights strain of the Equal Protection Clause. Once the right was protected under the Equal Protection Clause, the Court had to decide when a statute affected the right to travel enough to trigger equal protection analysis. In Shapiro, Justice Brennan stated that the inquiry would begin if "any classification . . . serve[d] to penalize the exercise of that right."

This penalty inquiry offers "nothing more than the illusion of a principled judicial framework." A penalty has been defined both as "the denial of a . . . fundamental political right" or "basic necessit[y] of life" to those who have recently exercised their right and as a "permanent deprivation of a significant benefit." But mere delays to access may not amount to penalties because the benefit will "ultimately [be] obtained." As these widely divergent statements indicate, the penalty focus has been analytically unhelpful and unlikely to produce the same outcome even in cases presenting similar circumstances.

No matter how the Court applies the penalty inquiry, once it does so, the Court must scrutinize the state statute under some level of scrutiny. Under Skinner, the burdening of fundamental rights should always be scrutinized under strict scrutiny. Beginning in Shapiro, the Court found that the states may only infringe on the right to migrate when the statute withstands strict scrutiny. Following Shapiro, the Court consistently applied this standard to state statutes affecting the right to migrate. In Zobel, however, the Court decided to straddle

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250 See Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").
251 See id. at 627.
252 Id. at 634.
257 Some have argued that the Court should look at the penalty in comparative terms. Therefore, "a state that grants some benefit or lessens some burden for established residents must have good reason for failing to do likewise for newcomers." Farrell, supra note 202, at 607. This comparative focus is highly problematic. Most legislation grants a benefit or lessens a burden, so there is almost always a comparative dissimilitude. If these all become equal protection problems, the Court will be deluged, and legislatures would be unable to pass constitutional laws.
259 See Sosna v. Iowa, 419 U.S. 393, 407 (1975) (upholding an Iowa statute which served a paramount interest of the state); Memorial Hosp., 415 U.S. at 254 (requiring Arizona to justify a durational residency for receiving free medical care by a showing of a compelling government interest); Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (holding that the Tennessee statute denying the right to vote for a durational period must be justified by a substantial and compelling government interest).
the scrutiny fence, claiming that "if the statutory scheme cannot pass even the minimal test proposed by the State, we need not decide whether any enhanced scrutiny is called for."260 One might think that this shift from strict scrutiny to a less exacting standard may have been influenced by the resounding accusations of judicial activism made against the Warren Court.261 This was apparently not so, however, because Saenz resumed Shapiro's strict scrutiny standard.262

In analyzing the right to travel under the Equal Protection Clause, the Court has been consistent in only two respects. First, the Court has consistently held that the right to travel is constitutionally protected. Second, the Court has also consistently held that the Equal Protection Clause is not the source of that right, notwithstanding the Court's use of the clause to analyze the cases. As the preceding discussion demonstrates and the Court admits, the Equal Protection Clause is an unlikely source of the right to travel. It is highly questionable that the clause is the source of any rights.263 It is beyond question that the clause was never intended to be the source of the right to travel.

III. A TEXTUAL HOME FOR THE RIGHT TO TRAVEL

As Part II has demonstrated, none of the discussed clauses were intended to, nor should they now, protect the right to travel. Nevertheless, the Supreme Court has claimed, at one time or another, that each of those clauses, individually or in combination, protects the right to travel. This zeal to protect the right to travel without identifying its constitutional source has prevented the right from being

260 Zobel v. Williams, 457 U.S. 55, 60-61 (1982). The Court has fully embraced this straddling position in subsequent cases. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985) ("As in Zobel, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.").

261 See BORK, supra note 129, at 69-100 (arguing that the Warren Court "stands first and alone as a legislator of policy"). But see Jeffrey Rosen, Hyperactive: How the Right Learned to Love Judicial Activism, NEW REPUBLIC, Jan. 31, 2000, at 20 (illustrating how the Court nullified the Violence Against Women Act as beyond the power of Congress).

262 See Saenz v. Roe, 526 U.S. 489, 504 (1999) ("The appropriate standard may be more categorical than that articulated in Shapiro, but it is surely no less strict.").

263 Professor Fullinwider argues:

[An explicit rule of constitutional equality, such as the equal protection clause of the Fourteenth Amendment, does not add anything distinct from and independent of the other rights (to liberty, security, due process, etc.) already enumerated in or implied by other provisions of the Constitution. Since these other constitutional rights apply to all citizens, their form already entails their equal application. The explicit principle of constitutional equality serves only a rhetorical purpose, reminding us of the nature of other constitutional principles.


264 See Segall, supra note 146, at 493-94 ("In order for the right to travel to be fundamental, it must have emerged from somewhere else in the Constitution. Thus, while equal protection analysis is used in right to travel cases, there is no reason to believe that the Equal Protection Clause is the source of the right to travel.") (footnote omitted).
found in the appropriate text, the Comity Clause and the Privileges or Immunities Clause. Occasionally, individual members of the Court have put forth such arguments, but the Court has not embraced them. In Saenz, however, the Court appeared to have made a giant leap towards a forthright discussion concerning the right and its proper textual source. Unfortunately, Saenz’s initial shine wears off and it becomes clear that Saenz failed to engage in a complete discussion of the right to travel, adding yet more confusion to established right-to-travel jurisprudence.

This section will inquire into the origin and meanings of privileges and immunities and show that they encompass the right to travel. Finding that the right to travel is a privilege or immunity, this section will put forth a test for determining whether state laws have abridged the right. Then, the test will be applied to some of the right to travel case previously decided to illustrate how the test works.

A. The Origins and Meaning of Privileges and Immunities

In his dissent in Saenz, Justice Thomas inquired into the origins and meaning of “privileges and immunities.” Other than Justice Thomas’ inquiry, the Supreme Court has gone to little trouble to inquire or explain the origins and intended meaning of “privileges and immunities,” especially in relation to the right to travel. Only after inquiring into and embracing the meaning of “privileges and immunities” will the Court be able to provide substance to the Comity Clause and the Privileges or Immunities Clause, thereby providing a forthright protection of the right to travel.

1. The Origin of the Comity Clause

Privileges and immunities are mentioned only once in the original text of the Constitution. The Comity Clause, Article IV, section 2, states: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Article IV of the Articles of Confederation provided the model for this constitutional provision:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free

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265 See Saenz, 526 U.S. at 521 (Thomas, J., dissenting) (“Unlike the majority, I would look to history to ascertain the original meaning of the Clause.”).

266 U.S. CONST. art. IV, § 2.
ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively...267

At the Constitutional Convention, Charles Pinckney, the drafter of Article IV of the Constitution, stated that the Comity Clause was "formed exactly upon the principles of the 4th article of the present Confederation."268

While there is no doubt that Article IV of the Articles of Confederation is the origin of Comity Clause, it is less than clear if all, or just a portion, of the principles in the Articles of Confederation were imported into the Comity Clause. If the Comity Clause were intended to incorporate all of Article IV, interpretive problems would arise. Article IV sets forth two distinct and mutually exclusive principles. The first segment of Article IV entitles free inhabitants "to all privileges and immunities of free citizens in the several States."269 Paupers, vagabonds, and fugitives are exempted from this entitlement.270 The second segment of Article IV sets forth a separate principle; that is, those in a state other than their own are afforded an equality of commercial privileges and immunities with those of the state visited. Thus, there is a stark contrast between the two principles. The former is an entitlement to privileges and immunities no matter where the person is currently situated, so long as they are not paupers, vagabonds, or fugitives. The later prevents states from discriminating against foreign persons conducting commerce within the state. There is no language within the Comity Clause to suggest that it incorporates both distinct principles. Consequently, the Comity Clause must incorporate only a portion of Article IV.

It only makes sense to argue that the Comity Clause incorporates that portion of Article IV most similar to it. "[T]he free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens of the several states" is markedly similar to the Comity

267 ARTICLES OF CONFEDERATION, art. IV.
268 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1937). Pinckney's comment should not be taken as the intended meaning of the delegates of the Constitutional Convention. In fact, little can be said as to the delegates' intended meaning. See David S. Bogen, The Privileges and Immunities Clause of Article IV, 37 CASE W. RES. L. REV. 794, 795-6 (1987) ("There is virtually no report of significant discussion of the clause's meaning prior to its adoption in the Constitution.").
269 ARTICLES OF CONFEDERATION, art. IV.
270 If a person was a "pauper[,] vagabond[,] or fugitive[,] from justice," then the Articles did not entitle that person to any privileges and immunities that would be protected against state action. Id. See also Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 156 (Story, J., dissenting) (arguing that, according to this interpretation, states may "have a right to pass poor laws, and laws to prevent the introduction of paupers").
Clause. But the two clauses are not carbon copies. Instead of Article IV's "free inhabitants" and "free citizens," the Comity Clause speaks of "Citizens." Instead of exempting "paupers, vagabonds, and fugitives" from entitlement to privileges and immunities, the Comity Clause fails to mention any exceptions. Otherwise, the language and the principle of the clauses are identical. Both are aimed at entitling citizens to privileges and immunities irrespective of the state the citizen is situated in. Therefore, interpreting the Comity Clause as based upon a portion of Article IV, but not incorporating all of Article IV, is more in accordance with the language of the Comity Clause and less an affront to our belief that "peoples of the several states must sink or swim together."

2. The Origin of the Privileges or Immunities Clause

The origin of the Privileges or Immunities Clause of the Fourteenth Amendment is even clearer than is the origin of the Comity Clause. The Fourteenth Amendment, ratified in 1868, was a direct refutation of *Dred Scott v. Sandford*. In *Dred Scott*, Chief Justice Taney declared that blacks were never and could never become citizens of the United States. As blacks were not entitled to citizenship, they were unable to pursue legal claims in federal court (the issue presented in *Dred Scott*) and more importantly, were forever outside the purview of the Comity Clause. The Citizenship Clause of the Fourteenth Amendment was a direct refutation of Taney's holding in *Dred Scott*. It was hoped that a constitutional amendment, forever granting citizenship to those born or naturalized in the United States, would prevent a repeat of *Dred Scott*. The rest of the Fourteenth Amendment, the Privileges or Immunities, Equal Protection and Due Process Clauses, should be seen as a reiteration by extrapolation of the Comity Clause. As citizens, the freedmen were entitled to privileges and immunities that could not be abridged by any state.

3. The Meaning of Privileges and Immunities

While this Note argues that the right to travel was originally considered a privilege or immunity protected by the Comity Clause and that this was reiterated in the Privileges or Immunities Clause of the Fourteenth Amendment, a limited inquiry into the scope and meaning of privileges and immunities is appropriate. There are two divergent schools of thought concerning the meaning of the phrase "privileges and immunities." One school argues that the clause refers to natural

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273 See id. at 426-27.
274 See id.
275 See supra notes 203-209 and accompanying text.
law, that is, the fundamental rights possessed by all men at all times, which no government may ever deprive or abridge. The other school of thought argues that the clause prevents only discriminatory state action.

The fundamental rights-natural law school argues that the scope of privileges and immunities was finite and connoted a fixed, identifiable meaning until the adoption of the Fourteenth Amendment. As Professor Antieau has demonstrated, the Comity Clause was a gap-filler in the political process of states. In the era preceding the ratification of the Constitution, "[i]t was the unspoken assumption . . . that no state could ever justifiably deny its own citizens their natural rights." A state's citizens were the locus of political power who had fought in defense of their natural rights and were not about to allow their elected officers to trample those newly secured rights. Non-citizens within the jurisdiction of the state, however, were in jeopardy of having their natural rights trampled, as they possessed no political voice. Moreover, citizens had little motivation to look out for the rights of non-citizens, and officeholders were motivated to trample non-citizens' rights. This predicament was exactly the motivation behind the Comity Clause. In fact, the clause was the only protection afforded to non-citizens from such abuses.

In Federalist No. 80, Alexander Hamilton implicitly endorsed the fundamental rights-natural law view of privileges and immunities. Hamilton characterized the Comity Clause as the "esteemed . . . basis of the Union." As the clause was intended to ensure an "equality of privileges and immunities to which the citizens of the Union will be entitled," Hamilton maintained that states could not be trusted to pro-

276 See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 100 (1986) (arguing that the Framers incorporated a fundamental rights view into the Privileges or Immunities Clause); Clarence Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 HARV. J.L. & PUB. POL'Y 63, 63-67 (1989) (arguing that a natural law theory of the Privileges or Immunities Clause is not only historically warranted, but is also the best defense of limited government, separation of powers, and judicial restraint).

277 See, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause, 101 YALE L.J. 1385, 1473-74 (1992) (arguing that the Privileges or Immunities Clause is an anti-discrimination provision).

278 See CHESTER JAMES ANTEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 317 (1997) ("In all the years from then until the Fourteenth Amendment in 1868, it was the general view in the nation that this protected the natural fundamental rights, including the right to travel or freedom of movement."). In fact, the adoption of the Fourteenth Amendment, and the restrictive interpretation given to its Privileges or Immunities Clause, led to the current confusion as to the scope and meaning of the Comity Clause. See Baker, supra note 39, at 1141.

279 See Chest Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 WM. & MARY L. REV. 1 (1967).

280 Id. at 3.

281 See id.

282 See id.

tect fundamental rights. Hamilton believed that the national judiciary, however, “having no local attachments, will be likely to be impartial between the different States and their citizens.” In essence, Hamilton theorized that, because of self-interest, states would become hostile to the protection of non-citizen’s privileges and immunities and that the Comity Clause would enable the national judiciary to protect fundamental rights.

Rarely has anyone attempted to enumerate those rights considered fundamental. In *Corfield v. Coryell*, however, Justice Bushrod Washington made such an attempt. The New Jersey statute at issue in *Corfield* proscribed non-residents from gathering oysters. The court rejected a challenge to the statute that claimed that it was an abridgment of the Comity Clause. In ascertaining whether oyster fishing was a fundamental right, Justice Washington provided a list of fundamental rights:

> [T]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

Justice Washington’s list of fundamental rights has often been cited and relied upon by later courts, and it has never been rejected outright by the Supreme Court. The Court, however, has never explicitly adopted this sweeping inventory of fundamental rights in a Comity Clause case. In *Ward v. Maryland*, the Court made refer-

284 Id.
285 Id.
286 6 F. Cas. 546 (Washington, Circuit Justice 1823).
287 Id. at 551-52 (quoting ARTICLES OF CONFEDERATION, art. IV) (emphasis added).
288 79 U.S. (12 Wall.) 418 (1871).
ence to fundamental rights, declaring that the Comity Clause protects
the right of non-residents to enter states "for the purpose of engaging
in lawful commerce, ...; to acquire personal property; to take and
hold real estate; to maintain actions in the courts of the State; and to
be exempt from any higher taxes or excises than are imposed by the
State upon its own citizens." Just two years later, however, in the
Slaughter-House Cases, the Court was asked to determine the
scope of the Fourteenth Amendment's Privileges or Immunities
Clause. Slaughter-House, which came before the Court only a short
time after the ratification of the Fourteenth Amendment, involved a
state monopoly granted to one New Orleans slaughterhouse. Butch-
ers excluded from the monopoly challenged the statute, claiming that
Louisiana had abridged their privileges and immunities. In dis-
missing the butchers' claim, the Court held that the Privileges or Im-
munities Clause added nothing to the Constitution and referred to the
same rights enumerated in Corfield. Under this interpretation, then,
federal protection of fundamental rights was limited to those situa-
tions in which a state interfered with the rights of national citizenship,
which were few. In sum, "with the exception of [prohibitions
against ex post facto laws, bills of attainder, and laws impairing the
obligation of contracts], the entire domain of the privileges and im-
munities of citizens of the States ... lay within the constitutional and
legislative power of the States, and without that of the Federal gov-
ernment." This extremely narrow view of the Privileges or Immunities
Clause has been widely condemned. In his Slaughter-House dissent,

291 See id. at 66.
292 See id. at 76. The Court then stated that privileges and immunities were those rights
that are "fundamental; which belong of right to the citizens of all free governments, and which
have at all times been enjoyed by citizens of the several States which compose this Union, from
the time of their becoming free, independent, and sovereign." Id. (quoting Corfield, 6 F. Cas.
at 551).
293 See id. at 78-79. In interpreting the privileges and immunities protected by the Comity
Clause, the Court held that the clause offered no protection from state governments. Its purpose
was
to declare to the several States, that whatever those rights, as you grant or establish
them to your own citizens, or as you limit or qualify, or impose restrictions on their
exercise, the same, neither more nor less, shall by the measure of the rights of citi-
zens of other States within your jurisdiction.
Id. at 77. See also ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 43 (1975) ("[T]he
rights themselves did not depend on the federal government for their existence or protection.
Their definition and their limitation lay within the power of the states.").
Among the rights concomitant with national citizenship that Justice Miller enumerated
were the rights to come to the seat of government, to assert claims against it, to have access to
its seaports, courts, and offices, to have protection abroad, to assemble and petition, to use navi-
gable waters, and to become a citizen of another State by residence. See Slaughter-House, 83
U.S. (16 Wall.) at 79.
294 Slaughter-House, 83 U.S. (16 Wall.) at 77.
Justice Field claimed that the Court had emasculated the clause, rendering it "a vain and idle enactment." Justice Field found the meaning of the clause quite evident: "In the first section of the Civil Rights Act Congress has given its interpretation to these terms." In Adamson v. California, Justice Black argued that Slaughter-House marked a tolerance for state regulation of business activities and a "failure to carry out the avowed purpose of the Amendment's sponsors." Scholars have similarly criticized the narrow interpretation given to the Privileges or Immunities Clause by the Slaughter-House Court. They have argued that the clause affords residents and non-residents more protection from state governments than that recognized in Slaughter-House.

If the Supreme Court were to construe this "privileges and immunities" language to protect fundamental rights, this would create the risk that such language "will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of [the] Court.'" Although this risk is real, given that fundamental rights have been protected under the Court's equal protection and due process jurisprudence, some have expressed hope that "the Court's revival of the Privileges or Immunities Clause and its use of a methodological textualism invite a reconsideration of the Court's strict scrutiny protection of civil rights in its equal protection and due process fundamental rights ju-

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295 Id. at 96 (Field, J., dissenting). For the terms of the Civil Rights Act of 1866, see supra note 236; infra note 299.

296 Slaughter-House, 83 U.S. (16 Wall.) at 96 (delineating fundamental rights as the right to contract, sue, and own and possess property).

297 332 U.S. 46 (1947).

298 Id. at 81 (Black, J., dissenting).

299 See, e.g., Ely, supra note 129, at 24 ("The Privileges or Immunities Clause ... seems to announce rather plainly that there is a set of entitlements that no state is to take away ... "); Harrison, supra note 277, at 1387 ("The main point of the clause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens."); Donahue, supra note 202, at 470 nn.104-06 ("[T]he Slaughter-House Cases basically eviscerated this clause by holding that it only protected citizens from state interference with the privileges or immunities of national citizenship.") (footnote omitted).

Professor Berger maintains that the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment should be taken from the Civil Rights Act of 1866. See BERGER, supra note 170, at 30 ("[T]he key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the Amendment to embody and protect.") (footnote omitted). The Civil Rights Act referred to the following fundamental rights: personal security, freedom of locomotion, and ownership and disposition of property. See id. at 31. While Berger's privileges and immunities seem narrower than those proclaimed by Justice Washington in Corfield, Berger contends otherwise. When discussing Justice Washington's list of rights, Berger states that, on the whole, "these are the privileges and immunities enumerated in the Civil Rights Bill." Id. at 40.

risprudence." Professor Tribe has argued that those fundamental rights represented by privileges and immunities are not "co-extensive with the . . . fundamental interests recognized by equal protection doctrine." Whatever the distinction between fundamental rights represented by privileges and immunities and those recognized by equal protection, there is some cause for concern.

Possibly in an effort to subjugate the fundamental rights risk, the anti-discriminatory school maintains that privileges and immunities are readily identifiable as those which are granted by each individual state to its own citizens. Professor Bogen concurs in Professor Antoine's basic premise that political union required a special obligation of states to non-citizens. However, he differs with Professor Antoine in holding that "history shows the privileges and immunities were to be based on those found in each state separately, rather than an abstraction common to all states." Professor Bogen concedes that much of the rhetoric leading up to the Articles of Confederation and the Constitution spoke of natural law and fundamental rights. But he maintains that when Englishmen decried the deprivation of natural rights, they were speaking about rights guaranteed to them by positive law in England, which were independently thought of as grounded in natural law. In essence, then, fundamental rights talk was more effectual in stirring unrest against the English government than appeals to positive law.

In Paul v. Virginia, the Supreme Court adopted the anti-discriminatory approach to the Comity Clause. Even though Chief Justice Taney had previously held in Dred Scott that the purpose of the Comity Clause was to prevent states from abusing citizens and non-citizens alike, the Paul Court held that the privileges and immunities possessed by a citizen of one state sojourning in another were those recognized by the second state for its own citizens. In dicta, Justice Field, however, went further:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting

303 See Bogen, supra note 268, at 795 ("The principle that states have a special obligation to the citizens of other states was crucial in developing a common national identity.").
304 Id. at 843.
305 See id. at 844.
306 75 U.S. (8 Wall.) 168 (1869).
307 See Antoine, supra note 279, at 13 ("The privileges and immunities of Article Four, [Chief Justice Taney] assuredly attests, are not to hinge upon what any state thought them to be.").
308 See Paul, 75 U.S. (8 Wall.) at 180.
from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.  

Notwithstanding the sweep of Justice Field's language, this understanding foreclosed the Comity Clause's protection of "the common rights of free citizens." Instead, the Clause would protect only those rights afforded by the state in question. Thus, residents of a state have no recourse in claiming their privileges and immunities have been abridged. States are free to provide or deny any benefit as they see fit, as privileges and immunities only require that the benefits granted to citizens be granted to non-citizens as well. As then-Justice Rehnquist would later pronounce: "That Clause assures that nonresidents of a State shall enjoy the same privileges and immunities as residents . . . [and] has no application to a citizen of the State whose laws are complained of."

This anti-discrimination rationale effectively read the Privileges or Immunities Clause out of the Constitution, because the Equal Protection Clause also prohibits discrimination. In *Slaughter-House,* the Court acknowledged the fundamental rights meaning of privileges and immunities, but held that only nonresidents could complain of a

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309 Id.
310 Antieau, supra note 279, at 22.
311 See id. In *Toomer v. Witsell,* 334 U.S. 385 (1948), the Court enunciated a test for determining whether a state has failed to respect the privileges and immunities of a non-resident. The test first asks whether nonresidents targeted by a state law "constitute a peculiar source of the evil at which the statute is aimed." Id. at 398. If the nonresidents do not constitute a peculiar source of evil, the Comity Clause will not have been violated unless the law burdens an "essential activity" or the exercise of a "basic right." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 387 (1978). See also *New Hampshire v. Piper,* 470 U.S. 274, 283 (1985) (holding that a state law restricting bar admission to state residents violated the Comity Clause); *Hicklin v. Orbeck,* 437 U.S. 518, 526-27 (1978) (holding that a state law containing a one-year duration residency requirement for employment purposes was invalid under the Comity Clause).

Some have argued that the *Toomer* test is too lenient upon states. See *Wildenthal,* supra note 248, at 1592-93 ("Any discrimination among a state's citizens on the basis of nonresidence at some point in the past, irrespective of the interest affected by the discrimination, [should] be subject to strict scrutiny and sustained only if closely related to the achievement of a compelling state interest; the existence of any less restrictive alternative would invalidate such discrimination.").

313 83 U.S. (16 Wall.) 36 (1873).
state's laws. Thereafter, neither the Court nor Congress would intervene on behalf of a citizen against her own state to enforce the citizen's rights.

4. The Right to Travel is a Privilege or Immunity

Although the precise meaning of "privileges and immunities" is critically important, resolving the debate is beyond the purview of this Note. For purposes of this Note, it is important to recognize that both schools of thought understand the right to travel as a privilege or immunity. Under the fundamental rights-natural law school, the right to travel has always been considered a right no government may deny or disparage. \[supra\] The right to travel has always been deemed fundamental.\[supra\] Similarly, Professor Bogen, advocate of the anti-discrimination perspective, concedes that privileges and immunities include the right to travel. He has traced the right to travel through colonial charters, in which the king promised his colonial subjects various "liberties, privileges, franchises, and immunities in every other colony as if born in England or that colony."\[supra\] These entitlements included the right to travel, to become a member of another colony, to own property, engage in discrimination-free trade, and various other rights vested in colonial members.\[supra\] Once colonists' link to England was broken by independence, these rights were put in jeopardy. Article IV of the Articles of Confederation and, later, the Comity Clause of the Constitution, can be understood as playing the same role as the colonial charters.\[supra\]

B. Protecting the Right from State Abridgement: One Workable Analysis Is Worth Two Unworkable Analyses in Precedent

As the right to travel is a privilege or immunity, it must be determined how the Court should protect it from state abridgement. Exactly how the Court should do so is not mandated by the text of the Constitution. The Comity Clause merely entitles citizens to privileges and immunities, while the Fourteenth Amendment prohibits states from abridging privileges or immunities. The Court has advanced two methods of analysis involving the privileges and immuni-

\[supra\] See text accompanying notes 278-302.
\[supra\] See BERGER, supra note 170, at 31.
\[supra\] Bogen, supra note 268, at 817.
\[supra\] See id.
\[supra\] Bogen asserts that the Comity Clause invests more protections for the non-resident than did the Articles of Confederation. While the Articles of Confederation imposed obligations upon states to non-residents, the overwhelming power in Congress of states (unanimity of states necessary to pass legislation) gave little practical effect to the provision. However, under the Comity Clause and the limited power of individual states in the Constitution, the national government took the place of the king in colonial times, uniting the states under a single citizenship. See id. at 832.
ties clauses. Neither of those analyses adequately protect the right to travel because they are difficult to apply and are unwarranted by the language and history of the clauses. This Note advances a third approach that protects all aspects of the right, is easy to apply, and is faithful to the language and text of the Constitution.

1. Two Unworkable Analyses

The Court has followed two approaches in protecting the right to travel. The first is that employed by the Court in Saenz. Saenz dissected the right to travel into three components: the rights to visit, to pass through, and to migrate to another state. The Court held that the right to visit is protected by the Comity Clause and that the right to migrate is protected by the Privileges or Immunities Clause.\(^{319}\) The Court held that the right to pass through is not protected by the text of the Constitution, but the Court protected it nevertheless.\(^{320}\) As previously argued, the origins and meaning of the clauses concerning privileges and immunities are of the same genus and do not warrant separate jurisprudential doctrines.\(^{321}\) Additionally, the penalty analysis for determining whether the right to travel has been abridged is, at best, unwarranted by the Constitution, and at worst, unhelpful and unworkable judicial legislation.\(^{322}\)

Even if these criticisms of the Saenz test as applied are not persuasive, a cursory reading of Saenz makes clear that the Court was simply applying equal protection analysis to California’s welfare scheme. The Court discussed the appropriate level of scrutiny to be applied to the scheme and decided upon the same level as that applied in Shapiro, a case undeniably analyzed under the Equal Protection Clause. Assuming, for argument’s sake, that modern equal protection analysis is constitutionally appropriate,\(^{323}\) the privileges and immunities analysis should not be the same. Otherwise, the Privileges or Immunities Clause again becomes superfluous, this time not because of Slaughter-House’s poor reasoning, but because the Court has failed to construct an analysis under the Privileges or Immunities Clause different from equal protection analysis.

The Court’s other approach to protecting the right to travel was advocated by Justice O’Connor. In Zobel v. Williams,\(^{324}\) Justice O’Connor concurred in the Court’s holding that an Alaska statute in-

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\(^{320}\) See id.

\(^{321}\) See supra Part III.A.

\(^{322}\) See supra notes 252-57 and accompanying text.

\(^{323}\) See supra Part II.F.3.

\(^{324}\) 457 U.S. 55 (1982).
fringed upon the right to migrate. Justice O'Connor's concurrence differed from the majority, however, regarding the constitutional location of this aspect of the right to travel. She reasoned that the Comity Clause was the source of the right because it was intended to "'insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'" Because Alaska was denying benefits—which O'Connor construed as privileges—based upon length of residency, Alaska had violated the Comity Clause.

Similar to the Saenz's test, Justice O'Connor's analysis, based on the Toomer test, is unsatisfactory. This is not because it renders the Privileges or Immunities Clause superfluous as the Saenz analysis does, but because it fails to protect the right to migrate. Justice O'Connor's general statement of the purpose of the Comity Clause implies protection short of migration. "Venturing into State B" connotes something similar to visitation or passing through, far less than entering State B with all earthly possessions and intending to remain indefinitely. Additionally, the analysis asks whether a state law has discriminated against a non-resident. Once non-residents enter a state to reside, the Citizenship Clause transforms them into citizens of a state in which they reside. Therefore, only non-residents venturing into a state to visit or pass-through, and not to reside, would be protected under this approach.

The final weakness inherent in Justice O'Connor's proposed test is that it is based solely in the Comity Clause, which Chief Justice Taney interpreted as excluding blacks from ever becoming citizens and being entitled to privileges and immunities. There is no doubt that Chief Justice Taney was wrong. The Fourteenth Amendment is the constitutional proof of Taney's incorrectness. By its ratification, the Fourteenth Amendment was intended to forever prevent subsequent decisions similar to Dred Scott.

Therefore, the Fourteenth Amendment, in a sense, replaced the Comity Clause and indeed strengthened its prohibitions. To give the Comity Clause an independent meaning, as Justice O'Connor does, disregards the Fourteenth Amendment.

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325 The Court had previously held that those aspects of the right to travel exercised by non-residents, the rights to travel through and to visit, were protected by the Comity Clause. See supra note 311.

326 Writing for the Court, Chief Justice Burger failed to declare the source for the right, but found that because Alaska "distribute[d] benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Zobel, 457 U.S. at 61 n.6.

327 Id. at 74 (O'Connor, J., concurring) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

328 See id. at 73.

329 See supra Part II.F.1.

and the Court refuse to give credence to the Privileges or Immunities Clause, the Constitution’s guarantee of privileges and immunities will not be realized appropriately.

2. *One Workable Analysis*

As the weaknesses of the two unworkable analyses demonstrate, any test for determining whether the right to travel has been abridged must be couched primarily in the Privileges or Immunities Clause. In determining whether to include the Comity Clause, one must consider the effect of *Dred Scott* and the Fourteenth Amendment upon the clause. If *Dred Scott* is understood as an obliteration of the Comity Clause, the Privileges or Immunities Clause overruled *Dred Scott* and replaced the Comity Clause. If, on the other hand, *Dred Scott* simply misconstrued the Comity Clause, the Privileges or Immunities Clause reaffirmed the Comity Clause. In either instance, the Comity Clause merely enhances the more current Privileges and Immunities Clause.

Unfortunately, the Privileges or Immunities Clause suffers from its own weaknesses. Even in the face of continual vilification, *Slaughter-House* has shackled the Privileges or Immunities Clause for over a century. Without discussing its constitutional demise, the Court resurrected the clause in *Saenz*. The Court drew from *Slaughter-House*: "it has always been common ground that [the Privileges or Immunities Clause] protects the third component of the right to travel," the right to migrate. In fact, the Court even quoted from the *Slaughter-House* opinion: "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." While the Court’s willingness to discuss *Slaughter-House* in *Saenz* sparks a glimmer of hope that the right to travel and

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331 The Privileges or Immunities Clause was relied upon by the Court only once prior to *Saenz*. See Colgate v. Harvey, 296 U.S. 404 (1935), *overruled by Madden v. Kentucky*, 309 U.S. 83 (1940). Individual members of the Court have cited the clause as a likely source for the right to travel, however. See Shapiro v. Thompson, 394 U.S. 618, 666-69 (1969) (Harlan, J., dissenting) (contending that the Privileges or Immunities Clause protects the right of interstate travel and migration against state interference, but concluding that the statute in question was valid since Congress had authorized the penalty); Edwards v. California, 314 U.S. 160, 177, 185 (1941) (Douglas, J., concurring) (Jackson, J., concurring) (arguing that the right to travel was part of national citizenship and could not be infringed under the Privileges or Immunities Clause).


333 *Id.* (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873)). Justice Stevens, emphasizing the universal agreement that the Privilege or Immunities Clause protected the right to migrate, quoted Justice Bradley’s dissent in *Slaughter-House*:

A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of right, with every other citizen; and the whole power of the nation is pledged to sustain him in that right.

*Id.* at 503-04 (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 112-13 (Bradley, J., dissenting).
other privileges and immunities will be protected by their legitimate constitutional clause, the Court must come forth and "kill Slaughter-house [sic] once and for all" if it expects outsiders to take the Court seriously.334

Only after removing the Slaughter-House roadblock from Privileges or Immunities Clause jurisprudence will the Court be able to construct a straightforward rule for determining whether the right to travel has been abridged by a state law. As designated by the language of the Fourteenth Amendment, only state law would be subject to privileges and immunities analysis.335 Under this analysis, only state laws directly impairing the right to travel, whether visiting, passing-through or migrating, would be declared unconstitutional. The Court would first ask whether the challenged law affects interstate travel. If the Court concludes that the law does not, then it could not be held to abridge the right to travel. If, on the other hand, the law does affect interstate travel, the Court would next ask whether the law erects barriers to interstate travel or discriminates against out-of-state travelers. If the law erects such barriers or discriminated in this way, then the law would be held unconstitutional, no matter the state's justification.

This analysis improves upon the analysis discussed in Bray v. Alexandria Women's Health Clinic.336 In Bray, pro-life demonstrators protested in proximity to an abortion clinic, making it difficult for women seeking abortions to enter the clinic. Some of those women had come from out-of-state and alleged that their right to travel had been abridged by the protestors. The Court held that there was no abridgement of the right to travel because, as Justice Scalia reasoned, the right of interstate travel "protects interstate travelers against two sets of burdens: the erection of actual barriers to interstate movement and being treated differently from intrastate travelers."337 Therefore, because no state law erected a barrier to interstate movement or treated out-of-state travelers differently, the right to travel had not been abridged.338 The Bray analysis suffers in that there is no inquiry into whether a state law dealing with travel was implicated. Notwithstanding Bray's failure to inquire into this issue, the Court arrived at the correct outcome.

335 See U.S. CONST. amend. XIV, §1.
337 Id. at 277 (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)) (internal quotation marks omitted). See also Toomer v. Witsell, 334 U.S. 385, 395 (1948); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).
338 See Bray, 506 U.S. at 277.
The analysis advanced in this Note is superior to both the Saenz test and Justice O’Connor’s.\textsuperscript{339} The analysis applies only to state laws directly impairing travel. The Court would no longer question whether the law constitutes a penalty.\textsuperscript{340} Even the most carefully drafted law affects actions outside the intended scope of the law. Those laws having incidental effects upon travel may be unconstitutional, but not because they abridge the right to travel. Additionally, it is a prophylactic rule as required by the text of the Fourteenth Amendment, which declares that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”\textsuperscript{341} This language does not suggest any inquiry into the reasonableness of the law or the balancing of the government’s interest against the individual’s interest to determine the constitutionality of the law. If a state law abridges the right to travel, the law would be unconstitutional. Accordingly, the rule relieves the judiciary from inquiring into the propriety of laws, traditionally a legislative function.\textsuperscript{342} An additional benefit is its ease of application. This rule is much easier to apply than either the Saenz rule or that proposed by Justice O’Connor.

C. The Proposed Analysis Applied

This Note has argued that the Court’s right-to-travel jurisprudence has been confused and wrong-headed. It does not follow, however, that the Court’s right-to-travel precedents must all be overturned. Instead, the Court’s prior right-to-travel cases should be re-evaluated based upon the analysis advanced in this Note. Under this approach, some state laws previously held unconstitutional would remain unconstitutional, but others would be deemed constitutional. What will differ between the previous approaches and that advanced in this Note is the Supreme Court’s role in determining the constitutionality of the challenged state laws. This different approach restrains the Court’s nine-headed Caesar tendencies by ensuring, in right-to-travel cases, that the proper constitutional provision is invoked and a rule faithful to the text, structure, and history of the Constitution is employed.

Without question, the laws challenged in Crandall and Edwards would still be held unconstitutional under the analysis advanced in this Note. In Crandall, the State of Nevada taxed persons leaving the state.\textsuperscript{343} In answering the first question of the proposed analysis, it is clear that this statute affected travel by actually taxing the physical act

\begin{itemize}
  \item \textsuperscript{339} See supra Part III.B.1.
  \item \textsuperscript{340} See supra notes 252-57 and accompanying text.
  \item \textsuperscript{341} U.S. CONST. amend. XIV, §1.
  \item \textsuperscript{342} See supra note 43.
  \item \textsuperscript{343} See Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 39 (1867).
\end{itemize}
of leaving the state. Next, the analysis questions whether the law erected a barrier to interstate movement or discriminated against out-of-state travelers. The Nevada law does not discriminate, but it does erect a barrier. A tax upon leaving or entering a state is a barrier to interstate movement. If an individual cannot pay the tax, they could not legally exit the state. Clearly, the right to travel has been abridged by Nevada. Once the Court determines that the right has been abridged, the judicial inquiry would end. Nevada could not justify the law by offering a compelling or important governmental interest for it.

The California statute at issue in Edwards would similarly be deemed unconstitutional. The State of California imposed criminal penalties upon anyone who knowingly brought into or assisted in bringing an indigent person into the state. It is clear that the statute deals with travel, but the statute is somewhat more problematic than that in Crandall. California criminalized only the assisting persons, not the indigent assisted. The statute, however, clearly created a barrier to the entry of indigents. Indigents by definition need help and have little economic means to move about. By preventing others from assisting them into the state, the law erected a barrier to indigents entering California. Therefore, the statute is unconstitutional, no matter the justification.

If Supreme Court cases are representative of state statutes, the types of statutes at issue in Crandall and Edwards, creating barriers to interstate travel, are of little concern to travelers today. Crandall was decided in 1868, Edwards in 1941. The Supreme Court has not been presented with a similar state statute since. This is not to say, however, that state statutes have not abridged the right to travel since 1941. Numerous cases since 1941 have held state statutes unconstitutional as abridging the right to travel because they have penalized the right to travel. Under the analysis advanced in this Note, some of those cases were correctly decided. Others were decided incorrectly because the statutes at issue did not deal with travel.

In reviewing these statutes, one must remember that merely favoring in-state residents over out-of-state visitors does not necessarily abridge the right to travel. To actually abridge the right to travel, the statute must directly affect travel. Only with this in mind can Saenz be properly analyzed. In Saenz, California limited welfare benefits to those residing in the state for less than twelve months. During this period, the recipient’s benefits would be limited to the amount obtainable in the recipient’s prior state of residence. The question presented

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by this temporary limitation of benefits is whether the limitation affects travel.

In one sense, the limitation clearly affects travel. In modern society, welfare benefits make up a sizeable portion of state business. States have limited resources for welfare programs and have an avid interest in limiting the number of those receiving such benefits. Therefore, welfare denial statutes directly affect travel in one of two ways: (1) the state hopes to deter welfare dependent non-residents from moving into the state because of the denial; or (2) the state saves a portion of those limited resources each year by not granting benefits to those who decided to move without knowledge that they will receive no benefits for one year, or perhaps in spite of that knowledge.

The states' hope for impairment upon interstate travel is far from direct, however. Many new residents move into a state with a steady income, only to become welfare dependent within their first year of residency because of some unforeseeable tragedy or incident. A family tragedy or economic downturn may force individuals to seek welfare benefits. At best, the effect of the Saenz statute impairs interstate travel only indirectly. Accordingly, the Saenz statute would not constitute an abridgement of the right to travel.

One could argue that even if Saenz's temporary limitation of benefits is constitutional, the complete denial of benefits in Shapiro makes those statutes unconstitutional. Shapiro dealt with state statutes denying welfare benefits to persons residing within the states for less than one year. The distinction between limiting and denying welfare benefits does not change the fact that none of the statutes directly impair interstate travel. Consequently, the statutes in Shapiro would not be held unconstitutional as an abridgement of the right to travel.

Tennessee imposed a residency requirement upon voting that was challenged in Dunn v. Blumstein. The focus of the Court's inquiry should be whether the residency requirement directly dealt with interstate travel. More than the Shapiro statute, a residency requirement applicable to all persons recently moving into a state, not just those who are welfare eligible, impairs the right to interstate travel. Everyone who moves into the state is unable to vote. Notwithstanding, ineligibility to vote based upon interstate travel does not directly deal with travel. Using interstate travel as criteria for voter eligibility has no relation to the physical act of interstate travel. As Tennessee argued in Dunn, there was no showing that the residency requirement deterred interstate travel. If no one has been

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348 See id. at 339.
deterred from moving into the state, it would be intellectually dishonest to say that the statute directly impaired that same interstate movement. Therefore, the statute would not abridge the right to interstate movement.  

In Zobel v. Williams and Hooper v. Bernalillo County Assessor, the Supreme Court held that state statutes granting benefits based upon length of residency were unconstitutional. In Zobel, Alaska distributed income from its permanent fund to residents based upon their length of residency within the state. Those who were residents in 1959 received the largest share. Those who established residency in 1960 received the next largest share and so on for each successive year. Does this distribution scheme directly deal with interstate travel? Clearly, it does not. As evidence, the scheme would have no deterrent effect on interstate travel. No one considering a move to Alaska would be deterred from moving there by this statutory scheme. In fact, the scheme encourages people to move into the state. Those who were residents of Alaska would not be directly impaired. Although their share of the permanent fund would be forfeited if they decided to migrate to another state, this forfeiture cannot be characterized as directly dealing with interstate travel. Therefore, the statute in Zobel would not be declared an unconstitutional abridgement of the right to travel.  

In Hooper, New Mexico granted a tax exemption to Vietnam veterans residing in the state before a specified date. Even though the statute failed to directly deal with interstate travel, the Supreme Court held it unconstitutional. Similar to the statute in Zobel, a tax exemption retroactively granted cannot directly affect interstate travel. Vietnam veterans residing in another state would not be able to move to New Mexico to take advantage of the exemption after the date required to establish residency. Those able to take advantage of the statute may be discouraged from moving outside the state because they would not want to forfeit the exemption. Again, the forfeiture of a benefit only indirectly affects interstate travel.  

Even if the analysis advanced in this Note salvages many of the statutes held unconstitutional by the Supreme Court in previous cases, this fact should not lead one to believe that the rule allows states to legislate without concern for the right to travel. As a privilege and immunity, the right to travel prohibits states from enacting legislation that directly deals with interstate travel and abridges the right by

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349 This same reasoning would uphold statutes at issue in two other cases. See Sosna v. Iowa, 419 U.S. 393 (1974) (upholding a one year residency requirement for instituting divorce proceedings); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (challenging a state statute requiring one year of residency before receiving free non-emergency medical care).
erecting barriers to interstate movement or by treating interstate travelers differently from intrastate travelers. Crandall and Edwards serve as examples of impermissible barriers to interstate movement. Supreme Court of New Hampshire v. Piper\(^{352}\) is another example of a state abridging the right to travel. In Piper, New Hampshire limited bar admissions to state residents. The Supreme Court held that the practice of law was a fundamental right and states could not distinguish between residents and non-residents without violating the Comity Clause. Under this Note’s proposed test, New Hampshire’s limitation would still be an unconstitutional abridgement of the right to travel. The limitation directly deals with interstate travel by prohibiting non-residents from entering the state and becoming admitted to the bar. Attorneys may not visit New Hampshire to conduct legal business because they will not be admitted to practice law in New Hampshire. The way in which the limitation deals with interstate travel illuminates the fact that the limitation discriminates against interstate travelers. Intrastate travelers are welcomed into bar admission, while interstate travelers are not. Accordingly, the interstate travelers are unable to exercise their right to travel.

In reassessing the Supreme Court’s right to travel cases under the proffered rule, it should become clear that the proffered rule attempts to strike a balance between state and individual rights. States have the right to legislate in the absence of a constitutional prohibition. Individuals have a right to travel. The proposed analysis allows states to exercise their right to legislate so long as they do not abridge the right as properly viewed and allow individuals the freedom to exercise their right to travel interstate.

**CONCLUSION**

In an early scene in The Big Lebowski,\(^353\) two men accost the film’s main character, the “Dude.” One of the men interrogates the Dude as to the whereabouts of money—which is not actually owed by the Dude but by another with the same name—while repeatedly forcing the Dude’s head into a toilet. After withstanding numerous dunkings in silence and peering into the toilet bowl again, the Dude quips, “It’s, uh, it’s in there somewhere. Let me take another look.”\(^354\) Unfortunately, the Dude’s attitude sums up the Supreme Court’s approach to the right to travel. The Court, with its figurative head held over the Constitution, hastily concedes that the Constitution protects the right; but in its haste to protect, the Court fails to put forth a cogent rationale as to why any particular clause of the Constitution

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\(^{353}\) THE BIG LEBOWSKI (Polygram 1998).

\(^{354}\) Id.
protects the right. At this point, it seems that with each new case—as its head is again held over the Constitution—the Court offers a new clause as the source of the right as it strikes down the challenged statute as unconstitutional. This is not the reasoned judgment to be expected from the Court entrusted with the role of “faithful guardian of the Constitution.”

Accordingly, the Court must reevaluate its right-to-travel jurisprudence, beginning with the notion that the right to travel—or any unenumerated right—may or may not be protected by the Constitution. In so doing, the Court will realize that privileges and immunities of the Comity Clause and of the Fourteenth Amendment were meant to protect the right to travel, among others. But the Court must address the fact that the Privileges and Immunities Clause is shackled and then kill Slaughter-House, thereby shedding that clause of the limits imposed upon it. Only then can the right to travel be placed within its appropriate constitutional provisions, the Comity Clause and the Privileges or Immunities Clause of the Fourteenth Amendment. Then, to protect the right to travel, an analysis fashioned from the origins and meanings of the right’s constitutional home can be implemented. This Note has proposed such an analysis, one that is faithful to the text of the Constitution, would be easier for courts to apply than others employed or advocated, would clearly notify states of impermissible statutes, and would better inform the citizenry of its constitutional rights. If the Court fails to rework its right-to-travel jurisprudence, then Justice Scalia will have been proven correct, and the Court will have earned the epithet, “nine-headed Caesar.”

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† I would like to thank Professor Jonathan L. Entin, Professor William P. Marshall, and Salim A. Kafiu for comments on earlier drafts of this Note. I would also like to thank Ray McCullar; my parents, Greg and Lee; my in-laws, Philip and Pat; and my wife and children, Holly, Madysen, Speed, Layla, Avry, and a fetus to be named later for their prodding and support.