On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will It Travel?

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ON THE ROAD AGAIN: HOW MUCH MILEAGE IS LEFT ON THE PRIVILEGES OR IMMUNITIES CLAUSE AND HOW FAR WILL IT TRAVEL?

Nicole I. Hyland*

INTRODUCTION

In 1999, the Supreme Court dusted off an old, neglected constitutional clause, kicked its tires, revved its engine and drove it onto the constitutional highway for the first time in sixty-four years.1 In Saenz v. Roe, the Supreme Court declared that the right of a United States citizen to establish residency in a new state and be treated equally with long-term citizens is a component of the right to travel that is guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment.2

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1. The first and last Supreme Court case to rely on the Privileges or Immunities Clause was Colgate v. Harvey which struck down a Vermont statute that imposed a four percent tax on dividends earned on out-of-state investments. 296 U.S. 404, 426 (1935). Colgate was expressly overruled five years later. See Madden v. Kentucky, 309 U.S. 83, 92-93 (1940) (holding that "the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship").

2. 526 U.S. 489, 498, 502-03 (1999) (holding unconstitutional a California statute that limited welfare benefits during recipients' first year of residency to the amount they would have received in the state where they had previously resided). This Note refers to the Article IV, Section 2 clause as "the Privileges and Immunities clause" and the Fourteenth Amendment clause as the "Privileges or Immunities Clause." The Fourteenth Amendment clause was written in the disjunctive because it was formulated as a prohibition against government action, while the Article IV provision was written in the conjunctive because it was formulated as a positive grant of rights. See Mark Strasser, The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel, 52 Rutgers L. Rev. 553, 555-56 (2000).
The Court's reliance on the Privileges or Immunities Clause was unexpected because the clause has been considered "essentially moribund" since The Slaughter-House Cases. Nevertheless, Saenz is at least superficially consistent with the Slaughter-House decision, which identified the right of "a citizen of the United States [to] become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State" as a privilege or immunity of United States citizenship. Therefore, it is unlikely that Saenz signals a revolution in the Supreme Court's Privileges or Immunities jurisprudence. Nevertheless, it is arguable that Saenz has, or should have, broader implications for the Privileges or Immunities Clause. Careful analysis of the right to travel recognized in Saenz reveals some basic inconsistencies between Justice Miller's formulation of the Privileges or Immunities Clause in Slaughter-House and the Court's application of that clause to the right to travel in Saenz. These inconsistencies demonstrate that, although the Court may be reluctant to overturn Slaughter-House, it should reject Justice Miller's conception of the Privileges or Immunities Clause as inadequate and impracticable. The Court must adopt a principled construction of the Privileges or Immunities Clause if it

3. Lutz v. City of York, 899 F.2d 255, 264 (3d Cir. 1990). In Slaughter-House, the Court held that the Fourteenth Amendment's Privileges or Immunities Clause only protected the rights of United States citizens, as opposed to state citizens. Furthermore, the Court equated state citizenship rights with fundamental rights, concluding that the clause only guaranteed a limited group of rights conferred by the federal government. The Slaughter-House Cases 83 U.S. (16 Wall.) 36, 78-79 (1872). According to Erwin Chemerinsky, the clause was "rendered a nullity by the Slaughter-House Cases and it has been ever since." Erwin Chemerinsky, Constitutional Law: Principles and Policies 377 (1997). For more in-depth analyses of the Slaughter-House Cases, see Richard L. Aynes, Constraining the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627 (1994); Michael Kent Curtis, Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment, 38 B.C. L. Rev. 1 (1996) [hereinafter Curtis, Resurrecting]; Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 Yale L.J. 643 (2000).


6. One commentator argues that the Court's purpose in resurrecting the Privileges or Immunities Clause was to put to rest the debate over the source of the right to travel. Jide Nzelibe, Free Movement: A Federalist Reinterpretation, 49 Am. U. L. Rev. 433, 433-34 (1999). If this is true, the Court may well be jumping out of the frying pan and into the fire. While the Court has struggled over the years to reach a consensus on the proper source of the right to travel, resurrecting the Privileges or Immunities Clause to fulfill that role may lead the Court into the mire of having to rationalize its resistance to overturning Slaughter-House. Alternatively, it has been suggested that Saenz reflects an intent to construct a framework for equal citizenship rather than to locate the source of the right to travel. Tribe, supra note 5, at 154.
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intends to establish the Clause as a legitimate source of constitutional protection.

This Note argues that the Privileges or Immunities Clause protects certain fundamental rights from state abridgement. These fundamental rights include the right to travel freely not only to other states, but also within the borders of a state. The following hypothetical situations illustrate the intrastate travel issue:

Broadway Baby

Jennifer, an eighteen-year-old aspiring actress from Buffalo, New York, gets on a bus heading to New York City to pursue her dream of becoming a Broadway star. Three years later, disillusioned by a failed career and embittered by a brief but disastrous marriage to a stagehand named Omar, Jennifer decides to throw in the towel and return home with her six-month-old son, Ulysses. Unfortunately, while she was away, Jennifer's mother sold their family home and moved to a retirement community. Jennifer gets a job at a local fast-food restaurant and applies for admission to a public housing project. She is distraught when her application is denied because a city ordinance limits admission to the project to applicants who have resided in Buffalo for at least five years.

Father Knows Best

Meanwhile, back in New York City, Alisha is supporting herself and her two-year-old daughter as an administrative assistant while she pursues her standup career at local comedy clubs. One day she gets a call from her aging father demanding that she return home to Omaha, Nebraska where he insists the career opportunities have outstripped those available to her in New York. Realizing that he has lost his senses and fearful that senility has begun to set in, Alisha packs her bags and moves back home to care for him. Unable to find a job and overwhelmed by mounting medical expenses, Alisha commits her father to a mental institution and applies for public housing for herself and her daughter. Unfortunately, her application is denied because of a state statute that limits public housing to applicants who have resided in Nebraska for at least five years.

7. As noted, the situations described are hypothetical and are not based on actual residency requirements in Buffalo or Nebraska. Such restrictions do exist, however. Cole v. Housing Authority of Newport, 435 F.2d 807 (1st Cir. 1970), for example, involved a two-year residency requirement in the City of Newport for public housing eligibility.
In the second case, the durational residency requirement would almost certainly be an unconstitutional restriction on the right to travel.\(^8\) The first case, however, is not so clear. Because Jennifer moved from New York City to Buffalo, the residency requirement at most restricted her freedom to move within the state of New York. While the right to interstate travel has been judicially recognized since at least 1823,\(^9\) circuit courts are split over the existence of a right to intrastate travel.\(^10\)

As discussed above, this Note will argue that the Supreme Court should recognize a federally protected right to intrastate travel. Part I discusses the history of the constitutional right to interstate travel. Part II sets forth the current circuit split over the right to intrastate travel. Part III discusses the background of the Fourteenth Amendment Privileges or Immunities Clause and concludes that the clause was intended to protect fundamental rights. Part III also analyzes the right to intrastate travel as a fundamental right, ultimately concluding that the right to intrastate travel is best protected under the Privileges or Immunities Clause.

I. THE HISTORY OF THE RIGHT TO INTERSTATE TRAVEL

It is virtually uncontroverted in American constitutional case law that the right to interstate travel exists.\(^11\) The case law is much less

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\(^8\) See, e.g., Shapiro v. Thompson, 394 U.S. 618, 621-22 (1969) (holding unconstitutional a state statute denying welfare assistance to applicants who have resided in the state for less than one year).

\(^9\) See Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (recognizing in dicta the “right of a citizen of one state to pass through, or to reside in any other state” as a privilege and immunity protected under Article IV, Section 2).

\(^10\) Compare King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) (holding that it would be “meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state”), with Wardwell v. Board of Educ., 529 F.2d 625, 627 (6th Cir. 1976) (declining to find federal constitutional protection for the right to intrastate travel), and Wright v. City of Jackson, 506 F.2d 900, 901-02 (5th Cir. 1975) (finding no fundamental constitutional right to intrastate travel).

\(^11\) See Saenz v. Roe, 526 U.S. 489, 498 (1999) (“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.”) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) (“The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.”); Shapiro, 394 U.S. at 629 (“This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”); United States v. Guest, 383 U.S. 745, 757 (1966) (“The 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
clear, however, about where to find the source of this right, how to define the scope of the right, and how to analyze statutory impediments to the right. One commentator, after surveying the Supreme Court’s right to travel decisions, concluded:

By the close of the Burger Court... both the Court’s doctrinal approach to the right to travel and the resulting case law were muddled. Two hundred years of constitutional adjudication made it clear that a right to travel existed, but beyond that little was known. The Court failed to define the parameters of the right, identify a compelling rationale for the right, or resolve the case law in a coherent and consistent fashion.12

Much of the confusion over the right to travel may be attributed to the Court’s failure to distinguish clearly between the “source” of the right to travel and the basis for constitutional protection of that right.13 Recognizing and understanding this distinction is essential to understanding the nature of the right to travel.

The “source” of the right will be used in this Note to refer to the origin of the right itself. In some cases the source may be a specific

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12. Hartch, supra note 11, at 463.
13. A noteworthy exception to this common oversight was the intrastate travel case, Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990), in which the court distinguished between the rights of national citizenship and the protection of those rights under the Privileges or Immunities Clause of the Fourteenth Amendment:

Even though the Fourteenth Amendment Privileges and Immunities Clause on its face protects such rights against state infringement, the Court has always viewed the rights themselves as arising independently of the Fourteenth Amendment. Indeed the doctrine that certain unenumerated rights are implicit in the concept of national citizenship antedated the ratification of the Fourteenth Amendment. Even after its passage, however, this case line refused to subsume national citizenship rights under the Fourteenth Amendment, holding instead that they “do[] not depend upon any of the amendments to the Constitution, but arise[] out of the creation and establishment of the Constitution itself of a national government.”

Id. at 263-64 (citations omitted). The court went on to stress the importance of distinguishing between the creation and the protection of rights:

At first blush, insisting that the rights of national citizenship are protected, but not created, by the Fourteenth Amendment Privileges and Immunities Clause may seem like a quibble, but the distinction has critical doctrinal ramifications in other contexts. For example, rights created by the Fourteenth Amendment itself can be infringed only by state actors, while the rights of national citizenship recognized in this case line may be infringed by purely private actors as well.

Id. at 264 (citations omitted).
constitutional provision, while in others it may be a more general concept. For example, justices frequently ground the right to travel in the nature of federal sovereignty or the federalist structure.14 Those cases may rely, however, on specific constitutional provisions to assert constitutional protection over the right to travel. Thus, in Shapiro v. Thompson, the Court viewed the right to travel as deriving from a combination of federal sovereignty and personal liberty principles,15 yet it applied an equal protection analysis to determine whether the right had been infringed.16 In other words, a hybrid conception of federal sovereignty and personal liberty was the “source” of the right. The Fourteenth Amendment was not the “source” of the right to travel, although it did extend federal protection over the right in that particular case.

In cases where a constitutional provision is considered the “source” of the right to travel, the same provision has generally also functioned as the basis for constitutional protection of the right. For example, in a Supreme Court case that grounded the right to travel in the Commerce Clause, that clause functioned as both the source of the right and the basis for constitutional protection over the right.17

The importance of maintaining these categories becomes clear when one begins to analyze the case law regarding the right to travel. When courts conflate the source of the right and the basis for constitutional protection of the right, their right to travel analysis becomes confusing. A prime example of this confusion has been in the Court’s treatment of the right to travel under Article IV, Section 2. In some opinions, Article IV, Section 2 has been identified as the “source” of the right to travel, while in others, the right to travel has been treated as an independent fundamental right that is given constitutional protection by Article IV, Section 2.18 In order to avoid this confusion, this Note attempts, wherever possible, to identify the source of the right to travel and to distinguish the source from the constitutional provision that protects the right to travel in the context of the specific case.

This distinction is particularly significant in the case of intrastate travel because, even if there is a fundamental right of intrastate

14. See, e.g., Guest, 383 U.S. at 757 (noting that the right to travel is fundamental to the Union).
15. See Shapiro, 394 U.S. at 629. See infra Part I.A.3 for a discussion on the hybrid concept of federal sovereignty and personal liberty as the source of the right to travel.
16. Shapiro, 394 U.S. at 638.
18. See, e.g., Zobel v. Williams, 457 U.S. 55, 79-80 (1982) (O'Connor, J., concurring) (arguing that the right to travel contained in Article IV of the Articles of Confederation was carried forward into the Constitution’s Article IV Privileges and Immunities Clause); Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (identifying the right to travel as a fundamental right embraced by the general description of privileges and immunities).
movement, it does not automatically follow that the federal government is empowered to protect that right against state infringement. A court would still have to identify a constitutional provision or principle that extended federal protection over the right. For example, one constitutional scholar explains that constitutional provisions protecting rights can be either creative or declarative.¹⁹ Thus, many of the rights articulated in the Bill of Rights were declarative, because they were already considered to be fundamental rights prior to passage of the amendments.²⁰ In addition to declaring these rights, the Bill of Rights contained prohibitions against their abridgement by the government.²¹ Because the Framers considered fundamental rights to be natural and inherent, they understood the Constitution merely to provide "security" for rights that already existed.²² Furthermore, certain rights declared in the Constitution were only protected from abridgement by the federal government.²³ Thus, the rights declared in the Bill of Rights were enforceable against the federal government, but not against the states. It was not that state citizens did not possess those rights, but that the Constitution did not provide federal protection against state infringement of those rights.²⁴ Similarly, even if one acknowledges the existence of a right to intrastate movement, it does not necessarily follow that federal constitutional protection exists for that right.

A further source of confusion has been the Court’s inability to define the scope of the right to travel. Although modern Supreme Court decisions demonstrate that the right encompasses more than the right to a "change in background scenery,"²⁵ discerning the contours of the right to travel is difficult, nevertheless. According to the Supreme Court, the right to travel includes, not only interstate locomotion, but also a right of interstate travelers to be free of certain forms of discrimination.²⁶ In addition, the case law has identified the right to migrate and establish residency in a new state as an aspect of the right to travel.²⁷ Until recently, this aspect of the right to travel had been protected primarily under the Equal Protection Clause of the Fourteenth Amendment.²⁸ In Saenz v. Roe, however, the Court

20. Id.
21. Id.
22. Id. at 23.
23. Id. at 21-22.
24. See id. at 24.
25. Tribe, supra note 5, at 133.
grounded this right in the Fourteenth Amendment’s Citizenship and Privileges or Immunities Clauses.

In Saenz v. Roe, the Court, for the first time, expressly articulated three components of the right to travel. The first component was the basic right of physical locomotion—"the right of a citizen of one State to enter and to leave another State." The second component 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." The Court identified Article IV, Section 2 as the source of this right. The third component was "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." As previously noted, the Court identified the source of this right as the Fourteenth Amendment’s Citizenship and Privileges or Immunities Clauses. This Note will refer to these three components, respectively, as the right of locomotion, the right of comity and the right of migration.

While the framework articulated in Saenz is helpful in clarifying the rambling definition of the right to travel, uncertainty remains over the source of the first and most basic component of the right—the right of locomotion. Because that component was not implicated in Saenz, the Court asserted that "[f]or the purposes of this case . . . we need not identify the source of that particular right in the text of the Constitution." The Court’s failure to identify the source of the locomotion right is curious for two reasons. First, the Court did identify Article IV, Section 2 as the source of the comity right, even though that component was not implicated in Saenz either. Second, the right to locomotion, like the right of migration, was identified in Slaughter-House as a privilege or immunity of United States

29. Saenz, 526 U.S. at 502-03; see also Meyer, supra note 5, at 439 (noting that Justice Stevens "attempted to resolve the confusion surrounding the right to travel by dividing that right into three components").
31. Saenz, 526 U.S. at 500.
32. Id.
33. Id. at 501.
34. Id. at 500.
35. Id. at 503.
36. See Ellis & Miller, supra note 30, at 347 (referring to the third component as "the right to interstate migration").
37. See Dan Wolff, Case Comment, Right Road, Wrong Vehicle?: Rethinking Thirty Years of Right to Travel Doctrine: Saenz v. Roe, 119 S. Ct. 1518 (1999), 25 U. Dayton L. Rev. 307, 327 (2000) (noting that "[t]he first component, the right to cross state borders, has a somewhat elusive constitutional source, and since it was not the component at issue, the Court did not articulate where it would find the source"). But see, Tribe, supra note 5, at 126 (asserting that "one may still assume free ingress and egress are privileges of United States citizens").
38. Saenz, 526 U.S. at 501.
39. See Tribe, supra note 5, at 126.
It seems odd, therefore, that Saenz articulated the more controversial right of migration as a privilege or immunity of national citizenship, without acknowledging that the same clause protects the right of locomotion. Even if, as this Note argues, the locomotion right is a privilege or immunity of the Fourteenth Amendment, this does not mean that the Fourteenth Amendment is the "source" of the right, only that it grants federal protection over the right from state abridgement. The source of the right would still have to be identified.

Because of the persistent uncertainty regarding the source of the right to travel, this Note attempts to review and analyze the various sources that have been suggested by justices and commentators, ultimately concluding that the right to travel is best understood as a hybrid right comprising both personal liberty and federal sovereignty principles. This does not mean, however, that the right to travel is less fundamental than other individual human rights. The fact that the right is necessary to national unity merely serves to strengthen the national interest in preserving a right that is also an essential attribute of freedom.

Historically, the Supreme Court has relied on four "sources" for the first component of the right to travel. Section A of this part discusses each of these sources in detail. The four sources are: (1) the sovereign nature of the federal government; (2) fundamental rights or personal liberty; (3) a hybrid of federal sovereignty and personal liberty; and (4) specific constitutional provisions, such as the Commerce Clause or Article IV, Section 2.

Prior to Saenz, the Supreme Court relied on three constitutional provisions to provide federal protection over the right to travel. Section B of this part discusses each of these provisions as they apply to the right to travel. Because Article IV, Section 2 is treated as both a source and a basis for federal protection, it is discussed in Part I.A. The three primary constitutional provisions that the Court has used to protect the right to travel are: (1) the Privileges and Immunities provision of Article IV, Section 2; (2) the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment; and (3) the Equal Protection Clause of the Fourteenth Amendment.

Finally, Section C of this part discusses the Saenz decision and its use of the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses as the source of the right to travel.

41. This distinction would not necessarily exist for the migration right, which Slaughter-House specifically identified as being conferred by the Fourteenth Amendment itself. Id. at 80.
A. Sources of the Right to Travel

1. Federal Sovereignty as the Source of the Right to Travel

The federal sovereignty view posits the right to travel as a right inherent in and essential to the sovereign nature of a national government. The Articles of Confederation, which predated the Constitution by nine years, expressly provided that "the people of each State shall have free ingress and regress to and from any other State." Somewhat perplexingly, the Framers left this provision out of the Constitution without comment or explanation. It has been argued, however, that the right to free ingress and regress was even more essential to the Union that was fashioned under the Constitution than to the looser Confederation of states created under the Articles. Because the right to travel grows out of a government need to maintain a unified nation, the right is perceived only secondarily as a right of personal liberty. The primary purpose of the right is to promote the interests of the federal government. According to this view, restrictions by a state on an individual's right to travel could impede the operations of the federal government by creating significant barriers to the interactions between a citizen and the federal government.

An early articulation of the federal sovereignty view is found in Chief Justice Taney's dissenting opinion in the Passenger Cases. He noted that:

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same

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42. See, e.g., United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel... occupies a position fundamental to the concept of our Federal Union.").
45. For example, in Guest, the majority asserted that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Guest, 383 U.S. at 758. In addition, Justice Harlan separately noted that "[i]t has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution." Id. at 764 (Harlan, J., concurring in part and dissenting in part).
46. Id. at 767 (Harlan, J., concurring in part and dissenting in part) ("It is accordingly apparent that the right to unimpeded interstate travel... was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union.").
community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.\textsuperscript{38}

At least one commentator has taken the position that the right to travel is properly viewed exclusively as a federalist construction, free from any personal liberty or fundamental rights associations.\textsuperscript{39} Jide Nzelibe points out that early case law located the right to travel in the policy objective of "conserving the political and economic union against provincial state interests."\textsuperscript{50} At some point along the way, however, the right to travel doctrine became "mired in the language of personal rights," and the original federalist theory was replaced with a personal liberty view.\textsuperscript{51} In order to extricate the offending personal liberty terminology from the right to travel, Nzelibe uses the term "free movement doctrine" instead of "right to travel."\textsuperscript{52} Nzelibe argues that three constitutional limitations on state power—the Commerce Clause, the free movement doctrine and the Privileges and Immunities Clause of Article IV, Section 2—have a common source: Article IV of the Articles of Confederation.\textsuperscript{53} All three of these limitations serve the common purpose of promoting a unified nation.\textsuperscript{54} Nzelibe asserts that, although the Article IV, Section 2 language guaranteeing free ingress and regress between the states was excluded from the Constitution, the free movement principle was incorporated into Article IV, Section 2 of the Constitution "in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation."\textsuperscript{55} Although Nzelibe perceives the right to travel as a principle based on federalism, he actually locates its source in Article IV, Section 2 of the Constitution, which he claims incorporates the free movement principle of Article IV of the Articles of Confederation.\textsuperscript{56} This Note, on the other hand, argues that courts relied on federal sovereignty as an independent source of the right to travel. For example, one of the most explicit judicial articulations of the federal sovereignty view, found in Justice Miller's majority opinion in \textit{Crandall v. Nevada}, makes no mention of Article IV, Section 2 as the source of the right to travel.\textsuperscript{57}

\textsuperscript{48} \textit{Id.}
\textsuperscript{49} Nzelibe, \textit{supra} note 6, at 435.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 439.
\textsuperscript{54} \textit{Id.} The close connection, in both original source and purpose, between the two constitutional provisions and the free movement principle has led courts to identify those provisions as the source of the right to travel, according to Nzbile. \textit{Id.} at 440.
\textsuperscript{55} \textit{Id.} at 439 (quoting \textit{Austin v. New Hampshire}, 420 U.S. 656, 661 (1975)).
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{See} \textit{Crandall v. Nevada}, 73 U.S. (6 Wall.) 35 (1867).
Crandall involved a Nevada statute that imposed a tax of one dollar on every person leaving the state.\textsuperscript{58} The Court struck down the statute on the ground that it infringed the right to travel.\textsuperscript{59} Although a tax of one dollar may not seem to be a significant burden on interstate movement, the Court noted that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State."\textsuperscript{60} Thus, by imposing such taxes, "one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."\textsuperscript{61}

According to Justice Miller, the right to travel derived from the relationship between the sovereign national government and its own citizens.\textsuperscript{62} Thus, the federal government had the right to require its citizens to come to the capital or to any of its local offices in order to serve the government.\textsuperscript{63} Naturally, the federal government's power to exercise this right could not depend on the largesse of the state governments.\textsuperscript{64} Moreover, this power gave rise to a "correlative" right of the citizen:

\begin{quote}
[T]o come to the seat of the 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. He has right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.\textsuperscript{65}
\end{quote}

Thus, Justice Miller articulated the right to travel not primarily as a right of personal liberty but as a right grounded in national sovereignty.\textsuperscript{66} Nevertheless, the right belongs to the citizen and appears, even under the federal sovereignty view, to be a broad right of free movement. Thus, under Justice Miller's analysis, a citizen has the right to travel anywhere in the nation, within or across the borders of any state, free from state interference, because he or she may need to do so in order to fulfill obligations and exercise rights with respect to the federal government, even if in reality the trip does not implicate these obligations or rights. In fact, there is no indication that the

\begin{itemize}
  \item \textsuperscript{58} Id. at 36.
  \item \textsuperscript{59} Id. at 49.
  \item \textsuperscript{60} Id. at 46.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} See id. at 43-44.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id. at 44.
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} See id.
\end{itemize}
passengers in *Crandall* were traveling in order to fulfill an obligation to the federal government or to exercise a right against the federal government.\(^{67}\)

It has been argued that, in the passage quoted above, Justice Miller was merely providing a list of reasons supporting the right to travel. Thus, in *Edwards v. California*, the next major Supreme Court case to consider the right to travel, Justice Douglas claimed that “[t]he point which Mr. Justice Miller made was merely in illustration of the damage and havoc which would ensue if the States had the power to prevent the free movement of citizens from one State to another.”\(^{68}\) Because there was no evidence that the passengers in the *Crandall* case were traveling for any federal purpose, Justice Douglas denied that Justice Miller intended to limit the citizen’s right to travel to purposes deriving from the operations of the federal government.\(^{69}\) It is unlikely, however, that Justice Miller was merely “emphasiz[ing] that the Nevada statute would obstruct the right of a citizen to travel to the seat of his national government or its offices throughout the country” in order to illustrate how state regulation could impede the functions of the national government.\(^{70}\) Rather, he argued that the right to travel itself was rooted in the nature of federal sovereignty, which imposed a duty on citizens to serve the government and gave them the “correlative” right to approach the government seat.\(^{71}\) According to him, it was out of this right to approach the government that the right to travel grew.\(^{72}\) Consequently, Justice Douglas’s interpretation underplayed the significance of Justice Miller’s observations regarding the nature of the federal government and the attendant rights and duties of its citizens.

Justice Douglas’s mischaracterization of Justice Miller’s analysis was understandable, however, because there appeared to be a gaping hole in Justice Miller’s logic. If the right to travel derived from a citizen’s obligations to the federal government and the related rights that flowed therefrom, a state would still have the power restrict a citizen from traveling for purposes that were unrelated to those federal rights and obligations. Thus, Justice Miller’s analysis failed to provide sufficient support for the extensive right to travel recognized in *Crandall*.\(^{73}\)

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67. The decision did not mention the reason why the travelers were leaving Nevada, nor did it expressly limit its holding to those traveling for a federal purpose.
69. *See id.* at 179 (Douglas, J., concurring) (rejecting the dictum in *United States v. Wheeler*, 254 U.S. 281, 299 (1920), which characterized the statute in *Crandall* as one which directly burdened the performance of government functions or the rights derived from those functions).
70. *Id.* at 178 (Douglas, J., concurring).
71. *See Crandall*, 75 U.S. at 43-44.
72. *See id.*
73. One commentator notes that the federal view “falls far short of justifying the
Another shortcoming of a pure federal sovereignty view is that a right that exists primarily to advance federal interests may not be protected from infringement by the federal government itself. Thus, the federal government could presumably restrict the right to travel in the interests of federal sovereignty. For example, a federal statute requiring new state residents to wait six months before applying for federally funded public assistance might be justified on the ground that it enables the federal government to plan the distribution of welfare funds among the states. Under a personal liberty conception of the right to travel, however, such a provision would likely be unconstitutional.

The federal sovereignty view was again invoked in United States v. Guest, a case involving the prosecutions of private individuals for conspiracy to interfere with the rights of African-Americans to "use highway facilities and other instrumentalities of interstate extremely broad right" recognized by the Supreme Court since the 1960s. Hartch, supra note 11, at 476. Hartch characterizes the reliance on the federal sovereignty rationale as "insincere" because "the nation functioned reasonably well for almost 200 years" before the Court began to apply the right to travel to invalidate durational residency requirements. Id.

74. This point is slightly different from the point made by Jide Nzelibe. Nzelibe argues that there is no fundamental right to travel, merely a free movement principle, under which the federal government's power to restrict travel is unconstrained. Nzelibe, supra note 6, at 465-69. The federal sovereignty view, on the other hand, argues that the right to travel, although emanating from the federal government, ultimately gives rise to a fundamental right that is vested in the individual. Nevertheless, it is still arguable that a right to travel based solely on federal sovereignty is not protected from federal restriction since the right is defined by the federal government. Thus, in Shapiro v. Thompson, 394 U.S. 618, 667-68 (1969), Justice Harlan argued that the Privileges or Immunities Clause of the Fourteenth Amendment would not protect the right to travel from federal abridgement. According to Justice Harlan:

On the authority of Crandall v. Nevada, those privileges and immunities have repeatedly been said to include the right to travel from State to State, presumably for the reason assigned in Crandall: that state restrictions on travel might interfere with intercourse between the Federal Government and its citizens. This kind of objection... would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not), Congress has full power to define the relationship between citizens and the Federal Government.

Id. (Harlan, J., dissenting) (footnotes omitted). Presumably the same argument may be made with respect to the Equal Protection Clause, which the majority relied on to strike down the statute. Nevertheless, the majority held that Congress had authority to permit states to violate the Fourteenth Amendment's Equal Protection Clause. Id. at 641.

75. See Shapiro, 394 U.S. at 641.

76. Because of this limitation inherent in the federal sovereignty view, Justice Harlan argued that the right to travel should be regarded as a personal liberty protected by the Due Process Clauses of both the Fifth and Fourteenth Amendments. Id. at 669-77 (Harlan, J., dissenting). Nevertheless, Justice Harlan concluded that the statute in Shapiro should have been upheld. Id. (Harlan, J., dissenting).
The Court held that the defendants had been properly charged because the right to travel was a fundamental right. Justice Stewart, writing for the majority, noted 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."

While the case law clearly establishes that the right to travel is a central attribute of a strong unified nation, theories that articulate the right solely or primarily in terms of federal sovereignty miss an important point. The main reason the right to travel is so essential to the federal government is because respect for personal liberty is essential to a strong, unified nation. The right to travel is protected, not simply because the federal government would not function without it, but because the federal government would be worthless if it did not protect the basic liberties of its citizens.

2. Personal Liberty as the Source of the Right to Travel

The personal liberty view places the right to travel squarely within the ambit of individual civil rights. Thus, the freedom to move from place to place is an aspect of personal liberty which the government, be it state or federal, cannot restrict without good reason.

The personal liberty view conceives of the right to travel as an individual human right, essential to liberty and human dignity, not merely as a right deriving from federal citizenship. Although society may benefit as a whole from recognizing and protecting this fundamental freedom, the right is vested first and foremost in the individual, not in the government. For example, in *Corfield v. Coryell*, Justice Washington identified the right to travel as a right that was "in [its] nature, fundamental; which belong[s], of right, to the citizens of all free governments." Thus, he did not restrict the right to citizens of a federalist system, but to citizens of all free governments.

Similarly, in *Williams v. Fears*, Chief Justice Fuller described the right to travel as an "attribute of personal liberty." This personal liberty right, however, was "secured by the Fourteenth Amendment and by other provisions of the Constitution." In other words, the "source" of the right was personal liberty, while constitutional protection for that right derived from specific constitutional

78. Id. at 757.
79. Id.
80. See, e.g., Chafee, supra note 44, at 192-93.
82. Williams v. Fears, 179 U.S. 270, 274 (1900).
83. Id.
provisions. In *Edwards v. California*, Justice Jackson viewed the right to travel as a personal liberty, rather than as a right grounded in the Commerce Clause as the majority held. Thus, Justice Jackson wrote that “[t]o hold that the measure of [a human being’s] rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights,” demonstrating his belief that the right to travel was best understood as a natural human right.

3. The Hybrid Concept of Federal Sovereignty and Personal Liberty as the Source of the Right to Travel

The challenge of ascribing the right to travel to any one particular source has led some justices to conflate the concepts of federal sovereignty and personal liberty, either inferring or expressly asserting that the right to travel is dual-faceted. Thus, as one commentator notes:

There is, of course, a middle ground between these two positions—the doctrine could be both an attribute of our federalist structure in addition to a fundamental personal right. If there is a unifying theme to the Court’s right to travel jurisprudence, it is probably that there is this duality of values embodied in this “right.”

In *Shapiro*, for example, Justice Brennan writing for the majority noted the dual aspect of the right to travel when he observed that:

[Long ago [the Supreme Court] recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Other justices have described the right to travel in terms of both federal sovereignty and personal liberty. For example, Justice Stewart, whose opinion in *Guest* contains one of the strongest judicial statements of the federal sovereignty view, described the right to travel in *Shapiro* as “a virtually unconditional personal right, guaranteed by the Constitution to us all.” The hybrid approach reflects the recognition that the right to travel cannot be understood exclusively as a federal sovereignty or personal liberty right.

85. *Id*.
86. See Nzelibe, *supra* note 6, at 464.
87. *Id*.
89. *Id* at 643 (Stewart, J., concurring) (footnote omitted).
4. Specific Constitutional Provisions as Sources of the Right to Travel

Although the Articles of Confederation contained a provision expressly guaranteeing freedom of movement between states, the Constitution did not include this provision. Specifically, Article IV of the Articles of Confederation stated:

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 ingress and regress to and from any other State . . . .\(^\text{90}\)

Although the first clause of this Article, protecting the privileges and immunities of citizens, was incorporated into Article IV, Section 2 of the Constitution, the second clause guaranteeing freedom of movement between the states was not. At least three possible reasons have been suggested for its exclusion. First, the Framers found it “objectionable” in some way.\(^\text{91}\) Second, they believed that the right was “embodied elsewhere” in the Constitution making its inclusion “superfluous.”\(^\text{92}\) Third, they believed that the right was so fundamental to personal liberty or so basic to the nature of the federal government that it did not need to be articulated.\(^\text{93}\) Attempts to identify a specific constitutional source for the right are based on the


\(^\text{91}\). Chafee, supra note 44, at 185. Chafee rejects this explanation for the clause’s exclusion without detailing what those objections might have been. Gregory Hartch, on the other hand, adheres to the view that the Framers excluded the right to travel because they did not believe it to be either a necessary aspect of federalism or a fundamental personal right. Hartch, supra note 11, at 476. According to Hartch, “there is no evidence that the Framers regarded the right to travel as a fundamental right. In fact, if anything, originalist evidence points to jettisoning the right altogether.” Id. Hartch asserts that the Framers omitted the right to travel from the Constitution because they “did not view the right to travel as vital to the new nation.” Id. This view is not generally accepted by scholars. Thus, as one commentator notes: [I]t has never been suggested, nor would it be logical to suggest, that the Framers intended to abolish the right to travel by leaving the “ingress and regress” clause out of the text of the Constitution. Thus, it is likely that the right was necessarily intended to have its source somewhere else in the Constitution.

Meyer, supra note 5, at 431 (footnotes omitted). Similarly, Andrew Porter asserts that although “[o]ne reading of the change is that travel is no longer an important constitutional principle,” it is “[m]ore likely” that the right to travel was left out because it was considered such a basic right. Andrew C. Porter, Comment, Toward a Constitutional Analysis of the Right to Intrastate Travel, 86 Nw. U. L. Rev. 820, 822 (1992).

\(^\text{92}\). Chafee, supra note 44, at 185.

second theory that the right to travel was excluded from the text of Article IV, Section 2 because it was embodied in some other provision of the Constitution. The two primary provisions that have been identified as textual sources for the right to travel are Article IV, Section 2 itself and the Commerce Clause. Most recently, the Fourteenth Amendment’s Privileges or Immunities Clause has been identified as a source for one aspect of the right to travel—the right of migration. This third provision will be addressed in Section C of this part, which discusses Saenz v. Roe. The two primary provisions will be discussed below.

a. Article IV, Section 2, Privileges and Immunities

One reason offered for the exclusion of express language guaranteeing the right to travel between the states is that the right was embodied in the clause that the Framers of the Constitution did retain from the Articles of Confederation, namely that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

In Paul v. Virginia, for example, Justice Field identified Article IV, Section 2 as the source of the right to interstate travel. Article IV, Section 2, according to Field:

[Place[s] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting 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.

Field appeared to infer from the protections given to non-citizens within a state the existence of a right of non-citizens to travel to those states. One problem with this interpretation is that Article IV, Section 2 is not generally considered by constitutional authorities to be a rights-creating instrument or even a substantive protection, but an anti-discrimination provision. Thus, in Slaughter-House, Justice

95. U.S. Const. art. IV, § 2, cl. 1.
96. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (upholding a state statute imposing a tax on out of state insurance corporations on the ground that corporations are not citizens and are not protected by Article IV, Section 2).
97. Id. (emphasis added).
98. See Chemerinsky, supra note 3, at 350.
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Miller asserted that Article IV, Section 2 "did not create those rights, which it called privileges and immunities of citizens of the States." Rather, Article IV, Section 2 merely limits the power of a state to discriminate against citizens of other states with respect to their privileges and immunities. Thus, the privileges and immunities, whatever they may be, are derived from some other source. In addition, treating Article IV, Section 2 as the source of the right to travel is problematic because Article IV has generally been held to protect only the rights of non-residents of the state, whereas the right to travel extends to both residents and non-residents of a state. Thus, even if Article IV protects the right of a non-citizen to enter or leave a state, it does not address the right of a state citizen to enter or leave his or her own state. Under the case law, therefore, Article IV, Section 2, would fail to protect state citizens from restrictions imposed by their own states on the right to travel. Furthermore, if a state restricts the ingress and regress of its own citizens, presumably it can also limit the movement of non-citizens, since Article IV, Section 2 guarantees to non-citizens only those rights that the state grants to its own citizens.

100. Id. at 77. Justice Miller further explained that the clause did not "profess to control the power of the State governments over the rights of its own citizens." Id. According to him, the only purpose of the clause:

[W]as 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 be the measure of the rights of citizens of other States within your jurisdiction.

Id. Similarly, in Toomer v. Witsell, the Court asserted that Article IV, Section 2 "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948); see also Chemerinsky, supra note 3, at 353.
101. See Chemerinsky, supra note 3, at 352-56.
103. See Chafee, supra note 44, at 186; Hartch, supra note 11, at 477.
104. This traditional view of Article IV, Section 2 as protecting only non-residents has been questioned by some authorities. Professor Mark Strasser asserts that "[c]ourts and commentators also disagree about... whether it applies when individuals who are citizens in one state wish to become citizens of a different state or only when a citizen of one state temporarily visits another state." Strasser, supra note 2, at 558. Justice O'Connor has taken the position that Article IV protects not only out-of-state visitors, but individuals who venture into a state "to settle there and establish a home." Zobel v. Williams, 457 U.S. 55, 74 (1982) (O'Connor, J., concurring). Thus, Article IV, Section 2 protects state citizens from state discrimination based on length of residency because such restrictions infringe their fundamental right to migrate and establish residency in a new state, a privilege and immunity under Article IV. Id. at 76 (O'Connor, J., concurring). Justice Rehnquist holds the opposite view that the clause "has no application to a citizen of the State whose laws are complained of." Id. at 84 n.3 (Rehnquist, J., dissenting).
105. Professor Chafee illustrates this point as follows:

One possible explanation of the omission of ingress and egress... is that freedom of movement was regarded as part of the "Privileges and
There appear to be two basic impulses behind decisions favoring Article IV, Section 2 as the source of the right to travel. First, it makes some intuitive sense to link the right to travel to the constitutional provision that parallels its expression in the Articles of Confederation. Second, an early and influential case, *Corfield v. Coryell*, has been interpreted as identifying Article IV, Section 2 as the source of the right to travel. A careful reading of Justice Washington's opinion in *Corfield* reveals, however, that the right to travel, like the other rights he lists, is in fact a right of personal liberty that exists independently of Article IV, Section 2.

In a frequently quoted portion of that decision, Justice Washington posed the question: "[W]hat are the privileges and immunities of citizens in the several states?" He went on to answer the question by "confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." Thus, he equated privileges and immunities with the basic, fundamental rights that belong to free people. These fundamental rights included "[t]he right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."

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Immunities of Citizens in the several States," which must also be given to citizens of another state without discrimination. For example, if Rhode Island allows Rhode Islanders to come in and go out as they please, it cannot exclude visitors from Massachusetts. Still, suppose Rhode Island law refuses to readmit any citizen who has been out of the state for over a week. Then there would be no discrimination in keeping out Massachusetts men who have never been in Rhode Island at all.

Chafee, supra note 44, at 186.

106. See, e.g., Zobel, 457 U.S. at 78-79 (O'Connor, J., concurring) ("Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate."); United States v. Guest, 383 U.S. 745, 764 (1966) (Harlan, J., concurring in part and dissenting in part) ("Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution."). Jide Nzelibe argues that because the right to travel and the Privileges and Immunities Clause of the Constitution can both be traced to Article IV of the Articles of Confederation, courts have often identified the Privileges and Immunities Clause as the source of the right to travel. Nzelibe, supra note 6, at 436-37. Nzelibe further argues that another reason courts identified this constitutional provision as the source of the right was because the "free movement principle" and the Privileges or Immunities Clause were the product of the same policy objective to promote national unity. Id. at 441.

107. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *Corfield* involved a New Jersey statute, which prohibited the taking of oysters in the waters of New Jersey by citizens of other states. The court held that the statute did not violate the Privileges and Immunities Clause of Article IV. *Id.* at 551-52.

108. See Guest, 383 U.S. at 764-65; Nzelibe, supra note 6, at 442.

109. See *Corfield*, 6 F. Cas. at 551-52.

110. *Id.* at 551.

111. *Id.*

112. *Id.* at 552.
According to Justice Washington, "the enjoyment of [these privileges and immunities] by the citizens of each state, in every other state, was manifestly calculated... 'to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'"\textsuperscript{113}

Justice Washington's opinion has been criticized for interpreting the Privileges and Immunities Clause as a rights-creating provision.\textsuperscript{114} A more plausible reading of the Corfield passage, however, is that Article IV, Section 2 did not create these rights, but merely granted protection to interstate travelers with respect to these rights. Justice Washington assumed that the states already guaranteed protection for these rights to their own citizens.\textsuperscript{115} If this assumption is recognized, then the passage can be understood, not to create rights, but merely to grant equal protection to non-citizens with respect to those fundamental rights.\textsuperscript{116}

Justice Washington described privileges and immunities as fundamental rights belonging to citizens of "all free governments," implying that such rights exist independently of the Constitution and are grounded in principles of freedom and liberty. In addition, he listed the right to travel as one of those fundamental rights over which Article IV, Section 2 granted constitutional protection.\textsuperscript{118} Thus, in Justice Washington's view, the "source" of the right to travel was not Article IV, Section 2, but personal liberty.\textsuperscript{119}

\textsuperscript{113} Id. (citing the Articles of Confederation art. IV).
\textsuperscript{114} Nzelibe argues, for example, that:
\textsuperscript{115} See Corfield, 6 F. Cas. at 551 (noting that these rights "have, at all times, been enjoyed by the citizens of the several states").
\textsuperscript{116} See John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1400 n.48 (1992). Harrison notes:

The question whether the Comity Clause is limited to comity has been disputed by modern commentators. There is also controversy as to which of these views Justice Washington adopted. I think Justice Washington meant to embrace the comity reading. First, the point of the invocation of "fundamental" rights is the distinction between such rights and oysters. Moreover, Justice Washington seems to have been talking about \textit{kinds} of rights when he said that they fall under general categories. Finally, his explanation that the citizens of each state were to enjoy these privileges in every other state, combined with his appeal to the interstate harmony purpose of the provision, reinforces the antidiscrimination reading. Whatever he may have implied in Corfield, Justice Washington very likely subscribed at least to the comity reading of the clause.

\textit{Id.} (citations omitted).
\textsuperscript{117} Corfield, 6 F. Cas. at 551.
\textsuperscript{118} Id. at 552.
\textsuperscript{119} See id. at 551.
This idea that the right to travel arises independently of Article IV, Section 2 is more consistent with the traditional interpretation of the clause. As previously noted, Article IV, Section 2 is considered merely to protect existing rights, not to generate or create new rights.\textsuperscript{120} Thus, authorities that treat Article IV, Section 2 as the "source" of the right to travel probably misconceive the nature of the constitutional provision and misinterpret Justice Washington's \textit{Corfield} decision.\textsuperscript{121}

Most recently, the Court has identified Article IV, Section 2 as the source of the second component of the right to travel—the right of comity, or the right of visitors to a state to be treated equally with respect to certain rights.\textsuperscript{122} Significantly, however, the Court did not identify Article IV, Section 2 as the source of the right of locomotion (the first component of the right to travel) and, indeed, declined to identify any specific source of that right.\textsuperscript{123}

b. \textit{The Commerce Clause}

The first Supreme Court case to uphold the right to travel expressly declined to identify the Commerce Clause as the source of this right.\textsuperscript{124} Seventy-four years after that decision, however, the Court relied on the Commerce Clause to strike down a California statute that made it a crime to knowingly transport indigent non-residents into the state.\textsuperscript{125} In \textit{Edwards v. California}, Fred Edwards, a California resident, was arrested under the statute for transporting his wife's indigent brother,

\begin{footnotesize}
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\item[120.] See, e.g., \textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 77 (1872) ("The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States."); Nzelibe, \textit{supra} note 6, at 442 ("The idea that Article IV could be an independent source of fundamental rights... was dispensed with early." (citing \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 75)).
\item[121.] One Note writer argues, for example, that Justice Washington "intimated that [Article IV Privileges and Immunities] was a source of fundamental rights," and that \textit{Paul v. Virginia} later rejected this view and "redefine[d] the right to interstate travel as an anti-discrimination right embodied in principles of federalism." Benjamin C. Sassé, \textit{Note, Curfew Laws, Freedom of Movement, and the Rights of Juveniles}, 50 Case W. Res. L. Rev. 681, 684-85 (2000). This Note argues, on the other hand, that Justice Washington did not describe Article IV as the "source" of the right. The Court in \textit{Paul}, however, may have misconstrued Justice Washington's opinion when it asserted that Article IV "gives [citizens] the right of free ingress into other States, and egress from them." \textit{Paul v. Virginia}, 75 U.S. (8 Wall.) 168, 180 (1868).
\item[122.] Saenz v. Roe, 526 U.S. 489, 501-02 (1999).
\item[123.] \textit{Id.} at 501.
\item[124.] Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43 (1868). The majority expressed doubt as to whether the state border tax violated the Commerce Clause, but noted that "we do not concede that the question before us is to be determined by [the Commerce Clause]." \textit{Id.} In contrast, the concurring opinion by Justice Clifford asserted that "the act of the State legislature is inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I think the judgment of the court should have been placed exclusively upon that ground." \textit{Id.} at 49 (Clifford, J., concurring).
\item[125.] Edwards v. California, 314 U.S 160, 173 (1941).
\end{enumerate}
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Frank Duncan, from Texas to California.126 Justice Byrnes, writing for the majority, noted that "the transportation of persons is 'commerce' within the meaning of [the Commerce Clause]"127 and that, therefore, the direct prohibition on the transportation of indigents constituted "an unconstitutional barrier to interstate commerce."128

The Commerce Clause analysis raises several significant issues regarding the nature and the scope of the right to travel. First, if the right to travel is grounded in the Commerce Clause, then, by definition, Congress has significant power to regulate and restrict that right.129 As one commentator points out, "it seems unwise to base a fundamental right on the Commerce Clause when the clause itself permits Congress to restrict travel."130 Thus, any restriction on the power of Congress to regulate the right to travel would have to come from some other constitutional source.

Second, restricting the transportation of another person into a state is distinct from restricting interstate movement. In the former situation, the target of the restrictive statute is the person engaged in interstate commerce, namely the transportater of people, while, in the latter, the traveler is directly restricted. As Justice Jackson noted in his concurrence, however, "the migrations of a human being... do not fit easily into my notions as to what is commerce."131 Thus, he argued that the Commerce Clause was inadequate to encompass the full "measure" of a human being's right to travel.132 As mentioned earlier, Jackson feared that characterizing travel as a form of commerce would lead to the "denaturing [of] human rights."133 Like Justice Jackson, Justice Douglas perceived the right to travel as more fundamental than the right to engage in unrestricted interstate commerce.134 In contrast to Justice Jackson's personal liberty view,
however, Justice Douglas adopted the federal sovereignty construction, arguing that the right to travel had long been recognized as basic to the “national character of our Federal government.”

Despite this subtle difference between Justice Jackson’s and Justice Douglas’s concurring opinions, they both agreed that the right to travel was a fundamental right, regardless of whether its source was federal sovereignty or personal liberty. They also agreed that the Privileges or Immunities Clause of the Fourteenth Amendment, rather than the Commerce Clause, protected the right to travel. The Commerce Clause has, for the most part, lost its popularity with the Court as a source of the right to travel. Under modern case law, the right is generally viewed as a fundamental right derived either from federal sovereignty, personal liberty or a hybrid of these two sources. The next section discusses these provisions.

Having established the existence of the right to travel, a court’s work has only begun. The court must then analyze the scope of federal protection over the right. As previously noted, the courts have identified the following provisions as providing federal protection over the right to travel: the Due Process Clauses; the Equal Protection Clause; and the Privileges or Immunities Clause of the Fourteenth Amendment.

B. Constitutional Protection of the Right to Travel

1. Due Process

The Court’s most ardent advocate of the due process approach was Justice Harlan, who, in his opinions in Shapiro v. Thompson and United States v. Guest, articulated the argument that the right to state lines.

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135. Id. at 178 (Douglas, J., concurring).
136. The concurring opinions of Justices Jackson and Douglas are discussed further in Part I.C., dealing with the Fourteenth Amendment’s Privileges or Immunities Clause.
137. See Lutz v. City of York, 899 F.2d 255, 265 (3d Cir. 1990) (noting that the most recent case to rely on the Commerce Clause as a source of the right to travel was the 1941 case of Edwards v. California); see also, 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, 505 n.183 (1991) (explaining that Lutz rejected the Commerce Clause as the source of the right of intrastate travel because of “its disuse as a source” of the right to interstate travel).
139. Shapiro, 394 U.S. at 655 (Harlan, J., dissenting); Guest, 383 U.S. at 762
travel is a fundamental liberty that should not be denied without due process of law.\textsuperscript{140} Justice Harlan cited with approval Professor Zechariah Chafee’s theory that the right to travel should be analyzed in substantive due process terms.\textsuperscript{141} Chafee adhered to the personal liberty view of the right to travel, rejecting federal sovereignty as inadequate to encompass or protect “one of the most cherished of human rights.”\textsuperscript{142} According to Chafee, the right to travel was one of the “liberties” which could not “be taken away without due process of law.”\textsuperscript{143} Drawing on Chafee’s analysis, Justice Harlan asserted in \textit{Shapiro} that the “freedom to travel is an element of the ‘liberty’ secured by [the Due Process] clause.”\textsuperscript{144}

The due process approach was applied to the right to travel in \textit{Williams v. Fears}, a case involving a Georgia license tax on emigrant agents.\textsuperscript{145} The Supreme Court recognized that the “right of locomotion” was a liberty protected by the Due Process Clause.\textsuperscript{146} Nevertheless, it upheld the tax because it affected “the freedom of egress from the State . . . only incidentally and remotely.”\textsuperscript{147}

In \textit{Kent v. Dulles}\textsuperscript{148} and \textit{Aptheker v. Secretary of State},\textsuperscript{149} the Court upheld the right to travel under the Due Process Clause of the Fifth Amendment. These decisions were significant because they implicated the right to international travel as opposed to interstate travel and because they were the first limitations on federal power to restrict the right to travel.\textsuperscript{150} Later, the Court retreated from this expanded view of the right to travel in \textit{Zemel v. Rusk}, upholding a ban on travel to Cuba under the rational basis test.\textsuperscript{151}

In recent years, substantive due process analysis has primarily involved family and procreative issues.\textsuperscript{152} Therefore, because the Court has hesitated to recognize additional rights under the substantive due process doctrine, it is unclear whether it would apply substantive due process protection to the right to travel.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{140} \textit{Shapiro}, \textit{394 U.S. at 669-71} (Harlan, J., dissenting); \textit{Guest}, \textit{383 U.S. at 769-70} (Harlan, J., concurring in part and dissenting in part).
\item \textsuperscript{141} \textit{Guest}, \textit{383 U.S. at 769-70} (Harlan, J., concurring in part and dissenting in part).
\item \textsuperscript{142} \textit{Chafee, supra note 44}, at 192.
\item \textsuperscript{143} \textit{Id. at 193}.
\item \textsuperscript{144} \textit{Shapiro}, \textit{394 U.S. at 670} (Harlan, J., dissenting).
\item \textsuperscript{145} \textit{Williams v. Fears}, \textit{179 U.S. 270} (1900).
\item \textsuperscript{146} \textit{Id. at 274}.
\item \textsuperscript{147} \textit{Id}.
\item \textsuperscript{148} \textit{357 U.S. 116, 125} (1958) (invalidating federal passport restrictions).
\item \textsuperscript{149} \textit{378 U.S. 500, 505} (1964) (invalidating a federal ban on passports to communists).
\item \textsuperscript{150} \textit{See} \textit{Porter, supra note 91}, at 825.
\item \textsuperscript{151} \textit{Zemel v. Rusk}, \textit{381 U.S. 1} (1965); \textit{Porter, supra note 91}, at 825-26.
\item \textsuperscript{152} \textit{See} \textit{Chemerinsky, supra note 3}, at 637-89.
\item \textsuperscript{153} \textit{Porter, supra note 91}, at 850.
\end{itemize}
2. Fourteenth Amendment and Equal Protection

The Supreme Court's modern right to travel jurisprudence has focused primarily on state durational residency requirements or waiting periods. The Court has considered the validity of state-imposed waiting periods for welfare benefits, voter eligibility, access to divorce, and medical benefits. These cases generally involve restrictions on the migration right, or the right to establish residency in a new state and be treated equally with other state citizens.

The leading Supreme Court case analyzing the constitutionality of waiting periods was *Shapiro v. Thompson*, a 1969 decision involving state and District of Columbia statutes that denied welfare benefits to residents who had resided in the jurisdiction for less than one year. *Shapiro* was significant because it was the first case to apply equal protection analysis to classifications that infringed on the right to travel. According to the Court, the statutes created a classification based on the length of residency and denied welfare benefits to one of those classes. Under the traditional equal protection analysis, a classification will be upheld if it is rationally related to a legitimate government purpose. If, however, the statute singles out a "suspect class" or infringes a fundamental right, it will be subject to a heightened standard of review and the government will be required to show that the classification is necessary to promote a compelling government interest. The *Shapiro* Court held the right to travel to be a fundamental right, drawing primarily on the hybrid view of federal sovereignty and personal liberty as the source.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

154. See Chemerinsky, supra note 3, at 700-01.
158. Nelson, supra note 155, at 197.
159. Shapiro, 394 U.S. at 627.
160. This level of scrutiny is referred to as the "rational basis test." Chemerinsky, supra note 3, at 533-34.
161. The Court generally applies strict scrutiny when analyzing classifications based on race, national origin, alienage and for classifications infringing fundamental rights, such as the right to vote, access to judicial process and the right to travel. *Id.* at 417, 533. Strict scrutiny will almost always result in the invalidation of the law. *Id.* at 416.
162. Shapiro, 394 U.S. at 630-31.
163. *Id.* at 629.
The Shapiro Court struck down the statutes on several grounds. First, it held that the express governmental objective to deter the migration of the poor was "constitutionally impermissible" because it directly contravened the fundamental right to travel.\textsuperscript{164} According to the Court:

[The purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."\textsuperscript{165}

The Court also held that two other objectives proffered by the state, to discourage "those indigents who would enter the State solely to obtain larger benefits,"\textsuperscript{6} and "to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes,"\textsuperscript{7} were also constitutionally impermissible.

Four other objectives offered by the government were permissible according to the Court:\textsuperscript{166} (1) to plan the welfare budget; (2) to create an objective test of residency; (3) to minimize fraud in obtaining welfare payments; and (4) to encourage early entry of new residents into the work force.\textsuperscript{169} Nevertheless, the Court applied the strict scrutiny standard, holding that the classifications were not "necessary" to promote the government objectives, even if those objectives were compelling.\textsuperscript{170} According to the Court:

The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling government interest, is unconstitutional.\textsuperscript{171}

\textsuperscript{164} Id.
\textsuperscript{165} Id. at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968) (alteration in original)).
\textsuperscript{166} Id. at 631.
\textsuperscript{167} Id. at 632. The Court's justification for holding this objective to be impermissible per se is unclear. Apparently, the Court concluded that rewarding past contributions by distinguishing between short-term and long-term residents created "invidious distinctions between classes of its citizens." Id. at 633. If so, however, the Court's holding is conclusory, because it fails to explain why distinctions based on length of residency are invidious. If, however, the objective of rewarding past contributions itself was permissible and the classifications were merely suspect, then the Court should have applied the second prong of the equal protection analysis.
\textsuperscript{168} Id. at 633-34.
\textsuperscript{169} Id. at 634.
\textsuperscript{170} Id. at 634-38.
\textsuperscript{171} Id. at 634.
Thus, Shapiro appeared to hold that any classification that deterred or penalized the right to travel would trigger strict scrutiny.\textsuperscript{172} Shapiro did not consider all durational residency requirements to be penalties, however.\textsuperscript{173} For example, certain waiting periods "may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel."\textsuperscript{174} The Court did not explain, however, why the waiting period involved in Shapiro burdened the right to travel in such a way as to trigger strict scrutiny, nor did it discuss how to distinguish between waiting periods that penalize the right to travel and those that do not.\textsuperscript{175}

The Court cleared up one point of confusion in Dunn v. Blumstein, decided three years after Shapiro.\textsuperscript{176} Dunn involved a Tennessee statute requiring potential voters to reside in the state for one year and in their respective counties for three months.\textsuperscript{177} According to Dunn, a statute need not actually deter individuals from moving to another state to be considered an unconstitutional restriction on the right to travel. Thus, a statute that penalizes individuals who have exercised the right to interstate travel will be subjected to strict scrutiny even if it has no deterrent effect.\textsuperscript{178} Accordingly, Dunn concluded that, by precluding newcomers from exercising the "fundamental political right" to vote,\textsuperscript{179} the statute penalized the right to travel.\textsuperscript{180}

In Memorial Hospital v. Maricopa County, the Court further attempted to clarify its criteria for identifying unconstitutional restrictions on the right to travel.\textsuperscript{181} Maricopa involved an Arizona statute that required one year's residence in a county in order to receive county-funded, non-emergency hospitalization or medical care.\textsuperscript{182} The appellant had moved into Maricopa County from New

\textsuperscript{172} Peterson, \textit{supra} note 157, at 314.
\textsuperscript{173} \textit{Id.} at 313-14.
\textsuperscript{174} Shapiro, 394 U.S. at 638 n.21.
\textsuperscript{176} Dunn v. Blumstein, 405 U.S. 330 (1972); Peterson, \textit{supra} note 157, at 315.
\textsuperscript{177} Dunn, 405 U.S. at 334.
\textsuperscript{178} \textit{Id.} at 339-40.
\textsuperscript{179} \textit{Id.} at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).
\textsuperscript{180} \textit{Id.} at 341-42. The Court subsequently qualified its approach to voter eligibility requirements. One year after Dunn, the Court upheld a 50-day waiting period to vote in Marston v. Lewis, 410 U.S. 679 (1973). In addition, in Rosario v. Rockefeller, the Court upheld a state requirement that, in order to vote in a primary election, voters must register with their political affiliation thirty days before the prior general election. Rosario v. Rockefeller, 410 U.S. 752 (1973). The registration requirement was upheld even though it imposed a de facto one-year residency requirement. See Nelson, \textit{supra} note 155, at 200.
\textsuperscript{181} Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Peterson, \textit{supra} note 157, at 316.
\textsuperscript{182} Maricopa, 415 U.S. at 251.
Mexico, thus implicating the right to interstate—as opposed to intrastate—travel.\textsuperscript{183} The Court noted that while \textit{Shapiro} did not hold all durational residency requirements to be unconstitutional, it failed to clarify the level of impact a waiting period must have in order to trigger strict scrutiny.\textsuperscript{184} According to \textit{Maricopa}, however, \textit{Shapiro} articulated two factors to consider in determining the level of impact: 1) whether the residency requirement deterred migration; or 2) whether and to what extent the requirement penalized the right to travel.\textsuperscript{185}

The \textit{Maricopa} Court further explained that “\textit{Shapiro} and \textit{Dunn} stand for the proposition that a classification which ‘operates to penalize those persons . . . who have exercised their constitutional right of interstate migration,’ must be justified by a compelling state interest.”\textsuperscript{186} According to \textit{Maricopa}, the \textit{Shapiro} classification penalized the right to travel, not because it was a residency requirement per se, but because it denied residents “the basic ‘necessities of life.’”\textsuperscript{187} Furthermore, the \textit{Dunn} classification penalized the right to travel because it denied “a fundamental political right.”\textsuperscript{188} Thus, under the \textit{Shapiro-Dunn-Maricopa} formulation, a durational residency requirement is apparently subject to strict scrutiny if it penalizes the right to travel either by denying a basic necessity of life or depriving the traveler of another fundamental right.\textsuperscript{189} The \textit{Maricopa} Court held that, because medical care was “as much ‘a basic necessity of life’ to an indigent as welfare assistance,”\textsuperscript{190} the residency requirement “penalize[d] indigents for exercising their right to migrate to and settle in that State.”\textsuperscript{191} Moreover, none of the objectives articulated by the County—preserving the “fiscal integrity” of the medical care system,\textsuperscript{192} rewarding past contributions of long-term residents,\textsuperscript{193} developing modern medical facilities,\textsuperscript{194} determining bona fide residence,\textsuperscript{195} preventing fraud,\textsuperscript{196} and establishing budget predictability\textsuperscript{197}—were found to withstand strict scrutiny.\textsuperscript{198}

\begin{itemize}
  \item 183. \textit{Id.}
  \item 184. \textit{Id.} at 256-57 (“The amount of impact required to give rise to the compelling-state-interest test was not made clear.”).
  \item 185. \textit{Id.}
  \item 186. \textit{Id.} at 258 (citation omitted).
  \item 187. \textit{Id.} at 259.
  \item 188. \textit{Id.} (citation omitted).
  \item 189. \textit{See Meyer, supra} note 5, at 437; \textit{Porter, supra} note 91, at 828; \textit{Ellis & Miller, supra} note 30, at 345-46.
  \item 190. \textit{Maricopa}, 415 U.S. at 259.
  \item 191. \textit{Id.} at 261-62.
  \item 192. \textit{Id.} at 263.
  \item 193. \textit{Id.} at 266.
  \item 194. \textit{See id.}
  \item 195. \textit{Id.} at 267.
  \item 196. \textit{Id.} at 268.
  \item 197. \textit{Id.}
  \item 198. \textit{Id.} at 269 (“Such a classification can only be sustained on a showing of a
In his dissent, Justice Rehnquist criticized the majority for extending the scope of the right to travel beyond its historical parameters. Under *Crandall*, for example, the right to travel merely encompassed movement across the borders of the state, not the “right to free benefits from every State through which the traveler might pass.” Under *Edwards*, it protected the right of an indigent person to enter the state without being criminally penalized. According to Justice Rehnquist, the traditional right to travel was a right to be free from “effective and purposeful” barriers to migration. Thus, Justice Rehnquist proposed that the standard for identifying an infringement on the right to travel should be “whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote.” Under this test, according to Justice Rehnquist, the residency requirement in *Maricopa* was not a threat to interstate travel and should have been analyzed (and upheld) under the rational relationship standard of review.

Justice Rehnquist rejected as ahistorical the majority’s conception of the right to travel as embodying a right to migrate and settle in a new state. Some of the earliest cases, however, identify a right to settle in a new state and be treated equally with other state citizens. For example, in the 1823 case of *Corfield v. Coryell*, Justice Washington noted that 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” was a privilege and immunity under Article IV, Section 2. Similarly, in *Slaughter-House*, Justice Miller stated that a citizen can “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.” Thus, the Supreme Court’s more recent focus on the constitutionality of durational residency requirements is not necessarily inconsistent with the Court’s traditional understanding of the right to travel.

Not all durational residency requirements penalize the right to travel, according to the Supreme Court. For example, the Court upheld a state-mandated waiting period to obtain a divorce in *Sosna v.* 

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199. See *id.* at 280-83 (Rehnquist, J., dissenting).
200. *Id.* at 281 (Rehnquist, J., dissenting).
201. *Id.* at 282 (Rehnquist, J., dissenting).
202. *Id.* at 283 (Rehnquist, J., dissenting).
203. *Id.* at 285 (Rehnquist, J., dissenting).
204. *Id.* at 288 (Rehnquist, J., dissenting).
205. See *Peterson, supra* note 157, at 318.
207. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872). Justice Miller did not expressly describe this right as a “right to travel.”
The Court distinguished Sosna from the Shapiro-Dunn-Maricopa triad on the ground that regulation of domestic relations fell exclusively under the power of the states. Sosna also added a requirement to the Shapiro-Dunn-Maricopa test; namely, that, in order to be considered a penalty on the right to travel, the state restriction must "irretrievably foreclose[]" the individual's right to receive the restricted benefit. Sosna has been criticized as being unprincipled and inconsistent with the Court's prior right to travel holdings. Chemerinsky notes, for example, that the distinction based on the argument that the individual "would eventually qualify" for a divorce "seems questionable because all people precluded by a durational residency requirement will 'eventually qualify.'" Thus:

Those denied welfare benefits in Shapiro or medical care in Maricopa County ultimately could obtain the same benefits after waiting for a year. It is not clear why the ability to wait for divorce makes that durational residency requirement permissible, but waiting for welfare or medical care is an impermissible durational residency requirement.

One commentator argues that, in reality, the Court was concerned with the "seriousness of the deprivation" rather than whether the individual was "irretrievably foreclosed." Thus, the Court was willing to uphold a waiting period restricting access to divorce but not to welfare benefits, medical care or the right to vote.

The Court has also applied equal protection analysis to invalidate laws that provide unequal benefits to individuals based on their length of residency. For example, in Zobel v. Williams, the Court struck down an Alaska statute providing for dividend payments from a state oil fund to state citizens based on previous years of residence in the state. Chief Justice Burger declined to analyze the case as a right to travel issue, arguing that "right to travel analysis refers to little more than a particular application of equal protection analysis." Thus, in determining whether the statute violated the equal protection of short-term residents, he claimed to apply the rational basis standard of review rather than the strict scrutiny standard that the Court generally applies when fundamental rights are implicated by a government classification. He explained that the classifications created by the

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208. 419 U.S. 393 (1975).
209. Id. at 404-06; Peterson, supra note 157, at 319-20.
211. Chemerinsky, supra note 3, at 703.
212. Id.
214. See id.
217. Id. at 60 n.6.
218. See id. at 60-61.
Alaska statute did not restrict the right to travel because they did “not discriminate only against those who have recently exercised the right to travel . . . [but] also . . . among long-time residents and even native-born residents.”

Although Chief Justice Burger did not make this point directly, his analysis would also have been constrained by the Shapiro-Dunn-Maricopa test, which limited strict scrutiny review to durational requirements that deprive individuals of either a necessity of life or a fundamental right. Nevertheless, the opinion is confusing because, even though he asserted that the right to travel was not implicated, he relied on language from other right to travel cases to support his decision. For example, the Court held that one of Alaska’s objectives, “to reward citizens for past contributions,” was not a legitimate state purpose, relying on Shapiro’s rejection of the “past contributions” argument. Nevertheless, as Professor Tribe points out, “[a]lthough the majority [in Zobel] . . . asserted that Shapiro had already established the constitutional illegitimacy of that state purpose, it seems plain that Shapiro had done no such thing.” Shapiro held, in fact, that it was impermissible to reward past contributions by creating an “invidious distinction.” Thus, the Shapiro Court objected, not to rewarding past contributions per se, but to doing so by creating a classification that infringed on the fundamental right to travel. Alaska’s two other objectives—(1) creating a financial incentive for people to move to Alaska, and (2) encouraging prudent management of the mineral income fund—were not rationally related to Alaska’s system of classifications based on length of residence, according to the Zobel Court.

219. Id. at 59 n.5.
220. Chief Justice Burger did point out that, if the Alaska classifications were valid, states would only be prohibited from apportioning benefits when such apportionment “involves ‘fundamental rights’ and services deemed to involve ‘basic necessities of life.’” Id. at 64 n.11 (citing Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974)).
221. Justice Rehnquist points out this inconsistency in his dissent. Id. at 83 (Rehnquist, J., dissenting).
222. Id. at 63.
223. Tribe, supra note 5, at 145 (footnote omitted).
225. Justice O’Connor made this point in her concurring opinion in Zobel when she noted that:

The Court’s reluctance to rely explicitly on a right to travel is odd, because its holding depends on the assumption that Alaska’s desire “to reward citizens for past contributions . . . is not a legitimate state purpose.” Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of Shapiro v. Thompson and Vlandis v. Kline reveals, the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration. Zobel, 457 U.S. at 72 (O’Connor, J., concurring) (citations omitted).
226. Id. at 61. The Court’s main objection to the statute was its retrospective application. The statute provided for dividend payments for the twenty-one years
It appears that the Court’s real concern was that states would start apportioning state services and benefits according to arbitrary classifications based on length of residency, although the majority asserted that such classifications did not necessarily infringe on the fundamental right to travel. Thus, according to the Court, a statute that provides a benefit that increases in proportion to one’s length of residency does not necessarily burden the right of a citizen to move into a new state. In fact, it may arguably provide an incentive to move to that state if the benefit is not provided elsewhere, as in the Alaska case. Nevertheless, the Court was uncomfortable with the provision, not because it impacted the right to travel, but because it treated groups of people differently in the apportionment of benefits. The Court was apparently concerned with the consequences of holding such a provision constitutional:

prior to the enactment of the statute. According to the Court, this provision was not rationally related to the first objective, providing an incentive for people to move into the state:

Assuming, arguendo, that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the State... the State’s interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.

Id. at 62. Under the rational relationship test, however, a statute will be upheld unless it serves no “conceivable legitimate purpose or... is not a reasonable way to attain the end.” Chemerinsky, supra note 3, at 415. It is difficult to see why a statute that gives long-term residents extra dividend payments to cover past years of residence, in addition to providing payments for each year of continued residence, is so arbitrary and unrelated to the stated objective that it cannot survive rational basis review. The Court had a similar objection to the state’s second objective to encourage prudent management of the fund:

Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

Zobel, 457 U.S. at 63. Whether the Court “thinks” the objective is well-served by the enactment, however, is not generally considered relevant under the rational basis test. The Court is usually highly deferential to the legislature’s determination. Chemerinsky, supra note 3, at 415. In Zobel, the Court took an activist approach that is uncharacteristic of rational basis review. As Professor Tribe notes, the Court engaged “in heightened scrutiny under the pretense that [it was] merely enforcing a rule of minimum rationality.” Tribe, supra note 5, at 145. Justice Rehnquist, in dissent, criticized the majority for invalidating a state economic regulation which, under the Fourteenth Amendment, would be presumptively valid and which, according to the majority’s own analysis did not implicate the fundamental right to travel. Zobel, 457 U.S. at 81-82. The Court also applied the rational basis test in Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), to strike down a property tax exemption for Vietnam veterans who had established state residency prior to a particular date. Id. at 623.

227. See Tribe, supra note 5, at 145-46.
228. Zobel, 457 U.S. at 59 n.5.
229. Id. at 83 (Rehnquist, J., dissenting).
230. Id. at 64.
If the states can make the amount of a cash dividend depend on
length of residence, what would preclude varying university tuition
on a sliding scale based on years of residence – or even limiting
access to finite public facilities, eligibility for student loans, for civil
service jobs, or for government contracts by length of domicile?
Could states impose different taxes based on length of residence?
Alaska’s reasoning could open the door to state apportionment of
other rights, benefits, and services according to length of residency.
It would permit the states to divide citizens into expanding numbers
of permanent classes. Such a result would be clearly
impermissible.231

The Court’s conclusion here begs the question: Why would these
classifications based on length of residency be impermissible? Clearly, in the quoted passage, the Court did not claim that they were
impermissible because they were not rationally related to a legitimate
government objective. In fact, the Court did not even discuss the
possible objectives behind such hypothetical classifications, implying
that the classifications were impermissible per se. It is unclear,
however, why the classifications were impermissible if not because
they infringed on a fundamental right to move freely between states
without being subjected to discriminatory treatment.232

The Court’s right to travel analysis under the Equal Protection
Clause left much to be desired in the way of clarity and doctrinal
consistency.233 By the time Saenz had made its way to the Supreme
Court, the Court had yet to conclusively settle on a source of the right
to travel, clearly define the scope of the right and articulate a
consistent test for identifying unconstitutional restrictions on the
right.234

C. The Fourteenth Amendment’s Privileges or Immunities Clause as
the Source of the Right to Travel

After Shapiro, state welfare waiting periods became obsolete until
the passage of the Personal Responsibility and Work Opportunity
Reconciliation Act of 1996 (“PRWORA”), which authorized states to

231. Id. (footnotes omitted).
232. Professor Tribe suggests that Zobel analyzed the classifications as suspect
classes. Tribe argues that “the Zobel Court would have done far better to explain
forthrightly that it was treating the state’s legal stratification of its citizenry into
classes based on a factor like duration of residency as constitutionally suspect and, if
not per se invalid, then nearly so.” Tribe, supra note 5, at 145-46. According to Tribe,
Zobel is an example of the Court’s modern preference for viewing civil rights in terms
of structural federalism rather than personal liberty. Id. at 140. This trend was further
exposed in the Saenz decision, which “reflected the Court’s vision of governmental
design in a federal union of equal states, and not primarily the Court’s perception of a
personal right ineluctably flowing from constitutional text or deeply rooted tradition.”
Id. at 154.
233. See Ellis & Miller, supra note 30, at 345.
234. Id. at 344.
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enact durational residency requirements. In Saenz v. Roe, the plaintiffs challenged a California statute that limited the welfare benefits of individuals who had resided in the state for less than twelve months to the amounts available to them in their previous states of residence. In addition, plaintiffs challenged the constitutionality of PRWORA’s authorization for the statute. In Saenz, the Court invalidated the state statute, as well as the PRWORA authorization, on the ground that the waiting periods violated the Privileges or Immunities Clause of the Fourteenth Amendment.

Saenz was the first Supreme Court decision to uphold the right to travel under the Privileges or Immunities Clause. Prior to Saenz, however, individual Supreme Court justices had argued that the right to travel should be protected by the Privileges or Immunities Clause. Suprisingly, the first judicial expression of this view appears in the case that is now famous for decimating the Privileges or Immunities Clause. In The Slaughter-House Cases, Justice Miller identified the right to travel as a privilege or immunity of national citizenship.

In addition to recognizing the right to interstate movement, Justice Miller further stated that the Fourteenth Amendment itself conferred an additional right of national citizenship: the right to “become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State.” Although he did not identify this right as an aspect of the “right to travel,” it was subsequently identified as such in Saenz.

In Edwards v. California, four concurring justices agreed that a statute criminalizing the transportation of indigents across state lines violated the right to travel, but declined to ground the right in the Commerce Clause as the majority did. Rather, the concurring opinions argued that the statute violated the privileges or immunities of United States Citizens. According to Justice Douglas, “when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of national citizenship. As such it was protected by

235. Id. at 347.
237. Ellis & Miller, supra note 30, at 347.
240. Id. at 80.
241. Saenz, 526 U.S. at 502-03.
242. Edwards v. California, 314 U.S. 160 (1941). The majority invalidated the statute on the ground that it imposed “an unconstitutional burden upon interstate commerce.” Id. at 177.
243. Id. at 181 (Douglas, J., concurring); Id. at 185-86 (Jackson, J., concurring).
the privileges [or] immunities clause of the Fourteenth Amendment against state interference."^244

In addition, Justice Jackson noted that the Court "has always hesitated to give any real meaning to the privileges [or] immunities clause lest it improvidently give too much."^245 According to Justice Jackson, the Supreme Court:

[S]hould . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.^246

When the Supreme Court finally answered his plea, it did so only in part. In *Saenz v. Roe*, the Court identified the right to migrate and establish residency in a new state as a privilege or immunity of national citizenship.^247 The Court did not hold, however, that the right of interstate locomotion, the first and most basic component of the right to travel, was protected by the Privileges or Immunities Clause of the Fourteenth Amendment.^248 As previously noted, *Saenz* involved a California durational residency requirement that had been authorized by Congress.^249 California justified the waiting period solely on budgetary grounds, arguing that the provision would save the state $10.9 million per year.^250 The state denied that its purpose was to deter welfare recipients from moving to California in order to obtain higher welfare benefits.^251 California argued that, under the *Shapiro-Dunn-Maricopa* formulation, the statute did not penalize the right to travel because new residents would receive the same benefits as in their prior state of residency.^252 Although these benefits were generally lower than California's welfare benefits, the state argued that the statute did not constitute a penalty because the migrants were still in the same financial position as they were before they moved.^253 Moreover, California asserted that the statute was permissible under rational basis review as an "appropriate exercise of budgetary authority."^254

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244. *Id.* at 179 (Douglas, J., concurring) (pointing out the previous acknowledgement of this right by Justice Miller in *Crandall* and Chief Justice Taney in the *Passenger Cases*).
245. *Id.* at 183 (Jackson, J., concurring).
246. *Id.* (Jackson, J., concurring).
248. *Id.* at 501.
249. *Id.* at 495.
250. *Id.* at 497.
251. *Id.* at 506.
252. *Id.* at 497.
253. *Id.*
254. *Id.* at 497, 499-500.
The Court agreed with California that the statute did not "directly impair the exercise of the right to free interstate movement." This right of locomotion, however, was only the first of three separate components of the right to travel. The second component was the comity right, or the right of "a citizen of one State who travels in other States, intending to return home at the end of his journey . . . to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." This second component was protected by Article IV, Section 2 of the Constitution, according to the Court. The third component, which was at issue in Saenz, was the "right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." According to the Court, this right of migration "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." It is not clear how the migration right was protected by the "new arrival's status as a state citizen." Perhaps the Court believed that the migration right was already protected by Article IV, Section 2. Nevertheless, it held the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses to be an "additional source of protection" for this right. The Court noted that, in Slaughter-House, Justice Miller "explained that one of the privileges conferred by this Clause 'is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State.'" The Saenz Court appeared to apply strict scrutiny to strike down the statute, noting that "[t]he appropriate standard may be more categorical than that articulated in Shapiro . . . but it is surely no less strict." In addition, the Court adopted an Equal Protection-style analysis, asserting that the statute created "discriminatory classifications" which penalized the right to travel because "the right

255. Id. at 501.
256. Id. at 500-01.
257. Id. at 501.
258. Id. The Court noted that this protection is not "absolute," but that Article IV "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." Id. At 502 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).
259. Id. at 502.
260. Id.
261. Id.
262. Id. at 502-03. The Court asserted that in spite of the varying interpretations of the Privileges or Immunities Clause "it has always been common ground that this Clause protects the third component of the right to travel." Id. at 503 (citations omitted).
263. Id. at 503 (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1872)).
264. Id. at 504.
to travel embraces the citizen’s right to be treated equally in her new State of residence." 265

The Court also struck down the congressional authorization for the durational residency requirements, holding, as it did in Shapiro, that Congress may not authorize states to violate the Fourteenth Amendment. 266 According to Saenz, "the protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States." 267

It is important to note that the right to travel was not penalized because it deterred migration or because it denied a necessity of life (as the Shapiro-Dunn-Maricopa test required), but simply because it discriminated between citizens based on their length of residence. 268 As the Court noted, "since the right to travel embraces the citizen’s right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty." 269 Thus, the Saenz Court recognized both a substantive and equality-based aspect to the migration right. 270 The substantive aspect protected the right of a United States citizen to establish residency in a state, while the equality-based aspect protected the new state resident from discriminatory treatment by the state. It seems, therefore, that the Court understood the Privileges or Immunities Clause to incorporate

265. *Id.* at 505. According to the Court, California’s fiscal objective was legitimate, but its discriminatory method of accomplishing that objective was not. *Id.* at 506-07. The Court further noted that the purpose of deterring welfare recipients would be impermissible. *Id.* For an analysis of the theory that states providing higher welfare benefits operate as “Welfare Magnets” for the indigent, see Shauhin A. Talesh, Note, *Welfare Migration to Capture Higher Benefits: Fact or Fiction?*, 32 Conn. L. Rev. 675 (2000) (arguing that higher welfare benefits do not create an incentive for people to move). The Court’s application of equal protection analysis to the Privileges or Immunities Clause has further obfuscated its right to travel analysis. Instead, the Court should have articulated a distinct framework for analyzing privileges or immunities. See Ellis & Miller, *supra* note 30, at 347; Tim A. Lemper, *The Promise and Perils of “Privileges or Immunities”: Saenz v. Roe*, 119 S. Ct. 1518 (1999), 23 Harv. J.L. & Pub. Pol’y 295, 304 (1999).

266. *Saenz*, 526 U.S. at 507-08.

267. *Id.*

268. *Id.* at 515 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist explains that the *Saenz* decision abandoned the “effort to define what residence requirements deprive individuals of ‘important rights and benefits’ or ‘penalize’ the right to travel.” *Id.* But see Nelson, *supra* note 155, at 219 (arguing that *Saenz* did not eliminate the requirement that the restriction must impact fundamental rights or basic necessities of life in order to trigger strict scrutiny).

269. *Saenz*, 526 U.S. at 505 (emphasis added).

270. Justice Miller, in his *Slaughter-House* opinion, also identified this right to equal treatment between state citizens as one of the rights of national citizenship recognized by the Fourteenth Amendment and given protection from state abridgement by the Privileges or Immunities Clause of that same amendment. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873). Unfortunately, Justice Miller did not explain how the Fourteenth Amendment conferred the right to equal protection between state citizens, nor did he define the scope of that protection.
an anti-discrimination principle.271 The substantive right of a United States citizen to establish residency in a state would appear to be protected by the Citizenship Clause of the Fourteenth Amendment. It is unclear, however, what the source of the anti-discrimination principle is. Neither the Citizenship Clause nor the Privileges or Immunities Clause expressly articulates an anti-discrimination principle. Thus, the text of the Privileges or Immunities Clause appears to prohibit states from abridging substantive rights, rather than to protect against discrimination:272

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.273

There are at least two possible textual justifications for the Court’s articulation of the right to travel as an equality-based privilege or immunity. One is that the Fourteenth Amendment’s Citizenship Clause includes an equal protection guarantee for state citizens. An alternative explanation is that the Article IV, Section 2 Privileges and Immunities Clause embodies an anti-discrimination principle that was later incorporated into the Fourteenth Amendment’s Privileges or Immunities Clause. Either assumption is inherently problematic, however, in light of the Slaughter-House rationale. First, if the right to citizenship conferred by the Citizenship Clause includes the right to be treated equally with other state citizens, why should this equal protection guarantee be limited to rights between old and new residents? Why would the Citizenship Clause not protect each state citizen from every type of discriminatory treatment with respect to other citizens? In fact, Justice Bradley takes this position in his Slaughter-House dissent. The following portion of Justice Bradley’s opinion was quoted by the Saenz Court to support the existence of the right to equal treatment between state citizens based on length of residency:

271. See Lemper, supra note 265, at 304.
272. John Harrison points out that there are two types of constitutional limitations: substantive protections and equality-based protections. “A substantive protection either prescribes or forbids a certain content of state law. An equality-based protection, by contrast, says nothing about the substance of the state’s law; it instead requires that the law, whatever it is, be the same for all citizens.” Harrison, supra note 116, at 1387-88. Harrison argues that the Privileges or Immunities Clause is actually an equality-based protection and that “[t]he main point of the clause is to require that every state give the same privileges or immunities of state citizenship – the same positive law rights of property, contract, and so forth – to all of its citizens.” Id. at 1388. Harrison admits, however, that his theory is unconventional and conflicts with the traditional view of the clause. Id. at 1389.
273. U.S. Const. amend. XIV, § 1 (emphasis added).
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 rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.\textsuperscript{274}

Justice Bradley, however, did not limit this equality to classifications based on length of residency, but argued that full equal rights belonged to every citizen. Thus, in a passage of the opinion not quoted by the Saenz Court, Justice Bradley continues:

Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.\textsuperscript{275}

Therefore, Justice Bradley considered basic equality to be a right of national citizenship. Justice Miller's analysis, on the other hand, rejected such an assumption. According to him, the rights of national citizenship were limited to a few non-fundamental rights, such as the right to federal protection on the high seas, the right to petition the federal government for redress of grievances and the right to use the navigable waters of the United States.\textsuperscript{276} Under Justice Miller's formulation, United States citizenship did not include a general guarantee of equality between citizens. Thus, it seems unlikely that the anti-discrimination component of the right to travel recognized by Justice Miller was grounded in the Citizenship Clause.

Alternatively, as previously noted, the equal protection aspect of the right to travel may derive from anti-discrimination principles embedded in the Privileges and Immunities Clause of Article IV, Section 2. In other words, the right of equal treatment accorded to interstate travelers under Article IV, Section 2 was extended by the Fourteenth Amendment to individuals exercising their right to migrate and settle in a new state.\textsuperscript{277} The right to migrate, however, had already been recognized as a fundamental right under Article IV, Section 2 by Justice Washington in \textit{Corfield}.\textsuperscript{278} It is arguable, therefore, that Article IV, Section 2 already guaranteed equal protection between short-term and long-term state citizens. In fact, one commentator asserts:

\textsuperscript{274} \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 112-13 (Bradley, J., dissenting) (emphasis added).
\textsuperscript{275} \textit{Id.} at 113 (Bradley, J., dissenting).
\textsuperscript{276} \textit{Id.} at 79. While Justice Miller conceded that the right secured by the Equal Protection Clause of the Fourteenth Amendment was also a right of national citizenship, he limited the scope of that clause to discrimination against newly emancipated black citizens. \textit{Id.} at 81.
\textsuperscript{277} See Lemper, \textit{supra} note 265, at 304.
In the end, the third component of the right to travel is largely superfluous. Indeed, the third component merely reiterates what the Court had indirectly recognized in defining the second component of the right to travel: the principle of non-discrimination applies to the right to migrate as well as the right to travel.\footnote{279}

The *Saenz* Court appeared to adopt this rationale since it expressly recognized the Fourteenth Amendment as an “additional source of protection” for a right that is also protected by “the new arrival’s status as a state citizen.”\footnote{280}

The problem with this second line of reasoning is that it conflicts with Justice Miller’s contention that the rights of state citizenship “are not intended to have any additional protection by [the Privileges or Immunities Clause].”\footnote{281} Moreover, this analysis highlights another problem with the *Slaughter-House* decision, namely that Justice Miller’s interpretation rendered the Privileges or Immunities Clause superfluous.\footnote{282} It afforded no increased protection because the rights he classified as rights of United States citizens were already protected under the Constitution, in this case Article IV, Section 2. If a new state citizen already had a right under Article IV, Section 2 to be free from discrimination based on length of residence, why would the Court need to rely on the Fourteenth Amendment’s Privileges or Immunities Clause to protect the right? *Saenz*, therefore, serves as yet another reminder that the Privileges or Immunities Clause “enjoys the distinction of having been rendered a practical nullity by a single decision of the Supreme Court rendered within five years after its ratification.”\footnote{283}

\footnote{279. Lemper, *supra* note 265, at 304.}

\footnote{280. *Saenz v. Roe*, 526 U.S. 489, 502-3 (1999). This interpretation of the *Saenz* decision departs from Lemper’s argument that *Saenz* “made explicit that the right to migrate was located in, and secured by, the Fourteenth Amendment’s Citizenship and Privileges or Immunities Clauses, not Article IV or Justice Washington’s opinion in *Corfield*.” Lemper, *supra* note 265, at 304.}

\footnote{281. *Slaughter-House*, 83 U.S. (16 Wall.) at 74.}

\footnote{282. As Chemerinsky points out, the rights of United States citizenship articulated by Justice Miller already existed prior to the Fourteenth Amendment. Thus:}

\footnote{283. *Id.* (quoting Legislative Reference Service, Library of Congress, The Constitution of the United States of America 965 (Edward S. Corwin ed. 1953)). The *Saenz* decision has been criticized for trying to resurrect the Privileges or Immunities Clause without overturning *Slaughter-House*: It was the consensus of many that *The Slaughter-House Cases* were, in fact,}
Chief Justice Rehnquist's dissent in *Saenz* followed a line of reasoning similar to that in *Maricopa*, criticizing the majority for its unwarranted expansion of the right to travel. Chief Justice Rehnquist associated the right to travel with the "right to go from one place to another," although he was willing to concede that the right to travel may also include Article IV, Section 2's comity protection. Where Chief Justice Rehnquist departed from the majority was in characterizing, as a component of the right to travel, the right to "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. He noted that Justice Miller articulated this citizenship right as a separate right from the right to travel, but that, beginning with *Shapiro*, the Court had "conflated the right to travel with the right to equal state citizenship." According to Chief Justice Rehnquist, the right to travel is not implicated in cases involving classifications based on length of residency. These cases implicate the right of a state citizen to be treated equally with other state citizens. In addition, he argued that durational residency requirements fall within the state's power to establish objective tests of "bona fide residence," a prerequisite for claiming the right of equal citizenship. He noted that "the Court has consistently recognized that while new citizens must have the same opportunity to enjoy the privileges of being a citizen of a State, the States retain the ability to use bona fide residence requirements to ferret out those who intend to take the privileges and run."

Justice Thomas argued in dissent that, while the Privileges or Immunities Clause of the Fourteenth Amendment was probably intended to protect the fundamental rights of citizens from infringement by the states, the clause did not guarantee access to "every public benefit established by positive law." This statement mischaracterized the holding of *Saenz*, however, which guaranteed, not access to every public benefit, but equal treatment between short-
and long-term state citizens. Under Saenz, the equality guarantee between state citizens included equal access to public benefits, notwithstanding the fact that those benefits were not necessarily "fundamental rights."

While the Court's attempt to give judicial effect to the Privileges or Immunities Clause is commendable, the Slaughter-House precedent presents a significant challenge to the Court's effort. One of the most interesting issues raised by Saenz is whether the Privileges or Immunities Clause has any real viability as long as the Court continues to adhere to the Slaughter-House rationale. Part III of this Note argues the Court should reject Slaughter-House and find a workable formulation of the Privileges or Immunities Clause. Part III further argues that the right to intrastate travel is a Privilege or Immunity guaranteed by the Fourteenth Amendment. Before discussing this aspect of the Privileges or Immunities Clause, Part II will describe the circuit split that currently exists over the right to intrastate travel.

II. THE DEBATE OVER THE RIGHT TO INTRASTATE TRAVEL

While opinions differ as to its source, the right to interstate travel has been consistently recognized by the Supreme Court since the 1800s. The Court has never expressly decided whether there is a constitutional right to intrastate travel, however. In fact, in Memorial Hospital v. Maricopa County, the Court declined to consider whether "a constitutional distinction between interstate and intrastate travel" existed. Federal circuit courts, on the other hand, have addressed this issue and are currently divided.

292. See Tribe, supra note 5, at 134-35.

293. One commentator cautions against the revival of a fundamental rights analysis of the Privileges or Immunities Clause. Lemper, supra note 265, at 312. Lemper warns that "by reviving the Privileges or Immunities Clause and invoking Corfield's fundamental rights language, Justice Stevens's opinion in Saenz ... may indicate a tendency to re-invigorate fundamental rights, under the doctrinal head of 'privileges or immunities.'” Id. Such an approach would usher in a new era of unchecked judicial activism, according to Lemper. Id. at 313. Lemper argues that Saenz should be interpreted as reconstructing the Privileges or Immunities Clause as an anti-discrimination provision. Id. at 315.

294. Numerous commentators and scholars have advocated the overturning of Slaughter-House. See Chemerinsky, supra note 3, at 378. Chemerinsky points out that "except for the privileges or immunities clause, all of the other restrictive interpretations of the Fourteenth Amendment in the Slaughter-House Cases were subsequently overruled.” Id. at 376. For a novel argument that incorporation of the Bill of Rights does not necessitate overturning Slaughter-House, see Newsom, supra note 3.

295. See supra Part I.

296. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974). In Maricopa, the Court expressly declined to decide the issue of whether intrastate travel was federally protected. Although the statute implicated the right to intrastate travel by requiring one-year residency in a particular county, the appellant in Maricopa was
Some disagreement exists about whether the Supreme Court has, in fact, settled the question of intrastate travel. It has been argued by at least one commentator that a 1993 Supreme Court decision, Bray v. Alexandria Women's Health Clinic, ruled out constitutional protection for intrastate travel.

In Bray, the Supreme Court considered whether anti-abortion protestors who obstructed abortion clinics had violated the Civil Rights Act of 1871 by conspiring to deprive women seeking abortions of their right to interstate travel. Justice Scalia, writing for the majority, concluded that the activities of Operation Rescue, the anti-abortion group, only restricted intrastate movement. Scalia held that "such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied discriminatorily against them."

According to Gregory Hartch, the effect of Bray was to declare that "intrastate travel is devoid of constitutional protection." Commentator Mary LaFrance agrees, but points out that Bray "begs the question of whether and how intrastate and interstate travel can meaningfully be distinguished." As LaFrance recognizes, Bray did not specifically analyze the existence of a right of intrastate travel:

Both the majority and the dissent in Bray framed the question as whether the activities in question—demonstrations which actually traveling from another state. The Court noted:

Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court [because the appellant] has been effectively penalized for his interstate migration, although this was accomplished under the guise of a county residence requirement.

Id. at 255-56.

298. Hartch, supra note 11, at 465.
300. Id. at 277.
301. Id.
302. Hartch, supra note 11, at 465. Nevertheless, Hartch points out that:
           [N]one of the justices have offered a convincing explanation for why the right to travel should be confined to interstate travel as opposed to both interstate and intrastate travel. In Bray, the Court cited three cases to support its contention that the right pertains solely to interstate travel. These decisions affirm the existence of a right to interstate travel, but none rule out the existence of a corresponding right to intrastate travel.

Id. at 470.

303. Mary LaFrance, Constitutional Implications Of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce, 1994 Utah L. Rev. 1027, 1054 (interpreting Bray to "reject the existence of a right to intrastate travel"). Another article notes, however, that "the Supreme Court has not ruled on whether the right to travel includes the right to travel intrastate as well as interstate." Maria Foscarinis, Downward Spiral: Homelessness and its Criminalization, 14 Yale L. & Pol'y Rev. 1, 44 (1996). Foscarinis explains that Bray "was considering whether the right to interstate travel was violated, not whether a right to interstate travel exists." Id. at 44 n.341.
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blocked access to abortion clinics—interfered with the right of interstate travel. Neither opinion addressed the question whether a separate right of intrastate travel exists which might be infringed by those same activities.  

A 1999 Harvard Law Review article disputes the view that the intrastate travel issue was resolved in Bray, noting that "[t]he Supreme Court has expressly declined to rule on [the intrastate travel] issue, although in Bray v. Alexandria Women's Health Clinic, the Court indicated that the right may be confined solely to interstate travel." The article continues, "[n]otwithstanding Bray, however, lower courts consider the issue an open question." Thus, even after Bray was decided in 1993, several circuit courts treated the issue as unresolved.

In Townes v. St. Louis, for example, the Eastern District Court of Missouri asserted that the Supreme Court "has not determined whether there is a fundamental right to intrastate travel." Furthermore, in an unpublished opinion, the Eighth Circuit affirmed Townes after "[h]aving carefully reviewed the record" and concluding that the district court's decision was correct. Similarly, in Nunez v. San Diego, the Ninth Circuit noted that the Supreme Court had declined to decide the issue of whether the Constitution protects intrastate travel. Again, in Hutchins v. District of Columbia, the District of Columbia Circuit pointed out that "[t]he Supreme Court in Maricopa County specifically declined to decide whether the right to interstate travel recognized in Shapiro has its analogue in intrastate travel," and that "[t]he circuits are split on this question." Federal circuit courts have addressed intrastate travel in a variety of contexts. For example, the courts have examined municipal durational residency requirements for recipients of public benefits,

304. Id. at 1055.
306. Id. (citing Nunez v. San Diego, 114 F.3d 935, 944 n.7 (1997)).
307. Townes v. St. Louis, 949 F. Supp. 731, 734 (E.D. Mo. 1996), aff'd 112 F.3d 514 (8th Cir. 1997). Townes involved a city ordinance blocking access to a street. Id. at 732. The Townes court declined to weigh in on the intrastate travel issue, noting that "[e]ven if this court were to conclude that a federal constitutional right to localized intrastate travel exists" the ordinance would not violate the intermediate scrutiny standard. Id. at 735. The court held that strict scrutiny would not apply to the right to intrastate travel. Id.
309. Nunez v. San Diego, 114 F.3d 935, 944 n.7 (9th Cir. 1997). The court noted that it "need not decide the issue in order to resolve this appeal, so we express no opinion on it." Id.
residence requirements for public employees, salary differentials for public employees based on residence, anti-cruising ordinances, and juvenile curfews. The First, Second, and Third Circuits have recognized a right to intrastate travel. The right has been rejected in the Fourth, Fifth, Sixth and Seventh Circuits. The District of Columbia Circuit is still on the fence, although it appears to be leaning towards rejecting the right to intrastate travel.

In Cole v. Housing Authority of the City of Newport, the First Circuit broke ground by striking down a restriction on the right to intrastate travel. The regulation required applicants to reside in Newport, Rhode Island for two years in order to be eligible for federally funded public housing. Both plaintiffs in Cole were single mothers with two children. One plaintiff moved to Newport from another state, while the other moved from another city in Rhode Island. Both plaintiffs were turned down for public housing because they did not meet the residency requirement.

The court noted that the regulation created a classification, which, if it involved a "fundamental personal right," would be subjected to strict scrutiny. Relying on the Supreme Court's holding in Shapiro, the Cole court determined the "right to travel is a fundamental personal right." Cole interpreted Shapiro to stand for the proposition that the right to travel is impinged when a regulation penalizes travel, concluding that travel does not also need to be deterred by the regulation in order to trigger strict scrutiny. Thus, under Shapiro, not every classification that "touches on the fundamental right of interstate movement" would necessarily trigger strict scrutiny, because some waiting periods might not be penalties.

According to Cole, this apparent contradiction could be resolved by realizing that Shapiro's conception of travel was limited to "migration with intent to settle and abide," as opposed to freedom of

312. See Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).
317. Id. at 808.
318. Id. at 809.
319. Id.
320. Id.
321. Id.
322. Id.
323. Id. at 810.
324. Id. (quoting Shapiro v. Thompson, 394 U.S. 618, 638 (1969)). The Court in Memorial Hospital v. Maricopa County commended Judge Coffin for his "perceptive opinion" in Cole, noting in particular his discussion of Shapiro's ambiguity regarding the application of the strict scrutiny test. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257 n.10 (1974).
Thus, the right to travel would be impinged by restricting access to a benefit that would be used while residing within the state. On the other hand, individuals passing through a community would not be penalized for traveling if they were denied access to certain benefits within that community. For example, under Cole’s interpretation of Shapiro, waiting periods for obtaining a divorce, getting a library card or even qualifying for lower college tuition, might not constitute penalties.

While Cole’s analysis is insightful, it is problematic because it requires a court to examine a traveler’s motive for traveling in order to determine whether a restriction impermissibly burdens the right to travel. Thus, a student who moved to a new state to attend college with the intention of residing in that state indefinitely would be “penalized” by a residency requirement for lower college tuition, whereas a student who moved to the state without the intention of remaining would not be penalized. In addition, there is no evidence that the Supreme Court has limited its definition of travel in the way that Cole suggests. On the contrary, one of the earliest Supreme Court right to travel cases, Crandall v. State of Nevada, involved a restriction on movement across state lines, while the most recent case, Saenz v. Roe, identified “the right of a citizen of one State to enter and to leave another State” as one component of the right to travel.

It seems more likely that the Shapiro decision did not intend to restrict the definition of travel but to limit the types of regulations that would constitute penalties. As previously noted, under the Shapiro-Dunn-Maricopa formulation, travel was considered to be penalized by rules that deny either a basic necessity of life or another fundamental right. Later, in Saenz, the Court sought to clarify its analysis by dividing the right to travel into three components and eliminating the requirement that a restrictive classification deny a basic necessity of life or fundamental right to new residents, apparently holding that all classifications that discriminate against new residents are suspect.

Without directly addressing whether the right to travel encompassed intrastate travel, the Cole court held that Newport’s residency requirement penalized new residents because they had recently moved to Newport. Although the court did not expressly identify a right to intrastate travel, the regulation applied to both interstate and intrastate migrants, and the case itself involved

325. Cole, 435 F.2d at 811.
326. Id.
327. 73 U.S. (6 Wall.) 35 (1867).
329. Id. at 500.
331. See supra Part I.C.
plaintiffs of both types. The court, moreover, did not limit its holding to the impact on interstate migration.

Newport attempted to justify the waiting period on the ground that it was necessary to ensure the survival of public housing, because voters believed that eliminating the restriction would attract low-income families to the community. Without the restriction, Newport argued, voters would not support public housing, even if their belief was false and the waiting period had no deterrent effect on the poor. Thus, "the purpose and effect of the requirement are not to impair the right to travel, but to make the voters think the right to travel is being impaired, even though it is not." The court rejected this justification on the ground that "pandering to that mistaken assumption" was not a compelling interest and that the goal itself "rationalize[d] discriminatory classifications which are constitutionally impermissible." The court also considered and rejected a past contributions justification.

The Second Circuit adopted much of Cole's reasoning to strike down a five-year residency requirement in King v. New Rochelle Municipal Housing Authority. New Rochelle, a city in New York State, had passed a resolution requiring applicants for state-funded public housing to be "resident[s] of the City of New Rochelle for not less than five continuous years prior to the time of admission." The city's justification for the residency requirement was that each community should provide for the needs of its own residents before trying to take care of the needs of other non-residents.

The appeal involved three separate cases. Plaintiff-respondent Earnestine King had moved to New Rochelle from North Carolina, Gertrude Frazier had moved from Yonkers, New York, and Dorothy Green had moved from White Plains, New York. Each of the respondents had either been denied an application or had applied for public housing and been rejected for failing to meet the residency requirement. The court applied an Equal Protection analysis, noting that the city would have to show a compelling interest if a fundamental personal right was implicated.

333. Id. at 809.
334. Id. at 812.
335. Id.
336. Id.
337. Id.
338. Id.
339. Id. at 813.
340. 442 F.2d 646 (2d Cir. 1971).
341. Id. at 647.
342. Id. at 649.
343. Id. at 647.
344. Id.
345. Id. at 648.
The court rejected the city’s contention that, because there was no fundamental right to intrastate travel, Green and Frazier’s fundamental rights were not affected. The court asserted that the right to travel recognized in *Shapiro* was not limited to interstate travel and that *Shapiro*’s use of the term “interstate travel” reflected nothing more than the fact that the case involved state-wide legislation. Moreover, the court noted that *Shapiro* refused to identify a particular constitutional provision as the source of the right to travel, relying instead on “constitutional concepts of personal liberty.” Accordingly, “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.” The court also pointed out that it made little sense to penalize the in-state migration of New York State residents while permitting out-of-state migrators to have unrestricted access to these New York State public benefits.

The *King* court held that New Rochelle’s residency requirement created a classification that infringed the fundamental right to travel. The city’s resolution, according to the court, “penalizes respondents by adding an additional period of as much as five years to the time they must wait for public housing and... this penalty is imposed solely because they have recently exercised their right to travel.” Applying strict scrutiny, the court held that the city’s justification of “tak[ing] care of its own” was not compelling enough to favor long-term residents in the allocation of public housing.

The *King* court cited *Cole* in support of its holding, electing to “adopt that court’s analysis on the finer points involved and present in [its] opinion only the broad fabric of our approach.” Unfortunately, as previously noted, *Cole* did not analyze the distinction between interstate and intrastate travel. Thus, the *King* and *Cole* decisions, taken together, provide very little analytical support for the existence of a right to intrastate travel. In 1990, the Second Circuit reaffirmed its recognition of the right to intrastate travel, noting that “the rule enunciated in *King* remains the law in this Circuit.”

In *Lutz v. City of York*, the Third Circuit pointed out that the right to intrastate travel recognized in *King* was “underarticulated” and

346. *Id.*
347. *Id.*
348. *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)).
349. *Id.*
350. *Id.* at 648 n.6.
351. *Id* at 648.
352. *Id.*
353. *Id.* at 649.
354. *Id.* at 648.
sought to provide a more principled justification for the right. 356 In Lutz, the court considered whether an anti-cruising ordinance instituted by the City of York, Pennsylvania, violated the right to localized intrastate movement. The ordinance was passed in response to the problem of "unnecessary repetitive driving" around a certain portion of the city, an activity apparently enjoyed by the "local youth." 357 The ordinance imposed a fifty dollar fine for "[c]ruising," an offense defined as "driving a motor vehicle on a street past a traffic control point . . . more than twice in any two (2) hour period, between the hours of 7:00 p.m. and 3:30 a.m." 358

The Lutz court's first inquiry was whether a fundamental right to intrastate travel existed. After surveying the Supreme Court's right to travel case law, Lutz noted that most of the Court's recent cases involved statutes that discriminated against recent interstate migrants. 359 The consequences of this trend were that, first, the Supreme Court had not considered the question of intrastate travel, 360 and, second, that the Court's analysis had become so perfunctory that it had stopped trying to identify a source of the right. 361 Lutz pointed out that this uncertainty, along with the plethora of textual and non-textual sources suggested by various justices at various times, made it difficult to determine whether or not the right to travel was, in fact, a personal liberty, as asserted in Cole. 362 In the view of the Lutz court, however, the existence of the right to intrastate travel turned on this critical issue. 363

356. Lutz v. City of New York, 899 F.2d 255, 261 (3d Cir. 1990). The Third Circuit had previously considered the right to intrastate travel in Wellford v. Battaglia, 343 F. Supp. 143, 147 (D. Del. 1972), aff'd per curiam, 485 F.2d 1151 (3d Cir. 1973) and Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), cert. denied, 429 U.S. 964 (1976). In Wellford, the court affirmed a district court decision striking down a city residency requirement for mayors on the ground that it penalized the right to migrate within the city. In Bykofsky, the court approved a district court decision upholding a juvenile curfew ordinance on the ground that the juveniles' constitutional right to intrastate travel was outweighed by the governmental interests involved. Id. at 1261.

357. Lutz, 899 F.2d at 256-57.

358. Id. at 256 (quoting York, Pa., Ordinance 6, § 3(a) (Apr. 19, 1988)).

359. Id. at 259.

360. As Lutz noted, the Supreme Court expressly reserved the question of intrastate travel in Maricopa. Id. at 261.

361. Id. at 260-61. The use of the term "source" in Lutz differs from its use in this Note. This Note distinguishes between the "source of the right" and "federal protection of the right," while Lutz conflates those concepts. Thus, Lutz concludes that the right to intrastate travel "exists, and grows out of substantive due process." Id. at 256. In fact these two concepts can be separated and a fundamental right to intrastate travel can be found to exist as a personal liberty right, while the Due Process Clause can be found to provide federal protection over that right.

362. Id. at 260-61.

363. Id. at 261-62. According to Lutz:

To the extent that the right to travel is an aspect of personal liberty protected by substantive due process, for example -- and there is a clear line of cases cited in Shapiro at least suggesting that it is -- the proposition
In attempting to identify the "source" of the right to intrastate travel, Lutz analyzed the various constitutional provisions and doctrines that had been suggested as sources of the right to interstate travel (i.e., Article IV Privileges and Immunities Clause,\textsuperscript{364} Fourteenth Amendment Privileges or Immunities Clause,\textsuperscript{365} the rights of national citizenship,\textsuperscript{366} the Commerce Clause,\textsuperscript{367} the Equal Protection Clause,\textsuperscript{368} and substantive due process.\textsuperscript{369})

Ultimately, the court settled on the doctrine of substantive due process as the source of the right to intrastate travel. The court noted that early Supreme Court dicta indicated that a fundamental right to locomotion might exist. For example, the Court pointed out that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty... secured by the 14th amendment."\textsuperscript{370} Lutz noted, however, that, in order to have credibility as a substantive due process right, the travel aspect of Fears would have to be disassociated from the general spirit of \textit{Lochner v. New York}.\textsuperscript{371} After considering the substantive due process case law relating to the right to travel, Lutz concluded that, while the Due Process Clause was the only constitutional provision which, in its opinion, could "create a right of localized intrastate movement," none of the cases since the "demise of \textit{Lochner}" had considered the issue.\textsuperscript{372} Thus, the Lutz court found itself facing the task of trying to extrapolate a right to intrastate travel from the precepts of modern asserted by the Second Circuit [that the right to intrastate travel is a fundamental personal right] is unimpeachable. However, to the extent that the right to travel grows out of constitutional text animated by structural concerns of federalism - a no less implausible view under many of the Court's older major travel precedents - it might be entirely 'meaningful' to suppose that the right is not implicated by reasonable restrictions on localized intrastate movement.

\textit{Id}.\textsuperscript{364} \textit{Id}. at 262-63.

\textit{Id}.\textsuperscript{365} at 263-64. The court declined to locate the "source" of the right to travel in this clause because the Supreme Court's case law indicated that the clause does not create rights but protects already existing rights of national citizenship. Lutz appeared to assume, rather than explain, why intrastate travel is not a right of national citizenship. In addition, Lutz seemed to dismiss the clause because it "has remained essentially moribund since \textit{Slaughter-House}.") \textit{Id}. at 264.

\textit{Id}.\textsuperscript{366} at 264-65.

\textit{Id}.\textsuperscript{367} at 265.

\textit{Id}.\textsuperscript{368} at 266.

\textit{Id}.\textsuperscript{369} at 266-68.

\textit{Id}.\textsuperscript{370} at 266 (quoting Williams v. Fears, 179 U.S. 270, 274 (1900)).

\textit{Id}.\textsuperscript{371} pointed out, for example, that "\textit{Fears} itself... continues: 'And so as to the right to contract.' It seems uncertain, therefore, whether these old cases have significant continuing precedential value." \textit{Id}. (quoting \textit{Fears}, 179 U.S. at 274).

\textit{Id}.\textsuperscript{372} at 267. The court noted, for example, that the recognition of a substantive due process "right of locomotion" in \textit{Fears} may not carry much precedential weight unless it can be disassociated from \textit{Lochner}. \textit{Id}. at 266 (quoting \textit{Fears}, 179 U.S. at 274).
substantive due process.\textsuperscript{373} \textit{Lutz} argued that, while most fundamental
derights protected by the Due Process Clause implicated family and
reproductive matters, "the right to move freely about one's
neighborhood or town, even by automobile" met the narrowest due
process standard in that it was "implicit in the concept of ordered
liberty" and was "deeply rooted in the Nation's history."\textsuperscript{374}

Having recognized intrastate travel as a due process right, the court
upheld the anti-cruising ordinance, nevertheless, by subjecting it to
intermediate scrutiny rather than strict scrutiny. The court applied
the time, place and manner doctrine found in free speech
jurisprudence, arguing that "the time, place and manner doctrine
allows certain restrictions on speech to survive under less than fully
strict scrutiny" and reasoning that "[i]f the freedom of speech itself
can be so qualified, then surely the unenumerated right of localized
travel can be as well."\textsuperscript{375} The court concluded that the ordinance was
"narrowly tailored to combatting the safety and congestion problems
identified by the city."\textsuperscript{376} The application of intermediate scrutiny was
a significant departure from the traditional substantive due process
approach, which is based on the theory that, if a right is
"fundamental," the state must have a compelling reason to restrict
it.\textsuperscript{377} Thus, \textit{Lutz}'s application of intermediate scrutiny to a
fundamental right was at odds with the doctrine of substantive due
process and is unlikely to be adopted by the Supreme Court.\textsuperscript{378}

Four circuit courts have rejected a constitutional right to intrastate
travel. In 1987, the Fourth Circuit affirmed the District Court's
decision in \textit{Eldridge v. Bouchard} upholding the State of Virginia's
policy of paying police officers different salaries based on their
districts.\textsuperscript{379} The district court held that "plaintiffs do not have a
federally recognized fundamental right of intrastate travel."\textsuperscript{380}
According to the court, "[h]aving a fundamental right of interstate
travel does not necessitate recognizing a fundamental right of
intrastate travel. In fact, it is entirely consistent to recognize the right

\textsuperscript{373} Id. at 267.
\textsuperscript{374} Id. at 267-68 (citations omitted).
\textsuperscript{375} Id. at 269.
\textsuperscript{376} Id. at 270.
\textsuperscript{377} See Chemerinsky, \textit{supra} note 3, at 643. The Supreme Court has generally
applied intermediate scrutiny when analyzing semi-suspect classifications under the
Equal Protection Clause. Examples of semi-suspect classes are women, illegitimate
children and illegal alien children. \textit{Id.} at 415-16.
\textsuperscript{378} At least one commentator criticizes the \textit{Lutz} court for using intermediate
scrutiny, arguing that the court's "analysis is an aberration that deploys non-strict
scrutiny to arrive at the answer it thinks proper" and pointing out that intermediate
scrutiny implicitly categorizes the right to intrastate travel as "quasi-fundamental."
Porter, \textit{supra} note 91, at 854-55.
823 F.2d 546 (4th Cir. 1987).
\textsuperscript{380} \textit{Id.} at 754.
to interstate travel without recognizing the right of intrastate travel.\textsuperscript{381}

In \textit{Wright v. City of Jackson}, the Fifth Circuit upheld a city ordinance requiring municipal employees to live within the city limits.\textsuperscript{382} A group of non-resident firemen brought a class action lawsuit against the City of Jackson, claiming that the ordinance denied their right to travel and to select their residence.\textsuperscript{383} The court's conclusion that the right to travel doctrine articulated in \textit{Shapiro} did not apply to intrastate travel was based entirely on the Supreme Court's dismissal of \textit{Detroit Police Officers Association v. City of Detroit}.\textsuperscript{384} \textit{Detroit Police} involved a municipal ordinance similar to the residency requirement in \textit{Wright}.\textsuperscript{385} The Michigan Supreme Court upheld the ordinance under the traditional equal protection test, finding that the classification passed rational-basis review.\textsuperscript{386} Subsequently, the Supreme Court dismissed the case on appeal for "want of a substantial federal question."\textsuperscript{387} The \textit{Wright} court concluded that the Supreme Court's disposition of \textit{Detroit Police} was equivalent to a finding that there was no federally protected right of intrastate travel.\textsuperscript{388} Consequently, the \textit{Wright} court upheld Jackson's ordinance as being rationally related to the legitimate government objectives of promoting ethnic balance, reducing unemployment rates of minorities, improving relations between minorities and city employees, enhancing job performance of municipal employees, reducing absenteeism, increasing availability of trained emergency personnel, and encouraging local expenditure of employees' salaries.\textsuperscript{389}

There is some evidence that the Fifth Circuit may be retreating from its position on the right to intrastate travel. In \textit{Qutb v. Strauss}, the Fifth Circuit applied strict scrutiny to a Dallas juvenile curfew ordinance.\textsuperscript{390} In analyzing the ordinance, the court "assume[d] without deciding that the right to move about freely is a fundamental right."\textsuperscript{391} The court upheld the ordinance, however, noting that "under certain circumstances, minors may be treated differently from adults."\textsuperscript{392}

\begin{thebibliography}{99}
\bibitem{381} \textit{Id.}
\bibitem{382} 506 F.2d 900, 901-02 (5th Cir. 1975).
\bibitem{383} \textit{Id.} at 901.
\bibitem{384} \textit{Id.} at 902-03 (citing Detroit Police Officers Ass'n v. City of Detroit, 405 U.S. 950 (1972)).
\bibitem{385} \textit{Id.} at 902.
\bibitem{386} \textit{Id.}
\bibitem{387} \textit{Id.} at 903 (citation omitted).
\bibitem{388} \textit{Id.}
\bibitem{389} \textit{Id.} at 903-04.
\bibitem{390} Qutb v. Strauss, 11 F.3d 488, 496 (5th Cir. 1993).
\bibitem{391} \textit{Id.} at 492.
\bibitem{392} \textit{Id.}
\end{thebibliography}
In *Wardwell v. Board of Education*, the Sixth Circuit upheld a School Board rule requiring public school teachers hired after November 13, 1972, to reside within the school district. In declining to recognize a right to intrastate travel, the *Wardwell* court followed the same line of reasoning as the Fifth Circuit in *Wright*, concluding that the Supreme Court's disposition of *Detroit Police* amounted to a decision on the merits. Accordingly, the *Wardwell* court held that the rational relationship test was the appropriate standard of review for residency requirements affecting intrastate movement. The court concluded that the rule was rationally related to the School Board's objectives of encouraging integration and of hiring teachers who are likely to be committed to the urban educational system, supportive of school-related taxes, in closer contact with parents and community leaders, and sympathetic to their students' social problems.

Like the Fifth and Sixth Circuits, the Seventh Circuit also viewed the Supreme Court's dismissal of *Detroit Police* as a disposition of the question of intrastate travel. *Ahern v. Murphy* involved a Chicago ordinance that required police officers to reside in the city of Chicago. The court upheld the ordinance, noting that the "Supreme Court has labeled as unsubstantial the very question which constitutes the plaintiffs' most likely basis for asserting federal question jurisdiction."

The circuit courts in *Wright*, *Wardwell* and *Ahern* viewed the Supreme Court's dismissal of *Detroit Police* as a substantive holding in the issue of intrastate travel. As at least one commentator has argued, however, this position is not a forgone conclusion. First, a Supreme Court dismissal should not be relied on as binding precedent because the Court has not explained its reasoning. Second, the dismissal may mean that the Court does not consider the case worthy of its time. Third, the dismissal may mean that while the Court agrees with the outcome of the case it does not necessarily adopt the

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393. Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976).
394. Id. at 627-28.
395. Id. at 628.
396. Id.
397. Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972).
398. Id. at 365 (quoting Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 262 (2d Cir. 1967)). One commentator points out that the Seventh Circuit may yet be undecided on the issue of intrastate travel because five years after *Ahern* was decided, the court noted that it "need not consider whether a right of intrastate travel should be acknowledged." Gregory J. Mode, *Wisconsin, A Constitutional Right to Intrastate Travel, and Anti-Cruising Ordinances*, 78 Marq. L. Rev. 735, 748 (1995) (quoting Andre v. Board of Trs., 561 F.2d 48 (7th Cir. 1977)).
400. Id.
401. Id. at 844.
reasoning of the lower court. Thus, in the case of Detroit Police, the Court may have believed that the ordinance would withstand strict scrutiny.

In Hutchins v. District of Columbia, the District of Columbia Circuit considered whether a juvenile curfew law violated the substantive due process right of free movement. The court declined to decide the question of whether a fundamental right to intrastate movement existed. It noted, however, that the issue was "not whether Americans enjoy a general right of free movement, but rather whatever are the scope and dimensions of such a right (if it exists), do minors have such a substantive right?" The court concluded that minors, in fact, do not have a fundamental right to roam the streets at night unsupervised.

Several commentators have argued that the Supreme Court should recognize a constitutional right to intrastate travel. In most cases, these commentators ground the right either in the substantive due process doctrine or the Equal Protection Clause. For example, Paul Ades argues that the right to travel intrastate should be protected under both due process and equal protection and should be used to combat anti-homelessness laws. According to Ades, statutes that prohibit sleeping outdoors burden the free movement of homeless people who, because of financial constraints, are more likely to exercise their freedom of movement intrastate as opposed to

402. Id.
403. Id.
405. Id. at 538.
406. Id. Other circuit courts have analyzed juvenile curfew laws. For example, the Third Circuit affirmed the constitutionality of a juvenile curfew in Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), cert. denied, 429 U.S. 964 (1976). The Fifth Circuit upheld a curfew law under strict scrutiny analysis in Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993). In Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997), the Ninth Circuit struck down a curfew under strict scrutiny analysis. In Schleifer v. City of Charlottesville, 992 F. Supp. 823 (W.D. Va. 1997), aff'd, 159 F.3d 843 (4th Cir. 1998), cert. denied, 528 U.S. 1018 (1999), the Fourth Circuit upheld a juvenile curfew under intermediate scrutiny. For a discussion of the appropriate standard of review to apply to juvenile curfews, see Patryk J. Chudy, Note, Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges, 85 Cornell L. Rev. 518 (2000) (arguing that intrastate travel is a fundamental right and that intermediate scrutiny should be used to analyze juvenile curfews). Chudy highlights the curious fact that circuit courts rejecting intrastate travel as a fundamental right have, nevertheless, been more hostile to juvenile curfews than courts that recognize the right. Id. at 567. Another student Note analyzing juvenile curfews is Brant K. Brown, Note, Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents, 53 Vand. L. Rev. 653 (2000) (arguing that intermediate scrutiny should be applied to juvenile curfews).

Similarly, Emilia Wang argues that substantive due process is the "most viable constitutional source supporting a federally-protected right to intrastate travel." Andrew Porter also suggests that the substantive due process doctrine is the "proper source for the right to travel intrastate," conceding, however, that the doctrine's viability as a source for new rights is questionable. Part III of this Note argues that the Privileges or Immunities Clause provides an alternate basis for protecting intrastate travel that circumvents some of the problems associated with substantive due process. Before resolving the issue of intrastate travel, however, Part III will provide some background on the Privileges or Immunities Clause.

III. THE RIGHT TO INTRASTATE TRAVEL IS A PRIVILEGE OR IMMUNITY OF UNITED STATES CITIZENSHIP

A. Background on the Privileges or Immunities Clause

One of the primary purposes of the Fourteenth Amendment was to ensure the constitutionality of the Civil Rights Act of 1866. The Civil Rights Act, passed by Congress in the aftermath of the Civil War, declared all persons born in the United States to be United States citizens and guaranteed citizens of every race and color the same right ... to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

In other words, it guaranteed equal rights between whites and non-whites with respect to the enumerated activities. Concern over the validity and the survival of the Civil Rights Act prompted the Republican-controlled Congress to pass the Fourteenth

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408. Id. at 616-17.
409. Emilia P. Wang, Case Comment, Individual Rights—Unenumerated Rights—Are Unenumerated Rights a Viable Source for the Right to Intrastate Travel? Watt v. Watt, 971 P.2d 608 (Wyo. 1999), 31 Rutgers L.J. 1053, 1063-64 (2000) (noting that the Supreme Court of Wyoming's decision to ground the right to intrastate travel in the unenumerated rights clause of the Wyoming Constitution went "against the grain of the generally accepted argument that due process is the proper source").
410. Porter, supra note 91, at 850.
411. Chester James Antieau, The Original Understanding of the Fourteenth Amendment 2 (1981); Curtis, Resurrecting, supra note 3, at 33; Harrison, supra note 116, at 1389.
Amendment,\(^{414}\) embodying the principles of the Civil Rights Act and granting Congress the power to enforce those principles through legislation.\(^{415}\)

The true meaning of the Privileges or Immunities Clause has been a source of confusion and consternation for constitutional scholars and judges since the Fourteenth Amendment was first passed.\(^{416}\) What are the Privileges or Immunities of United States citizens? Numerous answers to this question have been suggested. They are the fundamental rights or natural rights belonging to a citizen of a free society.\(^{417}\) They are the rights embodied in the first eight amendments to the Constitution, made applicable to and enforceable against state governments.\(^{418}\) They are limited rights emanating from the relationship between the federal government and its citizens.\(^{419}\) They are unspecified rights to be enumerated and defined through future

\(^{414}\) Curtis, *Resurrecting*, supra note 3, at 33. Section 1 of the Fourteenth Amendment provides:

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.

\(^{415}\) Antieau, *supra* note 411, at 2. Professor Perry argues that the Framers of the Fourteenth Amendment intended merely to constitutionalize the Civil Rights Act, not to ensure complete "political and social equality" for the freed slaves. Perry, *supra* note 413, at 62. Nevertheless, according to Perry, even if the Fourteenth Amendment was intended to protect additional rights, it was at most intended to protect the same kinds of rights as those articulated in the Act. *Id.* Those rights pertained to the "physical security of one's person, freedom of movement, and capacity to make contracts and to acquire, hold and transfer chattels and land—'life, liberty, and property' in the narrow original sense." *Id.* at 62-63 (citing R. Berger, *Government by Judiciary* 22-30 (1977)).


\(^{417}\) The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95 (1872) (Field, J. dissenting) ("The fundamental rights, privileges, and immunities which belong to a United States citizen as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.").

\(^{418}\) Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting) According to Black:

[The language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.]

*Id.* But see, Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 132-39 (1949) (arguing that incorporation would not have been attempted by the thirty-ninth Congress, nor would it have been accepted by the people or ratified by the legislatures).

\(^{419}\) See *Slaughter-House*, 83 U.S. (16 Wall.) at 78-80.
They are the primary, fundamental rights of national citizenship.\textsuperscript{421} While there may be as many opinions on the clause as there are scholars and judges, most of these critics share the common conviction that the privileges or immunities of national citizenship are something other than the limited group of rights recognized by Justice Miller in \textit{Slaughter-House}.\textsuperscript{422} He delineated a rigid barrier between rights of state citizenship and rights of national citizenship, arguing that the fundamental rights articulated by Justice Washington in \textit{Corfield} were privileges and immunities of state citizenship, subject to the exclusive protection by the states. It has been noted by scholars, however, that Justice Miller misquoted both Justice Washington and Article IV, Section 2, and mischaracterized Washington's comments regarding Article IV Privileges and Immunities.\textsuperscript{423} Justice Miller altered Justice Washington's famous question "what are the privileges and immunities of citizens in the several States?" rendering it "what are the privileges and immunities of citizens of the several States?"\textsuperscript{424} He

\ \textsuperscript{420} See Antieau, \textit{supra} note 411, at 39 (quoting Congressman John Bingham's statement that the purpose of the Fourteenth Amendment was "to arm the Congress of the United States, by the Consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution. It hath that extent -- no more" (citing Cong. Globe, 39th Cong., 1st Sess., 1088 (1866)).

\textsuperscript{421} See Kaczorowski, \textit{Revolutionary, supra} note 416, at 915. Kaczorowski notes that the Citizenship Clause and the Privileges or Immunities Clause operate together as an "affirmative recognition of the fundamental rights" of United States citizens. \textit{Id}. Moreover, the Fourteenth Amendment "did not merely secure the right to be free from state infringements of fundamental rights, it delegated to Congress the requisite authority to secure these rights directly." \textit{Id}.

\textsuperscript{422} Richard L. Aynes, \textit{supra} note 3, at 627 (stating that "everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause"); Robert J. Kaczorowski, \textit{Reflections on "From Slaves to Citizens"}, 17 Cardozo L. Rev. 2141, 2143-44 (1996) [hereinafter Kaczorowski, \textit{Reflections}] ("While most constitutional scholars believe that the Supreme Court in the \textit{Slaughter-House} Cases interpreted the Fourteenth Amendment's privileges or immunities clause more narrowly than the framers intended in rejecting its apparent guarantee of fundamental rights, the question of what rights the framers intended to secure remains controversial.").

Justice Miller identified Privileges or Immunities of United States citizens to be those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 79. These rights include the protection by the Federal government of a citizen's life, liberty and property on the high seas or in a foreign country, the right to assemble and petition for redress of grievances, the right of the writ of habeas corpus, the right to use the nation's navigable waters, the rights guaranteed by international treaties and the right to establish citizenship in any state of the Union. \textit{Id}. at 79-80.

\textsuperscript{423} See, e.g., Louis Lusky, \textit{By What Right?: A Commentary on the Supreme Court's Power to Revise the Constitution} 194-95 (1975) (arguing that Justice Miller intentionally misquoted the clause); Aynes, \textit{supra} note 3, at 646-48.

\textsuperscript{424} \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 76 (emphasis added). Justice Bradley pointed out this error in his dissent, noting that "both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens in a State; not of citizens of a state." \textit{Id}. at 117 (Bradley, J., dissenting).
then characterized the privileges and immunities referred to in Article IV, Section 2 as, "[i]n the language of Judge Washington, those rights which are fundamental."\(^{425}\) Moreover, according to Justice Miller:

Throughout [Justice Washington's] opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.\(^{426}\)

Justice Washington's original language indicated, however, that the rights he listed were not rights "of" state citizens, but rights a citizen enjoys while present "in" a state.\(^{427}\)

Justice Miller, in *Slaughter-House*, further assumed that Congress had not intended to subject these fundamental rights to the protection of the national government because such an action would have dramatically usurped state sovereignty. Had Congress intended such a radical transformation of the federal structure, it would have expressly stated that intent, according to Justice Miller.\(^{428}\) Thus, he concluded, the rights of United States citizenship were not the fundamental rights articulated by Justice Washington, but a separate group of rights expressly conferred by the federal government on its citizens.\(^{429}\)

Justice Washington, however, did not describe these fundamental rights as privileges or immunities of state citizenship exclusively. In fact, a close reading of his opinion leads more naturally to the opposite conclusion. He noted that Privileges and Immunities were rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."\(^{430}\) Thus, Justice Washington described fundamental rights as belonging to citizens of all free governments, not merely to citizens of the states. Therefore, his statement does not imply that these rights do not also belong to individuals as citizens of the United States. In fact, it may be inferred that citizenship in the United States, a free government, would entitle a person to these fundamental rights as well. It should also be noted that one of Justice Washington's Privileges or Immunities "of citizens in the Several States" is considered by almost all constitutional authorities, including Justice Miller, to be a right of national

\(^{425}\) Id. at 76.

\(^{426}\) Id. at 76.

\(^{427}\) See id. at 117 (Bradley, J., dissenting).

\(^{428}\) Id. at 77-78.

\(^{429}\) Id. While Justice Miller declined to define all the rights of United States citizenship, he explained that they are rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Id. at 79. Some examples given by Justice Miller were the right to travel, the right to protection over life, liberty and property on the high seas, the right to assemble and petition the government, and the writ of habeas corpus. Id. at 79-80.

citizenship. That is the the right to travel.\textsuperscript{431} According to Justice Washington, this right, along with the rights of life, liberty and property "may be mentioned as some of the privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental."\textsuperscript{432}

Based on the foregoing, Justice Miller's conclusion that Justice Washington spoke exclusively of state citizenship rights is untenable. So, too, is Justice Miller's argument that the Privileges or Immunities Clause of the Fourteenth Amendment did not grant protection to these rights. This conclusion rests on the questionable assumption that, had the Framers of the Fourteenth Amendment intended to transfer power to the federal government to enforce these individual rights against the states, they would have made their intent more explicit.\textsuperscript{433} Justice Miller offered not one shred of objective evidence, however, to support his assumption that the Framers did not intend to grant federal protection to basic fundamental rights.\textsuperscript{434} As constitutional theorist Leonard Levy points out, Justice Miller's decision was a classic example of bad lawmaking justified by bad history.\textsuperscript{435} According to Levy, "[b]y making that clause a nullity, the Court in effect amended the Constitution, doomed a comprehensive federal program for the protection of civil rights, and paved the constitutional way for Jim Crow."\textsuperscript{436} The Court did this by "speaking of the purpose and intent of the amendment," without ever citing or referring to "the Congressional Globe or the state records that would show historical purpose and intent."\textsuperscript{437}

\begin{itemize}
\item \textsuperscript{431} Id. at 552 (identifying the "right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" as a privilege and immunity).
\item \textsuperscript{432} Id.
\item \textsuperscript{433} Slaughter-House, 83 U.S. (16 Wall.) at 78. Justice Miller wrote:
\begin{quote}
The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.
\end{quote}
\item \textsuperscript{434} Leonard Levy, Original Intent and the Framers' Constitution 316 (1988).
\item \textsuperscript{435} Id. at 315.
\item \textsuperscript{436} Id.
\item \textsuperscript{437} Id. at 316.
\end{itemize}
One of the most important purposes of the Fourteenth Amendment, from the perspective of the Framers, was to establish the primacy of United States citizenship and to give the national government authority to protect the civil rights of African-Americans. Prior to the Civil War, the states were imbued with the authority and responsibility to protect the fundamental rights of the individual. After the Civil War and during the period of Reconstruction, however, civil rights abuses by Southern states led Congress to enact the Civil Rights Act and the Fourteenth Amendment in order to ensure the freedom of former slaves.

Contrary to Justice Miller's assertion in *Slaughter-House*, the Fourteenth Amendment was intended to pierce the mantle of state sovereignty and extend federal protection over the fundamental rights of United States Citizens residing in the states. Moreover, this protection, while primarily intended to benefit African-Americans, was not limited to that race. As Professor Kaczorowski points out, "although African-Americans were the intended primary beneficiaries of constitutional and statutory guarantees of citizens' rights, they were not the only intended beneficiaries. The evidence is clear that the framers intended also to protect their white allies in the South."

When the Fourteenth Amendment is viewed within the historical context of Reconstruction, it becomes apparent that the Framers selected the phrase "Privileges or Immunities," paralleling the language of Article IV, Section 2, not to articulate a dichotomy between state and national rights, but to bring those same fundamental rights under the protection of the federal government.

During the Congressional debates over the Fourteenth Amendment, supporters of the proposal continually cited Justice Washington's opinion to describe the rights to be encompassed by the Fourteenth Amendment's Privileges or Immunities Clause. Thus, it is evident...
that one of the Framers' primary intentions was to grant direct federal protection to the Privileges and Immunities articulated by Justice Washington. Professor Kaczorowski notes that "[b]ecause the framers defined United States citizens to be freemen, they interpreted the privileges and immunities of citizenship as the natural rights of freemen." History demonstrates, therefore, that the Framers most likely intended the Privileges or Immunities Clause to confer federal protection over the fundamental rights of citizens.

Scholars have debated the wisdom of resurrecting the Privileges or Immunities Clause at this late stage and have reached differing conclusions. One issue that arises is whether fundamental rights protection under the clause would replace, augment or contract substantive due process jurisprudence. The advantages of replacing equal protection and due process analysis are debatable, particularly if one takes the view that fundamental rights analysis would not have developed much differently under the Privileges or Immunities Clause. While an in-depth analysis of these issues is beyond the scope of this Note, utilizing the Privileges or Immunities Clause to protect substantive rights would arguably give fundamental rights analysis more legitimacy. As Richard Aynes points out, even conservative constitutional theorists concede that the Fourteenth Amendment was intended to protect "some substantial rights" under the rubric of the Privileges or Immunities Clause. Thus, the protection of "unenumerated" rights under that clause might be more palatable to those who reject the jurisprudence of substantive due process.

privileges and immunities. \textit{Id.}

\begin{itemize}
  \item 446. \textit{Id.}
  \item 447. Kaczorowski, \textit{Revolutionary, supra} note 416, at 912.
  \item 448. \textit{See e.g.,} Robert H. Bork, \textit{The Tempting of America: The Political Seduction of the Law} 166 (1990) (describing the Privileges or Immunities Clause as properly remaining "a dead letter" since its adoption); Michael Kent Curtis, \textit{Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States}, 78 N.C. L. Rev. 1071 (2000) (arguing that the Privileges or Immunities Clause was intended to protect fundamental rights, including those rights articulated in the Bill of Rights); Jeffrey Rosen, \textit{Translating the Privileges or Immunities Clause}, 66 Geo. Wash. L. Rev. 1241, 1241-42 (1998) (arguing that any attempt to resurrect the Privileges or Immunities Clause in its original context will lead back down the path to \textit{Lochner}).
  \item 449. \textit{See Newson}, \textit{supra} note 3, at 646; Tribe, \textit{supra} note 5, at 195-96 (speculating about the "risks... of transplanting rights from their current substantive due process soil, however barren, to the heady mountains of privileges or immunities").
  \item 450. \textit{See Newson}, \textit{supra} note 3, at 650. Newsom argues that his interpretation of \textit{Slaughter-House}
  \begin{itemize}
    \item would permit courts to lay aside the historically confused and semantically untenable doctrine of 'substantive due process,' a doctrine that has for years visited suspicion and disrepute on the judiciary's attempt to protect even textually specified constitutional freedoms, such as those set out in the Bill of Rights, against state interference.
  \end{itemize}
  \item 451. Aynes, \textit{supra} note 3, at 628.
\end{itemize}
Laurence Tribe also argues that "perennial dissatisfaction with the whole concept of substantive due process, both linguistically and historically, in themselves support the use of the Privileges or Immunities Clause as a less troublesome vehicle both for selective incorporation and for the elaboration of whatever unenumerated rights merit protection against the states."\(^{452}\)

B. Analyzing the Right to Travel as a Privilege or Immunity

Supreme Court case law reveals that principles of federal sovereignty and personal liberty converge to create a right to travel.\(^{453}\)

Since the inception of the Union, this right has been afforded federal protection across state borders.\(^{454}\) The remainder of this Part argues that there is a fundamental right to free movement within state borders as well. Moreover, the Privileges or Immunities Clause of the Fourteenth Amendment grants federal protection over this right against state abridgement.

Careful analysis of the Supreme Court's case law reveals that the right to travel is best understood as a right that emanates from the direct relationship between a United States citizen and the federal government.\(^{455}\) The nature of federal sovereignty is such that it supercedes state sovereignty, bestowing certain rights directly on its own citizens—rights that may not be abridged by state governments.\(^{456}\) The right to travel, however, is not merely an aspect of federal power, imposed solely for the purpose of advancing national interest. It is a right that vests in the citizen. The relationship between the United States citizen and the federal government is the relationship of a free citizen to a government built upon principles of freedom and liberty.\(^{457}\)

Under a strict federal sovereignty view, the right to travel is perceived primarily as a means of consolidating national power.\(^{458}\) Proponents of this view fail to acknowledge, however, that the Union was conceived as a means of promoting a free society, not the other way around.\(^{459}\) On the other hand, a strict personal liberty approach

\(^{452}\) Tribe, \textit{supra} note 5, at 193-94 (footnotes omitted).
\(^{453}\) See \textit{supra} Part I.A.3.
\(^{454}\) See \textit{supra} Part I.
\(^{455}\) See \textit{supra} Part I.A.
\(^{456}\) See \textit{supra} Part I.A.
\(^{457}\) See \textit{supra} Part I.A.3.
\(^{458}\) See \textit{supra} Part I.A.1.
\(^{459}\) See U.S. Const. pmbl. The Preamble of the Constitution reads:

\textit{We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.}

\textit{Id.} (emphasis added). In Federalist No. 1, Hamilton assured his "countrymen" that the federal government created by the Constitution was "the safest course for your liberty, your dignity, and your happiness." Hamilton asserted that the Union would
does not tell the whole story of the right to travel either. The Supreme Court rarely articulated the right to travel solely as a personal liberty right.\textsuperscript{460} Moreover, the most accurate conception of the right to travel combines principles of federal sovereignty and personal liberty.\textsuperscript{461} Thus, the right to travel flows from the relationship between the United States citizen and the federal government, harmonizing dual aspects of sovereignty and liberty, and existing for the benefit of both parties.\textsuperscript{462} Logically, this right should not be limited to interstate travel but should include all movement within the United States. Furthermore, the existence of a federally-protected right to intrastate travel is supported by both case law and history.

The Supreme Court has indicated that there may be a fundamental right to free movement that transcends interstate travel. In \textit{Allgeyer v. Louisiana}, for example, the Court recognized a right of "locomotion" which included "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but . . . to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will."\textsuperscript{463} In \textit{Williams v. Fears}, Chief Justice Fuller noted that "the right of locomotion" recognized in \textit{Allgeyer}, included "the right to remove from one place to another according to inclination."\textsuperscript{464} Furthermore, he considered the right of locomotion to be "an attribute of personal liberty."\textsuperscript{465} Moreover, according to Chief Justice Fuller, "the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."\textsuperscript{466}

Chief Justice Taney assumed the existence of the right to free movement within a state, extending it to interstate movement, when he wrote "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass promote "political prosperity" and that the adoption of the Constitution would afford "additional security" to "liberty, and to property." The Federalist No. 1, at 4 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Constitutional scholar Michael Kent Curtis notes that:

In accordance with the Declaration, a basic purpose of government was to secure people their rights to life, liberty and the pursuit of happiness and their right to govern themselves. Keeping state government from destroying these values was therefore consistent with the proper role of state governments and entirely consistent with federalism.


\textsuperscript{460} See supra Part I.

\textsuperscript{461} See supra Part I.A.3.

\textsuperscript{462} See supra Part I.A.3.

\textsuperscript{463} Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

\textsuperscript{464} Williams v. Fears, 179 U.S. 270, 274 (1900).

\textsuperscript{465} Id.

\textsuperscript{466} Id. (emphasis added).
through every part of it without interruption, \textit{as freely as in our own States}.\textsuperscript{467} In addition, a right to intrastate movement may be inferred from Justice Miller's opinion in \textit{Crandall} where he wrote that the United States citizen must have free access to all the offices of the federal government "independent of the will of any State over whose soil he must pass in the exercise of it."\textsuperscript{468} Justice Miller implicitly recognizes, therefore, that interstate travel implicates movement within state borders. In fact, how can a citizen have a fundamental right to cross the borders of a state if he has no fundamental right to get to the border?\textsuperscript{469} Moreover, in many cases, the government offices that a citizen would need to visit in order to exercise his rights would be located in his or her own state, necessitating freedom of movement within states.

In \textit{Corfield v. Coryell}, Justice Washington identified freedom of movement as a liberty enjoyed by citizens of all free governments.\textsuperscript{470} Further, he noted, and perhaps assumed, that the right to "pass through, or to reside in any other state" was a right already enjoyed by citizens "in the several states."\textsuperscript{471} One of the purposes of Article IV, Section 2 was to grant constitutional protection to citizens attempting to exercise that right across state borders.\textsuperscript{472} Article IV, Section 2 did not, however, protect freedom of movement to citizens within their own states because it did not prohibit states from abridging the privileges and immunities of their own state citizens. Furthermore, as previously noted, prior to the passage of the Fourteenth Amendment, the authority to protect the fundamental rights of citizens belonged to the state governments. By incorporating the fundamental rights articulated by Justice Washington into the Fourteenth Amendment, however, the Framers extended federal protection over those rights \textit{within} the states. In doing so, the Fourteenth Amendment's Privileges or Immunities Clause conferred federal protection over the right of free movement within the states and prohibited states from abridging the movement of citizens within state borders.

The conclusion that the Fourteenth Amendment extended federal protection over intrastate travel is further supported by historical evidence. After emancipation, the Southern states attempted through discriminatory legislation and private coercion to return the African-American population to its former condition of servitude.\textsuperscript{473} Southern

\begin{thebibliography}{9}
\bibitem{467} The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) (emphasis added).
\bibitem{468} Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867).
\bibitem{469} See, Chudy, \textit{supra} note 406, at 567.
\bibitem{470} Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).
\bibitem{471} \textit{Id}.
\bibitem{472} \textit{Id}.
\bibitem{473} Aremona G. Bennett, \textit{Phantom Freedom: Official Acceptance of Violence to Personal Security And Subversion of Proprietary Rights and Ambitions Following}
states enacted Black Codes restricting the liberty of freed slaves, such as their right to bear arms, to assemble and to hold worship services.\textsuperscript{474} In addition, efforts were made to restrict the physical mobility of African-Americans.\textsuperscript{475} Prior to the Civil War, "blacks had been forbidden to travel without passes."\textsuperscript{476} After the war, however, freed African-Americans eagerly attempted to claim the right of free movement. According to one commentator, "blacks took to the roads with a notable enthusiasm. 'Right off colored folks started on the move,' a former slave in Texas recalled. 'They seemed to want to get closer to freedom, so they'd know what it was—like it was a place or a city.'"\textsuperscript{477} According to David Bernstein, one of the purposes of the Black Codes was to prevent a free labor market from developing.\textsuperscript{478} For example, legislation which curtailed the mobility of African-Americans also limited their economic freedom.\textsuperscript{479} For example, a number of states passed vagrancy laws that penalized individuals who had no fixed residence or employment.\textsuperscript{480} These laws effectively restricted the movement of African-American workers, because "traveling in search of a new job would leave them vulnerable to arrest for vagrancy."\textsuperscript{481} Even after the Civil Rights Act and the Fourteenth Amendment invalidated the Black Codes, African-Americans found their freedom restricted by facially-neutral legislation.\textsuperscript{482} In addition, private violence was also used to curtail migration by African-Americans.\textsuperscript{483} 

While most historical accounts of Reconstruction focus on Southern oppression of African-Americans, the victims of these abuses also included Northerners and Southern whites who had supported the Union.\textsuperscript{484} These oppressive tactics practiced by the Southern states included murder, physical abuse, enforced labor without compensation, and denial of freedom of movement.\textsuperscript{485}

\textsuperscript{475} Id. at 31.
\textsuperscript{477} Id.
\textsuperscript{478} Bernstein, supra note 473, at 787.
\textsuperscript{479} Id.
\textsuperscript{480} Id.
\textsuperscript{481} Id.
\textsuperscript{482} Id. at 789-90.
\textsuperscript{483} Id. at 789 & n.42.
\textsuperscript{485} Kaczorowski, \textit{Nationalization}, supra note 484, at 28.
It was in response to this social crisis that the Civil Rights Act and its constitutional companion, the Fourteenth Amendment, were passed. Congress intended to ensure that fundamental liberties would be protected against abuse by the states. Since much of this abuse took place within the borders of the states, it was necessary to provide citizens with enforceable rights against their own state governments. Thus, the Privileges or Immunities Clause gave citizens the right to exercise their fundamental right of free movement within the borders of their states, in the same way that Article IV, Section 2 had given citizens the freedom to travel across the borders of a state.

CONCLUSION

The right to travel is a fundamental right identified by Justice Washington in *Corfield* as a privilege or immunity of citizenship. This right was granted federal protection against state abridgement by the Framers of the Fourteenth Amendment who intended to protect fundamental rights from state abridgement. Consequently, the right to travel is guaranteed protection against state abridgement within the borders of the state by the Privileges or Immunities Clause of the Fourteenth Amendment. Therefore, the states may not abridge the right to intrastate travel.

Faced with the challenge of enunciating a lucid and principled construction of the Privileges or Immunities Clause, the Court may be tempted to put the clause back in its grave. It is to be hoped that the Court will finally take up the challenge to give the clause a meaningful position in constitutional rights jurisprudence.


487. Most commentators who argue in favor of constitutional protection for the right to travel ground their analysis in the doctrine of substantive due process. See *infra* Part II. One reason for this preference may be that the due process rights are protected against both federal and state infringement under the Fifth and the Fourteenth Amendment’s Due Process Clauses. It could be argued that the Fourteenth Amendment’s Privileges or Immunities Clause does not restrain the federal government’s power to restrict intrastate travel. The Supreme Court has held, however, that the federal government does not have the power to authorize states to violate the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489, 507-08 (1999). Nor may the federal government itself violate the protections conferred by the Citizenship Clause of the Fourteenth Amendment. *Id.* Thus, according to the Court, Congress may not “validate a law that denies the rights guaranteed by the Fourteenth Amendment.” *Id.* at 508 (citing Mississippi Univ. for Women *v.* Hogan, 458 U.S. 718, 732-33 (1982)).
Notes & Observations