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Constitutional Law - Right to Travel: The United States Supreme Court Invalidates a Statute Requiring Welfare Recipients to Reside in a State for One Year before Receiving Full Benefits

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CONSTITUTIONAL LAW—RIGHT TO TRAVEL: THE UNITED STATES SUPREME COURT INVALIDATES A STATUTE REQUIRING WELFARE RECIPIENTS TO RESIDE IN A STATE FOR ONE YEAR BEFORE RECEIVING FULL BENEFITS

Saenz v. Roe, 526 U.S. 489 (1999)

I. FACTS

In 1992, hoping to make a modest reduction in its vast welfare budget, California enacted section 11450.03 of its Welfare and Institutions Code (section 11450.03).[1] The statute was part of an experimental project that amended one of California's most expensive programs, Aid to Families with Dependent Children (AFDC).[2] As amended, the AFDC program limited residents of California who had resided in the state for less than one year to the welfare benefits they would have received in the state of their prior residence.[3] Additionally, the experimental project consisted of a "work-incentive" program which decreased the amount of benefits given to AFDC recipients but increased the amount of earned income recipients could keep.[4] In October of 1992, the Secretary of

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1. *See* Saenz v. Roe, 526 U.S. 489, 493 (1999) (citing CAL. WELF. & INST. § 11450.03 (West Supp. 1999)). The petitioners characterized the statute as one aspect of a larger "time-limited experimental project" designed to reduce California's welfare budget. *See* Petitioner's Brief at 4-5, *Saenz* (No. 98-97) (explaining the legislative history of section 11450.03); *see also* Beno v. Shalala, 30 F.3d 1057, 1061 (9th Cir. 1994) (discussing other portions of the experimental project).

2. *See Saenz*, 526 U.S. at 493. AFDC was created by the Social Security Act of 1935. *See* Green v. Anderson, 811 F. Supp. 516, 517 n.1 (E.D. Cal. 1993) (explaining the development of AFDC), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated*, 513 U.S. 557 (1995). AFDC benefits are financed through a cooperative program between the states and federal government. *See id.* AFDC costs California $2.9 billion annually. *See Saenz*, 526 U.S. at 493. Based on the information for the fiscal year of 1996-1997, California had the sixth highest benefit level in the nation; however, that ranking dropped to 18th when housing costs were factored in. *See id.* at 496-97 (citing the uncontested findings of the district court in Roe v. Anderson, 966 F. Supp. 977, 981 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *aff'd sub nom. Saenz*, 526 U.S. 493).

3. *See Saenz*, 526 U.S. at 492. Section 11450.03 of the California Welfare and Institutions Code provided:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.
> (b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this sections so as to ensure the continued compliance of the state plan for the following:
> (1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).
> (2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with section 1396) of Chapter 7 of Title 42 of the United States Code).

4. *See Beno*, 30 F.3d at 1060-61 (explaining the "work-incentive" portion of the project).

Health and Human Services issued waivers granting approval of the residency requirement[5] and the work incentive program.[6]

On December 21, 1992, three California residents filed an action challenging the constitutionality of section 11450.03.[7] The district court concluded that the statute was unconstitutional and issued a restraining order enjoining its enforcement.[8] The Court of Appeals for the Ninth Circuit affirmed,[9] and the Supreme Court granted California's petition for certiorari.[10] Subsequent to this, however, the Court of Appeals for the Ninth Circuit decided *Beno v. Shalala*.[11] At issue in *Beno* was the work-incentive portion of the experimental project.[12] In order to allow California to implement the work-incentive program, the Secretary of Health and Human Services waived the "Maintenance of Effort" requirement of 42 U.S.C. § 1396a(c)(1).[13] However, the Court of Appeals for the Ninth Circuit vacated the Secretary's waiver on the basis that the administrative record did not indicate that the Secretary adequately considered why disabled AFDC recipients were included in the work-incentive benefit reduction.[14] Without this waiver, the residency requirement of section 11450.03 could not be implemented.[15] Thus, the Supreme Court could not reach the merits of the case because there was no longer a justiciable controversy.[16]

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5. *See Saenz*, 526 U.S. at 493. Reducing the incentive for families to migrate to California in order to obtain higher aid payments was the objective of the residency requirement according to the waiver request letter. *See Green*, 811 F. Supp. at 522 n.14 (discussing the waiver request letter).

6. *See Beno*, 30 F.3d at 1062 (discussing the waiver for the work-incentive program). Petitioners in *Saenz* characterized the waiver as also granting approval of additional portions of the project. *See* Petitioner's Brief at 6, *Saenz* (No. 98-97). First, Petitioners asserted that the project increased the allowable value of the resources and automobiles of AFDC recipient families. *See id.* Petitioners further asserted that the project provided additional child-care funding for recipients and school progress bonuses for parenting teens. *See id.*

7. *See Saenz*, 526 U.S. at 493-94. In the first challenge to section 11450.03, the plaintiffs alleged that they had moved to California to escape abusive relationships. *See Green*, 811 F. Supp. at 517.

8. *See id.* at 523. The district court concluded that section 11450.03 penalized the right to travel without a sufficient justification for the penalty. *See id.*

9. Green v. Anderson, 26 F.3d 95, 96 (9th Cir. 1994), *vacated*, 513 U.S. 557 (1995).

10. Green v. Anderson, 513 U.S. 922, 922 (1994).

11. 30 F.3d 1057 (9th Cir. 1994).

12. *See* Beno v. Shalala, 30 F.3d 1057, 1060-61 (9th Cir. 1994) (discussing the "residency requirement" and "work-incentive" portions of the experimental project).

13. *See id.* at 1061. The "Maintenance of Effort" statute provided that the Secretary would not approve any state's medical assistance plan with AFDC benefits levels less than those in effect under such a plan on May 1, 1988. *See id.* (citing 42 U.S.C. § 1396a(c)(1) (1994)). Since the California experiment reduced benefit levels below this amount, the state needed a waiver to implement the experiment. *See id.*

14. *See id.* at 1076.

15. *See* Saenz v. Roe, 526 U.S. 489, 495 (1999) (stating that California acknowledged that the Act would not be implemented without the Secretary's waiver); *see also* Petitioner's Brief at 7, *Saenz* (No. 98-97) (stating that a waiver of the maintenance effort requirement was necessary for the implementation of the residency requirement).

16. *See Saenz*, 526 U.S. at 495 (citing Anderson v. Green, 513 U.S. 557 (1995)).

The residency requirement remained inoperative until Congress enacted the Personal Responsibility and Work Reconciliation Act of 1996 (PRWORA).[17] Under PRWORA, California no longer needed approval of the Secretary of Health and Human Services to implement a residency requirement,[18] and consequently, enforcement of section 11450.03 commenced on April 1, 1997.[19] Respondents filed an action in district court the same day.[20] The district court concluded that the enactment of PRWORA did not affect its previous analysis and issued a temporary restraining order.[21] The Court of Appeals for the Ninth Circuit affirmed.[22] The Supreme Court granted certiorari[23] and *held* that the residency requirement of section 11450 was unconstitutional.[24]

II. LEGAL BACKGROUND

The United States Supreme Court has never conclusively identified the precise source of the right to travel.[25] Notwithstanding this lack of consensus on its source, the freedom to travel interstate has long been

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17. *See id.* PRWORA replaced the AFDC program with Temporary Assistance to Needy Families (TANF). *See id.* PRWORA provided:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c) (Supp. IV 1998).

18. *See Saenz*, 526 U.S. at 495. The rationale underlying Congress' authorization of residency requirements was to protect states with high benefits levels from becoming "welfare magnets." *See* Petitioner's Brief at 7, *Saenz* (No. 98-97). The "welfare magnet" theory hypothesizes that welfare recipients will migrate to states that provide high benefits to a degree that would threaten to drain the resources of those states. Brief for Institute for Justice at 2-3, *Saenz* (No. 98-97).

19. *See Saenz*, 526 U.S. at 495. The California Department of Social Services announced the enforcement of the statute by issuing an "All County Letter." *Id.* According to the letter, families would receive the lower benefit amount even if they had lived in California all their lives but had resided in another state for a short period and then decided to move back to California. *See id.* at 495-96. The residency requirement would not, however, apply to families that have recently moved to California from another country. *See id.* at 496. The letter also explained that section 11450.03 would be applied regardless of a family's motive for moving to California. *See id.*

20. *See* Roe v. Anderson, 966 F. Supp. 977, 980 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998, *aff'd sub nom. Saenz*, 526 U.S. 493.

21. *See id.* at 985. Respondents in *Roe* asserted that they moved to California to obtain better employment. *See id.* at 980.

22. *See* Roe v. Anderson, 134 F.3d 1400, 1405 (9th Cir. 1998), *aff'd sub nom. Saenz*, 526 U.S. 493.

23. *See* Anderson v. Roe, 524 U.S. 982, 982 (1998).

24. *See Saenz*, 526 U.S. at 511. After the case was argued before the Supreme Court, Rita L. Saenz replaced Eloise Anderson as the director of the California Department of Social Services. *See id.* at 498 n.10.

25. *See* Attorney General v. Soto-Lopez, 476 U.S. 898, 902 (1986) (citing Zobel v. Williams, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring in judgement) (assigning the right to travel to the Privileges and Immunities Clause of Article IV)); Edwards v. California, 314 U.S. 160, 173-74 (1941) (assigning the right to travel to the Commerce Clause); *Edwards*, 314 U.S. at 177-78 (Douglas, J., concurring) (assigning the right to travel to the Privileges and Immunities Clause of the 14th Amendment).

recognized by the Court as a basic right under the Constitution.[26] To understand the willingness of the Court to infer the right to travel from the Constitution, it is helpful to examine the right as it was known to the American colonists.[27]

A. THE RIGHT TO TRAVEL IN ENGLAND

During the early colonization of the United States, the right to travel was severely restricted for most of the people of England.[28] Apprenticeship laws and the existence of guilds often prevented people from moving to an area to engage in a new trade or craft.[29] More important than work related restrictions on mobility, however, were the restrictions created by the English system of poor relief.[30]

In 1601, an English statute was imposed that required each individual parish to supply relief for the poor through taxes on the lands of the poor person's parish.[31] If the people became poor while they were in the parish of their birth, then that parish would be responsible for their support.[32] Likewise, if they became impoverished after recently moving to a new parish, they would be required to return to their old parish and rely on its poor relief.[33] However, if a person became poor after acquiring a "settlement" in the new parish, the new parish would then be responsible for the poor relief.[34] Thus, parish officials often did all they could to prevent new people from settling in their parish for fear that the new residents may become paupers.[35] Furthermore, parish officials often discouraged current residents from leaving because they feared residents might return to them as paupers.[36]

B. THE PRE-CONSTITUTIONAL RIGHT TO TRAVEL

The restrictions created by the guilds, apprenticeship laws, and the poor relief statute provided strong incentives for English settlers to

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26. *See* United States v. Guest, 383 U.S. 745, 758 (1966) (citing *Edwards*, 314 U.S. at 177; Twining v. New Jersey, 211 U.S. 78, 97 (1908); Williams v. Fears, 179 U.S. 270, 274 (1900)).

27. *See* ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 163-66 (1956) (discussing the right to travel as it was known in seventeenth century England).

28. *See id.* at 163-64 (discussing the restrictions placed on the right to travel in England).

29. *See id.* Apprenticeship laws prevented a worker from engaging in a trade until the worker had been apprenticed in that trade for seven years. *See id.* at 163. Furthermore, each trade was operated under a legal monopoly of its own guild. *See id.* at 164. Thus, a worker could not move to a new town for a new job even if that new job was almost identical to the worker's old job. *See id.*

30. *See id.*

31. *See id.* at 165.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

escape to the open spaces of the American colonies.[37] In colonial America, the freedom to travel between the colonies received little or no mention in colony charters.[38] Similarly, legislation enacted by the colonies rarely addressed it.[39] Nonetheless, laborers moved freely among the colonies as needed.[40] Thus, it is likely that colonists took the freedom of movement between the colonies for granted.[41]

However, the Framers did address the right to travel specifically in the Articles of Confederation.[42] Article IV, Section 2 of the Articles provided that "people of each state shall have free ingress and regress to and from any other state."[43] In contrast, this clause was specifically left out of the text of the Constitution.[44] Notwithstanding its absence, it has never been suggested,[45] 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.[46] Thus, it is likely that the right was necessarily intended to have its source somewhere in the Constitution.[47]

C. EARLY RIGHT TO TRAVEL CASES

The first major right to travel case decided in 1867 by the Court was *Crandall v. Nevada*.[48] At issue in *Crandall* was a Nevada law that placed a tax on anyone passing through Nevada as a railroad or stagecoach passenger.[49] Writing for the Court, Justice Miller rejected the idea that the tax violated the Commerce Clause.[50] Instead, he found that the tax

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37. *See id.* at 166.
38. *See id.* at 177.
39. *See id.* at 178.
40. *See id.* at 181.
41. *See id.* at 177. In contrast to the colonial charters, the Treaty of Utrecht of 1713, by which France ceded Nova Scotia, contained provisions specifically protecting the right to travel. *See id.* at 177-78 (discussing the Treaty of Utrecht). Thus, Chafee concluded that the absence of similar specific provisions from the charters of the colonies indicates that "no serious barriers were expected to arise along the boundaries between English colonies." *Id.* at 178.
42. *See id.* at 184.
43. *Id.* at 184-85.
44. *See id.* at 185.
45. *See* United States v. Guest, 383 U.S. 745, 759 (1966) (stating that, while there have been disputes within the Court as to the source of the right to travel, "[a]ll have agreed that the right exists").
46. *See* CHAFEE, *supra* note 27, at 185. Chafee points out that as the members of the Philadelphia Convention were framing the Constitution, they took great care to ensure that states were not allowed to pass tariff laws. *See* CHAFEE, *supra* note 27, at 185. Chafee thus concludes that the Convention would not have wanted to allow states to pass immigration laws. *See* CHAFEE, *supra* note 27, at 185.
47. *See* CHAFEE, *supra* note 27, at 185.
48. 73 U.S. (6 Wall.) 35 (1867).
49. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 46 (1867).
50. *See id.* at 43. Justice Miller reasoned that since Congress had not passed laws that were in conflict with the Nevada tax, the Commerce Clause was not implicated. *See id.* Chafee argues that Justice Miller's reasoning at this point was unsound and contrary to a number of dormant Commerce Clause cases. *See* CHAFEE, *supra* note 25, at 188.

violated the right of a citizen "to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it."[51] In order to exercise this right, Justice Miller reasoned that citizens must be free to pass through states without burdens such as the tax imposed by Nevada.[52]

Following *Crandall*, the Court conservatively began to define the right to travel.[53] In 1941, the Court in *Edwards v. California*[54] invalidated a California statute that made it a crime to bring an indigent person into the state of California.[55] Writing for the Court, Justice Byrnes held that the statute violated the Commerce Clause.[56] Justice Byrnes reasoned that, since the transportation of people is commerce,[57] the intended and sole function of the California statute was to burden interstate commerce.[58] Furthermore, Justice Byrnes stated that while care for the poor may have formerly been a matter of state or local concern, it was now a concern for the nation as a whole.[59]

Justice Douglas concurred in the result in *Edwards* but disagreed with the majority's reliance on the Commerce Clause.[60] Instead, Justice Douglas argued that the right to travel interstate was "an incident of

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51. *Crandall*, 73 U.S. (6 Wall.) at 44.

52. *See id.* (stating that the "right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it"). Although the tax of only one dollar did not seriously effect this right, Justice Miller reasoned that if states were allowed to implement such a tax, they could hypothetically tax passengers $1000. *See id.* at 46 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). Furthermore, Justice Miller reasoned if one state could implement such a tax, then all states could, resulting in a serious burden on the transportation of passengers among the states. *See id.* Justice Clifford, joined by Chief Justice Chase, dissented from the majority's opinion. *See id.* at 49 (Clifford, J., dissenting). Justice Clifford argued that the tax was a burden on commerce among the several states; therefore, it should have been held unconstitutional as a violation of the Commerce Clause. *See id.*

53. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 281 (1974) (Rehnquist, J., dissenting) (citing Williams v. Fears, 179 U.S. 270 (1900)). In *Williams*, the Court, while recognizing a right to travel protected by the Fourteenth Amendment and other provisions of the Constitution, upheld a Georgia law that taxed persons hiring labor for work outside the state but did not tax agents hiring for local work. *See Maricopa County*, 415 U.S. at 281 (Rehnquist, J., dissenting) (citing *Williams*, 179 U.S. at 274).

54. 314 U.S. 160 (1941).

55. *See* Edwards v. California, 314 U.S. 160, 171 (1941). According to Justice Rehnquist, the statute in *Edwards* was "specifically designed to, and would, deter indigent persons from entering the State of California." *Maricopa County*, 415 U.S. at 282 (Rehnquist, J., dissenting) (citing *Edwards*, 314 U.S. at 171).

56. *See Edwards*, 314 U.S. at 173.

57. *See id.* at 172 (stating that the transportation of people is commerce).

58. *See id.* at 174.

59. *See id.* at 174-75 (analogizing the theory underlying English poor laws to the theory underlying the California statute); *see also* CHAFEE, *supra* note 27, 164-66 (discussing the English poor laws). Justice Byrnes wrote, "Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing for assistance to the needy has ceased to be local in character." *Edwards*, 314 U.S. at 175.

60. *See id.* at 177 (Douglas, J., concurring) (stating that the right to travel interstate occupied a more protected position than the movement of products across state lines). Justice Black and Justice Murphy joined in Justice Douglas's concurrence. *See id.* at 181.

national citizenship protected by the privileges [or] immunities clause of the Fourteenth Amendment against state interference."[61] Thus, Justice Douglas reasoned that the California statute directly contravened the principle of national citizenship by diluting the rights of such citizenship to a class of people.[62]

As *Crandall* and *Edwards* illustrate, the right to travel was originally implicated when a citizen of one state wanted to physically enter or pass through another state.[63] Throughout the second half of the twentieth century, the right to travel gradually expanded to include facets other than actual physical movement through a state.[64] A possible bridge between the early right to travel cases and the later expansion of that right may be found in the broad language defining the right to travel in the 1966 case *United States v. Guest*.[65]

Justice Stewart, writing for the majority in *Guest*, stated: "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 a position fundamental to the concept of our Federal Union."[66] Furthermore, Justice Stewart did not attempt to identify the source of the right, but rather suggested that it was conceived from the beginning to be necessary to a strong union.[67]

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61. *Id.* at 178. Justice Douglas reasoned that, when the Fourteenth Amendment was adopted in 1868, the right to travel had already been established as an incident of national citizenship by Justice Miller's opinion in *Crandall*. *See id.* (citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)). As such a right, Justice Douglas reasoned that the right to travel was protected from state interference by the Privileges and Immunities Clause of the Fourteenth Amendment. *See id.* at 179.

62. *See id.* at 181 (stating that it would contravene the conception of national unity if states were allowed to burden indigent people's freedom of movement). Justice Jackson also wrote a concurrence in which he agreed with Justice Douglas that the right to travel was an incident of national citizenship. *See id.* at 184 (Jackson, J., concurring). However, Justice Jackson qualified his agreement by stating that the right to travel was not unlimited. *See id.* (listing contagious diseases and criminal activity as bases for restricting a person's right to travel). Nonetheless, Justice Jackson did not find indigence to be a proper basis to limit one's rights as a national citizen. *See id.*

63. *See id.* at 173 (striking down a law prohibiting the transportation of indigents into California); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 39 (1867) (striking down a law that taxed people who wanted to "get out of" or "pass through" Nevada).

64. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 282-83 (1974) (Rehnquist, J., dissenting) (arguing that the early right to travel cases involved direct barriers to migration while the more recent right to travel cases focused on distribution of state benefits).

65. 383 U.S. 745 (1966).

66. United States v. Guest, 383 U.S. 745, 757 (1966).

67. *See id.* Justice Stewart did not deem it necessary to analyze the source of the right to travel suggested in previous cases since there had been a general consensus that the right exists. *See id.* at 759.

D. STRICT SCRUTINY ANALYSIS OF DURATIONAL RESIDENCY REQUIREMENTS

In 1969, drawing on the broad language from *Guest*, the Court expanded the right to travel in the landmark case of *Shapiro v. Thompson*.[68] At issue in *Shapiro* was the constitutionality of the one-year waiting periods that Connecticut, the District of Columbia, and Pennsylvania imposed on new residents before they could receive AFDC assistance.[69] Early in its opinion, the Court, as in *Guest*, identified interstate travel as a constitutional right but disclaimed any need to ground the right in any specific provision of the Constitution.[70]

The Court reasoned that the classification created by the one-year waiting period could not be justified by the purpose of deterring the immigration of indigents, as such a purpose would be constitutionally impermissible.[71] The Court then addressed a number of permissible fiscal purposes asserted by the states to justify the classification.[72] At the onset of addressing these fiscal objectives, the Court stated that there must be more than a rational relationship between permissible objectives and the one-year waiting period.[73] Rather, the Court found that, because the one-year waiting period penalized the constitutional right to travel, it must be necessary to promote a compelling governmental interest.[74] Under such scrutiny, the Court held that the one-year waiting period was not necessary to promote the asserted fiscal purposes; thus, the classification created by the waiting period violated the Equal Protection Clause.[75]

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68. 394 U.S. 618 (1969).

69. Shapiro v. Thompson, 394 U.S. 618, 622-26 (1969).

70. *See id.* at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").

71. *See id.* at 631 (citing United States v. Jackson, 390 U.S. 570, 581 (1968)). At least one scholar has argued that the Court erred at this point in its opinion by failing to distinguish between the right to travel and the right of interstate migration. *See* Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 VAL. U. L. REV. 893, 896 (1997). Thus, the argument continues, while a person may have a right to travel throughout a country, that same person does not necessarily have a right to establish permanent residence in that country. *See id.*

72. *See Shapiro*, 394 U.S. at 633-34. The permissible purposes asserted to justify the classification included: (1) facilitating the planning of the welfare budget, (2) minimizing the opportunity of recipients to fraudulently receive payments from two states, (3) providing an objective residency test, and (4) encouraging new residents to enter the workforce. *See id.*

73. *See id.* at 634.

74. *See id.* (stating that any classification that penalizes the exercise of a constitutional right must be "necessary to promote a compelling government interest"). A challenge to a classification created by a state's welfare statute would be subject to rational basis review when standing alone; however, when the classification also infringes on a fundamental right, it must survive strict scrutiny. *See* Maldonado v. Houstoun, 177 F.R.D. 311, 323 (E.D. Pa. 1997), *aff'd on other grounds*, 157 F.3d 179 (3d Cir. 1998).

75. *See Shapiro*, 394 U.S. at 638. It has been argued that, because the Court cited *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), after declaring the right to travel to be fundamental, it seemed the next step in the Court's analysis should have been a substantive due process analysis. *See* Zubler,

In *Dunn v. Blumstein*,[76] the Court relied on *Shapiro* to invalidate a Tennessee statute that imposed a one-year durational residency requirement as a prerequisite to voting in state elections.[77] The Court first concluded since the statute granted the right to vote to some and denied it to others, the classification must be necessary to promote a compelling state interest.[78] Additionally, the Court rejected the idea that *Shapiro* was limited to cases of actual deterrence of migration and, therefore, found that the statute directly impinged on the fundamental right to travel.[79] Under such scrutiny, the Court concluded that the reasons advanced by Tennessee could not justify the classification.[80] However, the court cautioned that *Shapiro* was not intended to invalidate appropriately defined and uniformly applied bona fide residency requirements.[81]

In 1974, the Court in *Memorial Hospital v. Maricopa County*[82] relied on *Shapiro* to invalidate an Arizona statute requiring a one-year residence in a county as a condition to receiving non-emergency medical care at county expense.[83] In attempting to clarify *Shapiro*, the Court stated that in *Shapiro* the right to travel was only involved in a limited sense; what was actually at issue in *Shapiro* was the right to migrate.[84] Furthermore, the Court stated that the unconstitutional one-year waiting period in *Shapiro* was distinct from appropriate residency requirements, which remained valid.[85]

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supra note 71, at 897. Zubler hypothesizes that the Court chose to cite *Sherbert* for its equal protection analysis because the court feared it would not be able to limit the scope of the right under due process analysis. *See* Zubler, *supra* note 71, at 897. However, Zubler argues that the same over-broad problem occurred under equal protection analysis. *See* Zubler, *supra* note 71, at 900. In his dissent, Justice Harlan expressed similar fears as he stated that the fundamental rights strand of equal protection "creates an exception which threatens to swallow the standard equal protection rule." *Shapiro*, 394 U.S. at 661.

76. 405 U.S. 330 (1972).

77. *See* Dunn v. Blumstein, 405 U.S. 330, 332 (1972).

78. *See id.* at 337.

79. *See id.* at 338. The Court rejected Tennessee's attempt to distinguish the classification on the basis that there was no evidence of the durational residency requirement actually deterring travel. *See id.* at 339. The Court stated:

> This view represents a fundamental misunderstanding of the law. . . . Shapiro did not rest upon a finding that denial of welfare actually deterred travel. . . . [T]he compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . . ."

Id. at 339-40 (citing and quoting *Shapiro*, 394 U.S. at 634).

80. *See id.* at 360. The first purpose rejected by the Court was that the durational residency prevented fraud in voting. *See id.* at 353. The Court reasoned that the durational residency requirement was not the least restrictive means of preventing fraud. *See id.* The court also rejected Tennessee's second purpose, which was to ensure that voters were knowledgeable, on the basis that the relationship between the state's interest in an informed electorate and the durational residency requirement was too tenuous. *See id.* at 360.

81. *See id.* at 342 n.13.

82. 415 U.S. 250 (1974).

83. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) (citing *Shapiro*, 394 U.S. at 627).

84. *See id.* at 254-55.

85. *See id.* at 255 (citing Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972); Shapiro v. Thompson,

Having clarified its *Shapiro* analysis, the Court next considered the initial question of whether the statute penalized people who recently migrated to Arizona.[86] To answer this question, the Court listed two factors to consider in determining whether a durational residency requirement impacted interstate travel to the extent necessary to invoke the compelling interest test.[87] The first of these factors was whether the waiting period would deter migration.[88] The second consideration was the extent to which the residency requirement served to penalize the exercise of the right to travel.[89]

In addressing the first consideration, the Court in *Maricopa County* concluded that indigent people could be deterred from migrating to Arizona if they knew they could not rely on the state for medical care.[90] Furthermore, the Court stated that even though there was no evidence of anyone actually being deterred from migrating, the compelling interest test was nonetheless appropriate due to the extent that the statute penalized the exercise of the right to travel.[91] To reach this conclusion, the Court reasoned that medical care, like the welfare benefits at issue in *Shapiro*, was a necessity of life; therefore, the denial of medical care penalized interstate travel to the same extent as the denial of welfare benefits.[92]

After concluding that the Arizona statute penalized the right to travel, the Court continued to the second prong of its analysis by asking whether the classification was supported by a compelling state interest.[93] The Court rejected Arizona's fiscal interest in conserving its resources by stating that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement

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394 U.S. 618, 636 (1969)).

86. *See id.* at 256.

87. *See id.* at 257.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.* at 258.

92. *See id.* at 259-60. The Court stated in a footnote that the lower court decisions that have contrasted in-state college tuition with necessities of life indicate that medical care is a necessity of life. *See id.* at 260 n.15. "Thus, the residence requirement in *Shapiro* could cause great suffering and loss of life[;] [t]he durational residence requirement for attendance at publicly finance institutions of higher learning (does) not involve similar risks." *Id.* (citing Starns v. Malkerson, 326 F. Supp. 234, 238 (Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (quoting Kirk v. Board of Regents, 78 Cal. Rptr. 260, 266-67 (1969), *appeal dismissed*, 396 U.S. 554 (1970))); *see also* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 906 (13th ed. 1997) ("The critical ingredient for triggering strict scrutiny and probable invalidation proved to be the existence of a 'penalty'; and whether there was a 'penalty' apparently turned largely on whether there was an effect on a 'necessity of life'!"). The Court rejected the state's attempt to distinguish *Shapiro* on the grounds that, unlike the complete denial of welfare benefits at issue in *Shapiro*, the Arizona residency requirement did not apply to emergency medical care. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 260-61 (1974). The Court reasoned that allowing an illness to go untreated until it required emergency medical care would subject indigents to serious illness and place them in great danger. *See id.* at 261.

93. *See id.* at 262.

which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State."[94] The Court rejected the State's second justification by stating the deterrence of migration was either constitutionally impermissible or over-inclusive.[95] The third argument rejected by the Court was that the state should be able to protect its longtime residents based on their past tax payments.[96] In rejecting this argument, the Court stated that such reasoning would logically permit the state to violate the Equal Protection Clause by apportioning all services based on past contributions.[97] The final justification the state asserted was that the durational residency requirement aided in the prevention of fraud.[98] The Court rejected this argument on the basis that there were less constitutionally intrusive means available.[99]

The trilogy of *Shapiro, Dunn,* and *Maricopa County* illustrated the expansion of the right to travel to include not only travel in the strict sense of the word, but also the right to migrate.[100] In these decisions the Court clearly required statutes that penalized this newly expanded right to survive strict scrutiny.[101] Decisions subsequent to *Maricopa County*, however, seemed to suggest that the Court was drifting away from its strict scrutiny analysis of right to travel infringements.[102]

E. DURATIONAL RESIDENCY REQUIREMENTS UNDER RATIONAL BASIS REVIEW

In decisions subsequent to *Maricopa County*, the Court seemed to move away from a strict scrutiny analysis of durational residency requirements towards a form of rational basis review, as it struck down a number of residency requirements on the basis that they were not reasonably related to legitimate government purposes.[103] In such

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94. *Id.* at 263.

95. *See id.* at 263-64. The Court stated that the statute was over-inclusive in that it treated all indigents as if they moved to Arizona solely to obtain free medical care. *See id.* at 264.

96. *See id.* at 266.

97. *See id.*

98. *Id.* at 268.

99. *Id.*

100. *See id.* at 255 (stating that in *Shapiro* the Court was concerned primarily with the right to migrate, while the right to travel was only involved in a limited sense).

101. *See id.* at 258 (stating that classifications which penalize the right to travel must be necessary to a compelling state interest).

102. *See* Maldonado v. Houstoun, 157 F.3d 179, 186 (3d Cir. 1998) (pointing out that a majority of the Court has never applied strict scrutiny to a durational residency requirement since *Maricopa County*).

103. *See Maldonado*, 157 F.3d at 186 (discussing the Court's use of rational basis review to strike down residency requirements). The Court first appeared to move away from a strict scrutiny analysis in *Sosna v. Iowa*, 419 U.S. 393 (1975). *See* Maldonado v. Houstoun, 177 F.R.D. 311, 326 (E.D. Pa. 1998), *aff'd on other grounds*, 157 F.3d 179 (3d Cir. 1998) (discussing *Sosna*). In *Sosna*, the Court upheld a one-year residency for petitioners seeking a divorce. *See* 419 U.S. at 410. The Court in *Sosna* first distinguished *Shapiro, Dunn*, and *Maricopa County* on the basis that the state's interests in

decisions, however, the court found it unnecessary to apply strict scrutiny because the durational residency requirements at issue could not even pass rational basis.[104] Therefore, *Shapiro* and *Maricopa County* remained binding precedents.[105]

Nonetheless, in the 1986 plurality opinion of *Attorney General v. Soto-Lopez*,[106] there was marked disagreement among the Justices regarding the appropriate level of scrutiny of an alleged right to travel infringement.[107] At issue in *Soto-Lopez* was a New York statute that granted a civil service employment preference for veterans who had lived in New York when they entered the service.[108] Justice Brennan, writing for the plurality, struck down the statute on the basis that it penalized the right to travel.[109] Justice Burger and Justice White, in a concurrence, found the statute failed the equal protection rational basis test.[110] Justice O'Connor, joined by Justices Stevens and Rehnquist, found the statute's effect on migration too insignificant to invoke the Article IV Privileges and Immunities Clause; therefore, they would have upheld the statute as passing the equal protection rational basis test.[111]

Thus, as *Soto-Lopez* illustrated, there was much disagreement among the Justices regarding the scope and source of the right to

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regulating its domestic relations and protecting its divorce decrees from collateral attack was materially greater than the administrative and budgetary interests advance in prior cases. *See id.* at 406-09. Second, the court in *Sosna* found that the one-year residency requirement did not prevent persons from eventually obtaining a divorce decree. *See id.* at 410.

The Court's shift away from strict scrutiny continued in the case of *Zobel v. Williams*, 457 U.S. 55 (1982). *See Maldonado*, 177 F.R.D at 326 (discussing *Zobel*). In *Zobel*, the court relied on rational basis review to invalidate an Alaska statute that based the size of oil reserve payments on the years of residency. *See* 457 U.S. 55. However, Chief Justice Burger, in writing for the *Zobel* Court, appears to have actually applied an enhanced rational basis review. *See Maldonado*, 177 F.R.D. at 326-27 (citing Zubler, *supra* note 71, at 905). Justice O'Connor, in a concurrence in *Zobel*, first articulated her argument that the right to travel should be based in Article IV's Privileges and Immunities Clause. *See Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring). Under this clause, the constitutionality of a durational residency requirement depended on whether non-citizens "constitute a peculiar source of evil at which the statute is aimed." *Id.* at 76. If the non-citizens constitute a peculiar source of evil, then there must be a "substantial relationship" between the residency requirement and the source of the evil. *Id.*

In *Hooper v. Benalillo County Assessor*, 472 U.S. 612 (1985), the Court applied *Zobel's* enhanced rational basis review to invalidate a New York statute that granted a tax exemption to Vietnam Veterans residing in the state prior to May 8, 1976. The Court, in *Hooper*, cited *Zobel* for the proposition that residents cannot be discriminated against solely on the basis of their date of arrival in the state. *See Hooper*, 472 U.S. at 622.

104. *See Maldonado*, 157 F.3d at 186 (discussing the Court's use of rational basis review to strike down durational residency requirements).

105. *Id.*

106. 476 U.S. 898 (1986).

107. *See Maldonado*, 177 F.R.D. at 327 (discussing Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986)).

108. *See Soto-Lopez*, 476 U.S. at 899.

109. *See id.* at 911.

110. *See id.* at 915 (Burger, J., concurring in the judgment), *id.* at 916 (White, J., concurring in the judgment).

111. *See id.* at 918-25 (O'Connor, J., dissenting).

travel.[112] The rational basis decisions had left the Supreme Court's right to travel jurisprudence in a state of confusion.[113] In *Saenz v. Roe*[114] the Court would have an opportunity to resolve some of this confusion.[115]

III. ANALYSIS

In *Saenz*, the Court *held* that it was a violation of the right to travel for California to require new residents to reside in the state for one year before receiving full in-state welfare benefits.[116] However, before reaching this conclusion, Justice Stevens, writing for the Court, attempted to resolve the confusion surrounding the right to travel by dividing that right into three components.[117]

A. THE THREE COMPONENTS OF THE RIGHT TO TRAVEL

Justice Stevens identified the first component of the right to travel as "the right of a citizen of one State to enter and to leave another State."[118] The Court found that this component was not implicated in *Saenz*, because the durational residency requirement at issue did not pose a direct barrier to interstate movement.[119] Similarly, the Court found that the second component, the right of a citizen of one state to be treated as a welcome visitor when passing through another state, was also not at issue.[120] The Court reasoned that the interstate travelers in *Saenz* were not merely visiting, but instead had established residence in California.[121] The component of the right to travel that the Court did find to be at issue was the third component—"the right of newly arrived citizens to the same privileges and immunities enjoyed by other citizens of the same State."[122]

The Court identified the source of the third component of the right to travel as the Privileges or Immunities Clause of the Fourteenth Amendment.[123] In doing so, Justice Stevens wrote, "it has always been common ground that this Clause protects the third component of the right to

112. *See Maldonado*, 177 F.R.D. at 327.
113. *See* Maldonado v. Houstoun, 157 F.3d 179, 185 (3d Cir. 1998) (stating that the law regarding the right to travel is unsettled and in need of clarification).
114. 526 U.S. 489 (1999).
115. *See generally* Saenz v. Roe, 526 U.S. 489, 500 (1999).
116. *See id.* at 511.
117. *See id.*
118. *Id.*
119. *See id.* at 501.
120. *See id.* at 502.
121. *See id.* Although it was not implicated in *Saenz*, the Court identified the source of the second component as the Privileges and Immunities Clause of Article IV of the Constitution. *See Saenz*, 526 U.S. at 501.
122. *Id.* at 502.
123. *See id.* at 502-03.

travel."[124] Having identified the constitutional source of the third component of the right to travel, the Court concluded that a statute which infringes on that right must be strictly scrutinized.[125]

B. THE ONE-YEAR RESIDENCY REQUIREMENT

The Court rejected California's argument that its welfare scheme only incidentally affected the right to travel.[126] The Court reasoned that the discriminatory classification created by the statute is in itself a penalty to the right to travel, even if migration is not actually deterred.[127] The Court then dismissed any attempt to label the statute as a bona fide residency requirement.[128] In doing so, the Court first reasoned that the state citizenship of the welfare recipients in this case was not disputed.[129] Furthermore, the Court concluded that, unlike bona fide residency requirements that governed the distribution of portable benefits, the residency requirement at issue in *Saenz* governed the distribution of welfare benefits that would be consumed within the state in which it was received.[130]

Having established the right being infringed upon and the appropriate level of scrutiny, the Court then defined the various classifications created by the statute.[131] The group favored by the classification included California citizens who had resided in the state for one year and new residents who had resided in a state with welfare benefits as high, or higher, than California's welfare benefits.[132] The disfavored class included those residents who had moved to California from a state with lower welfare benefits and had resided in California for less than one

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124. *Id.* at 503 (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)). Justice Stevens pointed out that even Justice Miller, writing for the majority in the *Slaughter-House Cases*, stated 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 bona fide residence therein, with the same rights as other citizens of that State." *Id.* (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 80). Justice Stevens then cited the stronger language of Justice Bradley's dissent in the *Slaughter-House Cases* in which Justice Bradley wrote:

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. 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. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

See id. at 503-04 (quoting *The Slaughter-House Cases* 83 U.S. (16 Wall.) at 112-13).

125. *See id.* at 504.

126. *See id.*

127. *See id.* (citing Dunn v. Blumstein, 405 U.S. 330, 339 (1972)).

128. *See id.* at 505.

129. *See id.*

130. *See id.* (citing Sosna v. Iowa, 419 U.S. 393 (1975); Vlandis v. Kline, 412 U.S. 441 (1973)).

131. *See id.*

132. *See id.*

year.[133] However, making up this disfavored class were various subclasses determined by the welfare laws of each new arrival's respective state of prior residency.[134] Therefore, the Court stated that California must "explain not only why it is sound fiscal policy to discriminate against those who have been citizens for less than a year, but also why it is permissible to apply such a variety of rules within that class."[135]

The Court prefaced its analysis of California's main argument by reiterating that residency requirements cannot have as their purpose the deterrence of immigration by welfare recipients from other states.[136] The Court first reasoned that the empirical evidence did not indicate that higher benefits motivated people to move, and the legislative history presented by California did not suggest that the statute was enacted for such a purpose.[137] Furthermore, the Court reasoned that even if the statute's purpose was to prevent an influx of welfare recipients, such a purpose would be constitutionally impermissible.[138]

The Court then turned to California's primary justification for the durational residency requirement.[139] California attempted to justify the statute on the basis that it saved the state approximately $10.9 million a year.[140] The Court rejected this argument based on the reasoning that the Citizenship Clause of the Fourteenth Amendment "does not allow for[ ] degrees of citizenship based on length of residence."[141] Therefore, the Citizenship Clause did not tolerate the forty-five subclasses created by California's durational residency requirement.[142] The Court reasoned that "[n]either the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits."[143] As in *Shapiro*, the Court concluded that to accept the reasoning proffered by California "would permit the State to apportion all benefits and services according to the past tax contributions of its citizens."[144]

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133. *See id.*
134. *See id.*
135. *Id.*
136. *See id.* at 506.
137. *See id.*
138. *See id.* (citing Shapiro v. Thompson, 394 U.S. 618 (1969)).
139. *See id.*
140. *See id.*
141. *Id.* (quoting Zobel v. Williams, 457 U.S. 55, 69 (1982)).
142. *See id.* at 506-07.
143. *Id.* at 507.
144. *Id.* (quoting Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969)).

C. CONGRESSIONAL APPROVAL OF THE RESIDENCY REQUIREMENT

Having determined that, standing alone, California's durational residency requirement was unconstitutional, the Court then considered whether congressional approval of the requirement affected its determination.[145] The Court concluded that Congress' approval of the residency requirement in no way affected its holding.[146] The Court reasoned, "[W]e have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment."[147] Furthermore, the Court stated that "the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States."[148]

The Court rejected the United States' argument that without durational residency requirements in place, there would be a "race to the bottom" under the Temporary Assistance to Needy Families (TANF)[149]

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145. *See id.* at 507.

146. *See id.*

147. *Id.*

148. *Id.* at 507-08. Professor Laurence Tribe argues that "although it has long been deemed axiomatic that 'Congress may not authorize States to violate the Fourteenth Amendment,' it does not necessarily follow that Congress may not utilize a state as a kind of federal agent empowering (although not commanding) it to carry out a federal function pursuant to a congressional enactment that itself violates nothing in the Constitution." Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present*, 113 HARV. L. REV. 110, 128 (1999). Thus, Professor Tribe concludes that it was important for the Court to explicitly state that the protection afforded by the Citizenship Clause of the Fourteenth Amendment is a limit on the national government as well as the states. *See id.*

149. *See Saenz*, 526 U.S. at 495 (stating that under PRWORA, TANF replaced the AFDC program). The "race to the bottom" theory starts with the proposition that under TANF, states are given broader discretion in setting their benefit levels than they had under AFDC. Brief for the United States at 13-14, *Saenz* (No. 98-97). Therefore, if states are not allowed to employ durational residency requirements, each state would attempt to offer a less attractive benefit plan than the other states in order to avoid becoming a welfare magnet. *See id.* at 16. The Court did not find sufficient evidence to support this argument and rejected it on the basis that "speculation about such an unlikely eventuality provides no basis for upholding section 11450.03." *Saenz*, 526 U.S. at 510.

Some researchers, however, have asserted that a race to the bottom could likely occur if states are prohibited from having durational residency requirements such as section 11450.03. *See* Zubler, *supra* note 71, at 933 & n.192 (stating that durational residency requirements "might mitigate the race to the bottom"). In collecting empirical evidence to determine if such a race to the bottom could occur, researchers have developed a two-step analysis. *See* Zubler, *supra* note 71, at 933. First, they look for evidence of whether higher benefit levels in a particular state will motivate indigent persons to move to that state. *See* Zubler, *supra* note 71, at 933. Second, researchers look for evidence of states lowering their benefit levels in response to an influx of indigent persons. *See* Zubler, *supra* note 71, at 933.

Regarding the first of these two inquiries, four studies have shown "positive and significant effects of welfare on residential location and geographic mobility." *See* Zubler, *supra* note 71, at 933 (quoting Robert Moffit, *Incentive Effects of the U.S. Welfare System: A Review*, 30. J. ECON. LITERATURE 1, 34 (1992)). Furthermore, one study predicts that a state with high benefit levels will increase a state's poverty rate by 0.9% compared to a state with lower benefits. *See* Zubler, *supra* note 71, at 933 (citing PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A CASE FOR A NATIONAL STANDARD 79 (1990)). Lastly, according to a Wisconsin study, 29% of welfare recipients who recently migrated to Wisconsin from Chicago listed Wisconsin's higher welfare benefits as the reason for the move. *See*

program as states would try to prevent an influx of welfare recipients by decreasing their respective benefit levels.[150] The Court reasoned that there would be no greater incentive to decrease benefits under the TANF program than there was under AFDC.[151] Similarly, the Court rejected the argument that there would be a greater incentive for welfare recipients to change their residency under the TANF program than there was under the AFDC program.[152] Furthermore, the Court reasoned that a policy of eliminating incentives for welfare recipients to move to California was just as constitutionally impermissible as actually preventing welfare recipients from moving to California.[153] The Court then briefly rejected the Solicitor General's attempt to classify the durational residency requirement as "a sort of specialized choice-of-law rule" by reasoning that "California law alone discriminates among its own citizens on the basis of their prior residence."[154]

The final argument rejected by the Court was that the classification would be permissible if the members of the disfavored class were limited to people who had received welfare in their prior state of residency within one year of moving to California.[155] The Court reasoned that to construct the statute in such a manner would cause the neediest members of the disfavored class to suffer the most and would reduce the state's monetary savings, thereby making the monetary justification asserted by California less tenable.[156] Furthermore, "it would confine the effect of the statute to what the Solicitor General correctly characterizes as 'the invidious purpose of discouraging poor people generally from settling in the State.'"[157]

Zubler, *supra* note 71, at 934 (citing Rogers Worthington, *Study Finds Evidence Some View Wisconsin as a Welfare Magnet*, CHI. TRIB., May 23, 1995, at 4).

Regarding the second inquiry, one study has indicated that state legislatures will react to indigent migration by cutting welfare benefits in order to make their respective states less attractive to the poor. *See* Zubler, *supra* note 71, at 934 (citing PETERSON & ROM, *supra*, at 79). Furthermore, even if the poor are not motivated to move to a state because of higher welfare benefits, the study hypothesized that legislatures act on this presumption anyway. *See* Zubler, *supra* note 71, at 934. Therefore, it has even been suggested that states may engage in a race to the bottom despite an absence of empirical evidence indicating that the poor migrate toward states with higher welfare benefits. *See* Zubler, *supra* note 71, at 934-35.

150. *See* Saenz v. Roe, 526 U.S. 489, 509-10 (1999).

151. *See id.* at 510.

152. *See id.*

153. *See id.*

154. *Id.*

155. *See id.*

156. *See id.*

157. *Id.* (quoting Brief for United States as Amicus Curiae at 30 n.11, Saenz v. Roe, 526 U.S. 489 (1999) (No. 98-97)).

D. CHIEF JUSTICE REHNQUIST'S DISSENT

Chief Justice Rehnquist prefaced his dissent by criticizing the Court's reliance upon the Privileges or Immunities Clause.[158] Justice Rehnquist agreed with the Court's identification of the first two components of the right to travel, but he did not agree that "the right to become a citizen of another State is a necessary 'component' of the right to travel."[159] Rather, he argued that "[t]he right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a 'component' of the other."[160]

Justice Rehnquist further asserted that infringements on the right to travel are limited to actual barriers on interstate migration, such as that in *Edwards v. California*.[161] However, he argued that the development of the Court's penalty analysis in *Shapiro* and its progeny has caused the right to travel to become confused with the right to equal state citizenship.[162] As a result, Justice Rehnquist concluded that the Court has strayed far from the original meaning of the right to travel.[163]

By grounding the third component of the right to travel—the right to become a citizen—in the Privileges or Immunities Clause, Justice Rehnquist asserted that the Court actually abandoned the penalty analysis and "essentially returned to its original understanding of the right to travel."[164] However, in "unearthing from its tomb" the right of a state citizen to be treated equally in a new state of residence, Justice Rehnquist argued that the Court ignored the states' needs for bona fide residency requirements.[165] Justice Rehnquist saw no distinction between the bona

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158. *See id.* at 511 (Rehnquist, C.J., dissenting) ("The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, *Colgate v. Harvey*, 296 U.S. 404 (1935), overruled five years later by *Madden v. Kentucky*, 309 U.S. 83 (1940).").

159. *Id.* at 513.

160. *Id.*

161. *See id.* at 514 n.1 (citing Edwards v. California, 314 U.S. 160 (1941)). Justice Rehnquist argued that the *Slaughter-House Cases* confirmed his view that state infringement on the right to travel is limited to actual barriers, as established in *Edwards*. *See Saenz*, 526 U.S. at 514. In *Edwards*, the Court held that a California statute which prohibited the transportation of indigents into California was unconstitutional. *See* 314 U.S. at 177.

162. *See* Saenz v. Roe, 526 U.S. 489, 514 (1999) (citing Memorial Hosp. v. Maricopa County, 415 U.S. 250, 280- 83 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969)).

163. *See id.* at 515 (arguing that laws distinguishing between old and new residents implicate the right of individuals to be free from unjustifiable classification rather than the right to travel).

164. *Id.* at 516.

165. *See id.* at 516.

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. . . . A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted

fide residency requirements to receive in-state college tuition and a one-year residency requirement to receive full welfare benefits.[166] Therefore, he criticized the majority's attempt to distinguish between these two benefits based on their portability as being "more apparent than real, and offer[ing] little guidance to lower courts who must apply this rationale in the future."[167]

Furthermore, Justice Rehnquist argued that states have a greater need for a durational residency requirement to determine eligibility for welfare benefits than they do to determine eligibility for in-state tuition.[168] Justice Rehnquist hypothesized that a large number of new residents seeking welfare benefits would have a far greater impact on a State's budget than a large number of new residents seeking to attend a state university.[169] Thus, Justice Rehnquist would have upheld the one-year residency requirement as "a permissible exercise of the State's power to 'assur[e] that services provided for its residents are enjoyed only by residents.'"[170]

E. JUSTICE THOMAS'S DISSENT

Justice Thomas joined Justice Rehnquist's dissent, but he also wrote separately to thoroughly address the majority's reliance on the Privileges or Immunities Clause.[171] Justice Thomas first traced the origins of the phrase "privileges or immunities" to similar phrases found in the charters of the American colonies.[172] In doing so, he concluded that "at

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to residents.

Id. at 517 (quoting Martinez v. Bynum, 461 U.S. 321, 328-29 (1983)). Chief Justice Rehnquist asserted that even under *Shapiro* and its progeny, the Court took care to distinguish bona fide residency requirements from residency requirements that penalized new residents. *See id.* (citing Attorney General v. Soto-Lopez, 476 U.S. 898, 903 n.3 (1986)).

Professor Tribe criticizes Justice Rehnquist's argument on this point. *See* Tribe, *supra* note 147, at 131-32. Professor Tribe argues that if California were truly concerned about a welfare recipient's bona fide status as a new resident, it would withhold benefits altogether rather than providing recipients the benefit levels of their old state of residency. *See* Tribe, *supra* note 147, at 131. Professor Tribe also points to the fact that the statute applies to those individuals who were not even on welfare before they moved to California. *See* Tribe, *supra* note 147, at 131. Similarly, Professor Tribe argues that California already had means to determine the bona fide residency of a recipient without the use of the residency requirement. *See* Tribe, *supra* note 147, at 131. Finally, Tribe asserts that Chief Justice Rehnquist's argument was "merely hypothetical and speculative justification" since neither California nor the United States advanced the bona fide residency argument. Tribe, *supra* note 147, at 132.

166. *See* Saenz v. Roe, 526 U.S. 489, 518 (1999).

167. *Id.* at 519. Chief Justice Rehnquist asserted that, while the cash received from welfare benefits will be consumed in California, the benefits that result from that income, such as occupational training and job experience, are easily transportable to the resident's old domicile. *See id.* at 519-20. Similarly, Justice Rehnquist asserted that "tuition subsidies are 'consumed' in-state but the recipient takes the benefits of a college education with him wherever he goes." *Id.* at 520

168. *See id.* at 519.

169. *See id.*

170. *Id.* (quoting *Martinez*, 461 U.S. at 328).

171. *See id.* at 521 (Thomas, J., dissenting).

172. *See id.* at 523 n.2 (citing a number of colonial charters with provisions similar to the Privi

the time of the founding, the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens, and more broadly, by all persons."[173]

Having established the historical underpinnings of the terms "privileges" and "immunities," Justice Thomas then turned to Justice Bushrod Washington's interpretation of Article IV's Privileges and Immunities Clause in the 1825 landmark opinion of *Corfield v. Coryell.*[174] Justice Thomas stated that in *Corfield,* Justice Washington "rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits."[175] Instead, Justice Thomas argued that Justice Washington "endorsed the colonial-era conception of the terms 'privileges' and 'immunities,' concluding that Article IV encompassed only *fundamental* rights that belong to all citizens of the United States."[176]

Justice Thomas then tied the *Corfield* opinion to the Privileges or Immunities Clause of the Fourteenth Amendment by citing the numerous references to *Corfield* found in the legislative history of the Fourteenth Amendment.[177] Thus, Justice Thomas reasoned that the repeated references to *Corfield,* combined with the historical underpinnings of the Clause's operative terms, "supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law."[178] Therefore, Justice Thomas concluded that it was contrary to the original meaning of the Privileges or Immunities Clause for the majority to hold that a state violates the clause by imposing a one-year residency requirement as a prerequisite to receiving full welfare benefits.[179]

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leges or Immunities Clause). Specifically, Justice Thomas traced the Clause to the 1606 Charter of Virginia, which provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England.*" *Id.*

173. *Id.* at 524.

174. *See id.* (citing Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230)).

175. *See* Saenz v. Roe, 526 U.S. 489, 525 (1999) (citing *Corfield,* 6 F. Cas. at 552).

176. *See id.* at 526.

177. *See id.* (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992); Cong. Globe, 39th Cong., 1st Sess., 2765 (1866)).

178. *See id.* at 527.

179. *See id.* Justice Thomas stated that he would be open to reevaluating the Privileges and Immunities Clause. *See id.* at 528. However, he suggested that the Clause should be used to "displace" rather than "augment" the Court's substantive due process and equal protection jurisprudence. *See id.*

IV. IMPACT

In *Saenz,* the Court relied on the Privileges or Immunities Clause of the Fourteenth Amendment for only the second time in the 130 years since its enactment.[180] Whether this could signify a resurgence of that clause is yet to be seen.[181] However, the more immediate effect of *Saenz* is likely to be the effect of the decision on the state welfare systems.[182]

A. EFFECT ON STATE WELFARE SYSTEMS AND BONA FIDE RESIDENCY REQUIREMENTS

In addition to California, thirteen other states had durational residency requirements similar to that struck down in *Saenz.*[183] It is likely that the residency requirements in these states would also be unconstitutional.[184] Unlike the California statute at issue in *Saenz,* North Dakota Century Code section 50-09-29(1)(1) does not limit new residents to the benefit levels of their previous states of residency.[185] Instead, section 50-09-29(1)(1) incorporated the durational limits for receiving such benefits of the new residents' previous states of residency.[186] Nonetheless, because section 59-09-01(1)(1) creates a classification between old and new residents, the Attorney General concluded that it would be unconstitutional after *Saenz.*[187]

It is also not clear what bona fide residency requirements will be constitutional after *Saenz,* since Respondents' California citizenship was not being disputed.[188] Thus, the Court did not need to address the constitutionality of bona fide residency requirements under the third component of the right to travel as now grounded in the Privileges or Immunities Clause of the Fourteenth Amendment.[189] However, the

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180. *See Saenz,* 526 U.S. at 511 (Rehnquist, C.J., dissenting).

181. *See generally* Tribe, *supra* note 147, 182-98 (discussing the possibility that *Saenz* indicates a rebirth of the Privileges or Immunities Clause).

182. *See* 1999 N.D. Op. Att'y Gen. No. 10 (July 23, 1999), *available at* 1999 WL 600316, at *2 (stating that section 50-09-29(1)(1) of the North Dakota Century Code and section 75-02-01.2-35.1 of the North Dakota Administrative Code are likely unconstitutional after the Court's decision in *Saenz*).

183. *See* Brief for the National Governors' Association at 12 & n.4, *Saenz* (No. 98-97) (listing Connecticut, Georgia, Illinois, Iowa, Minnesota, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wisconsin as states with residency requirements for welfare benefits).

184. *See* 1999 N.D. Op. Att'y Gen. No. 10, *available at* 1999 WL 600316, at *2 (stating that section 50-09-29(1)(1) of the North Dakota Century Code and section 75-02-01.2-35.1 of the North Dakota Administrative Code are likely unconstitutional after the Court's decision in *Saenz*).

185. *See id.* at *3 (distinguishing the North Dakota statute from the California statute at issue in *Saenz*).

186. *See id.*

187. *See id.*

188. *See* Saenz v. Roe, 526 U.S. 489, 505 (1999).

189. *See id.*

Court, in passing, distinguished previous valid bona fide residency requirements by stating: "whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile."[190] In his dissent in *Saenz*, Chief Justice Rehnquist asserted that by affirming the right to be treated equally in a new state of residence immediately, the Court ignored the states' need to have bona fide residency requirements.[191] Furthermore, Justice Rehnquist predicts that the Court's attempt to distinguish a valid from an invalid residency requirement based on the portability of the effected benefit is a confusing and vague standard for lower courts to apply.

B. THE POSSIBLE REBIRTH OF THE PRIVILEGES OR IMMUNITIES CLAUSE

In *Saenz*, the Court identified the source of the third component of the right to travel as the Privileges or Immunities Clause of the Fourteenth Amendment.[192] In so doing, the Court unearthed a clause that was once thought by many to be dead.[193] In recent times, a number of scholars have called for the revival of the Privileges or Immunities Clause.[194] Whether *Saenz* is the first step in that direction is yet to be seen.[195]

If such an event were to take place, it is not clear what role the clause would play in the creation of substantive rights.[196] One possible role the clause could play is in the challenging of comprehensive economic regulation.[197] A second role of the clause would be to overlap the protection of a similar set of rights protected by the Due Process Clause.[198] Finally, as argued by Justice Thomas in his dissent in *Saenz*, the clause could be used to displace portions of the Court's current substantive due process jurisprudence.[199]

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190. *Id.*
191. *See id.* at 518 (Rehnquist, C.J., dissenting).
192. *See Saenz*, 526 U.S. at 502-03.
193. *See id.* at 527 (Thomas, J., dissenting).
194. *See* Tribe, *supra* note 147, at 182.
195. *See* Tribe, *supra* note 147, at 197.
196. *See* Tribe, *supra* note 147, at 183 n.327 (citing Harrison, *supra* note 177, at 1387-88).
197. *See* Tribe, *supra* note 147, at 189 n.341.
198. *See* Tribe, *supra* note 147, at 193 n.353.
199. *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

However, whatever its proper role, it is not likely that *Saenz* will be the first step in the revival of the Privileges or Immunities Clause.[200] Instead, *Saenz* may be more properly seen as an illustration of the Court's current willingness to protect human rights that may be described as necessary to the structure of the Constitution or the system of federalism.[201] As such a right, it was easy for the Court to reach its decision in *Saenz*.[202] Thus, as Professor Tribe concludes, *Saenz* may be more properly seen as "a window to the present and the recent past," rather than a "glimpse into the future."[203]

V. CONCLUSION

In *Saenz* the Supreme Court clarified its right to travel jurisprudence by dividing that right into three components.[204] Furthermore, the Court grounded the third component of that right in the Privileges or Immunities Clause of the Fourteenth Amendment.[205] Thus, *Saenz* could signify an attempt by the Court to breathe new life into a clause that was once thought dead.[206] However, in all likelihood, the impact of *Saenz* will be limited to its immediate effect on state welfare systems.[207]

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200. *See* Tribe, *supra* note 147, at 197.

201. *See* Tribe, *supra* note 147, at 198.

202. *See* Tribe, *supra* note 147, at 197-98 (stating that the Court is comfortable protecting rights that can be described in terms of federalism).

203. *See* Tribe, *supra* note 147, at 198.

204. *See Saenz*, 526 U.S. at 500.

205. *See id.* at 502-03.

206. *Id.* at 527 (Thomas, J., dissenting).

207. *See* 1999 N.D. Op. Att'y Gen. No. 10, *available at* 1999 WL 600316, at *2 (stating that section 50-09-29(1)(1) of the North Dakota Century Code and section 75-02-01.2-35.1 of the North Dakota Administrative Code are likely unconstitutional after the Court's decision in *Saenz*).

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