A New Chapter in Constitutional Law: Saenz v. Roe and the Revival of the Fourteenth Amendment's Privileges or Immunities Clause

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COMMENT

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SAENZ V. ROE AND THE REVIVAL OF THE 
FOURTEENTH AMENDMENT'S PRIVILEGES OR 
IMMUNITIES CLAUSE

I. INTRODUCTION

On May 17, 1999, the Supreme Court decided Saenz v. Roe\(^1\) and began a new chapter in constitutional law.\(^2\) In a seven to two decision, the Court struck down a California welfare statute containing a one-year durational residency requirement.\(^3\) The decision is particularly noteworthy because of the Justices’ rationale: The Court, for only the second time in 130 years, firmly grounded its opinion in the Fourteenth Amendment’s Privileges or Immunities Clause.\(^4\) The previously dormant provision had been considered a nonentity in the Court’s jurisprudence; consequently, lawyers and law professors virtually ignored its existence.\(^5\) The Saenz opinion substantially altered the Court’s constitu-

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2. See Akhil Reed Amar, Lost Clause: The Court RedisCOVERS Part of the Fourteenth Amendment, NEW REPUBLIC, June 14, 1999, at 14.
3. See Saenz, 119 S. Ct. at 1521, 1524.
4. See id, at 1530 (Rehnquist, C.J., dissenting) (stating that “[t]he Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment”).
5. When introducing the Fourteenth Amendment my Constitutional Law Professor, Leon Friedman, referred to the Fourteenth Amendment’s Privileges or Immunities Clause as almost a nonentity, stressing that the “action” lies in the other two clauses, Due Process and Equal Protection. When it came time for the final exam, on May 19, 1999, all of that had changed. Consequently, exam question one invited an answer entirely unexpected by the professor when he wrote the exam. Similarly, one legal scholar offered the following story:

When I was studying for the bar examination, the constitutional law instructor told the class there was only one thing we needed to know about the 14th Amendment’s “privileges or immunities” clause: It was never the right answer to a bar exam question.

Last Monday, the bar exam suddenly got tougher.

Clint Bolick, Back From the Grave: The Supreme Court Exhumes the 14th Amendment's
tional philosophy; privileges and immunities are again alive, and a new era in constitutional law has begun.

The road to this historical decision began in California. When the California legislature enacted section 11450.03 of the State Welfare Institutions Code, it created a two-tiered welfare scheme that limited the benefits paid to new California residents, individuals living in the state for less than one year, to the amount payable by their state of former residence. In 1992, newly arrived California residents eligible for welfare benefits challenged the constitutionality of the statute. Seven years later, after a long and tortuous path, the case arrived at the Supreme Court, presenting the primary question of whether the durational residency requirement contained in the California statute was constitutional.

In the past, the Supreme Court had employed a form of equal protection analysis to answer similar questions. The Court has held that state laws restricting the welfare benefits, voting rights, and medical benefits of new citizens for a specified period of time impermissibly "penalized" them, under the Fourteenth Amendment's Equal Protection Clause, for exercising their right to travel. Some scholars argue that the Justices could have followed precedent, invalidating the California law as a violation of equal protection; while others argue that the Court needed to go beyond existing case law because primary cases were distinguishable in key respects.

This Comment, falling somewhere between those two views, intends to show that a new analytical framework was necessary in order to

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6. See infra note 82.
7. See Saenz, 119 S. Ct. at 1521.
8. See infra note 142.
9. See infra note 142.
10. See Saenz, 119 S. Ct. at 1521. Another issue present in the case was whether Congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act affects that determination. See id. The Court stated: "That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." Id. at 1528. Since the Supreme Court concluded that the federal statute did not affect its constitutional analysis, it will not be examined in this Comment.
12. See Dunn v. Blumstein, 405 U.S. 330, 330 (1972) (striking down a law requiring one year of county residence before being granted the right to vote in state elections).
14. See Saenz, 119 S. Ct. at 1532 (Rehnquist, C.J., dissenting) (discussing the Court's previous equal protection approach to durational residency requirements).
15. See, e.g., Bolick, supra note 5, at 19.
16. See, e.g., Amar, supra note 2, at 15.
legitimize the Supreme Court's right to travel jurisprudence. Part II.A of this Comment explains the equal protection analysis that the Court had relied on for the past thirty years when deciding the "right to travel" cases. Then Part II.B demonstrates how Saenz v. Roe could have been decided within that equal protection framework. A problem existed, however, with deciding Saenz along traditional lines. A decision based on existing precedent would have allowed the "mysterious" right to travel to continue to exist without a constitutional home. Indeed, much of the criticism levied at the Court's equal protection analysis was its failure to connect the right to the Constitution. As explained in Part III, the Court no longer could continue to ignore this gap in its reasoning; therefore, a new mode of analysis was required. Finally, the Court's ultimate decision to resurrect the Fourteenth Amendment's Privileges or Immunities Clause in Saenz v. Roe, as the constitutional embodiment of the right to travel, is analyzed in Part IV.

II. EQUAL PROTECTION ANALYSIS: PROTECTING THE RIGHTS OF NEWLY ARRIVED RESIDENTS

A. The Shapiro Line of Cases

In 1969, the Supreme Court launched a new mode of equal protection analysis that applied strict scrutiny to durational residence requirements penalizing the right of interstate travel, more precisely termed the right of interstate migration. As Chief Justice Warren Burger later observed: "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." This new mode of analysis began with Shapiro v. Thompson.

The laws at issue in Shapiro denied welfare assistance to residents living in Connecticut, Pennsylvania, and the District of Columbia for less than one year immediately preceding their requests for assistance.

This waiting period, in effect, created a two-tiered welfare system composed of needy families virtually indistinguishable from each other, except for their terms of residence in the jurisdiction.\(^2\) In fact, the district court in each case found that the plaintiffs were indeed bona fide residents in their jurisdictions, meeting all other eligibility requirements.\(^3\) On this minor distinction rested a family's ability to obtain food, shelter, and other "necessities of life."\(^4\) The primary justification proffered for this class-creating statutory device was that it protected and preserved the fiscal integrity of state funded assistance programs. The Court squarely rejected this justification and declared it to be "constitutionally impermissible" for a state to inhibit the migration of needy people into its territory.\(^5\)

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.\(^6\)

Thus, the Court based its opinion, which struck down all three laws as unconstitutional,\(^7\) upon the constitutional right to travel without pausing to ascribe its source to any particular constitutional provision.\(^8\)

Connecticut, Pennsylvania, and the District of Columbia offered this alternative argument: Even if deterring the entry of all indigents was impermissible, the class distinctions could be justified as a valid attempt to discourage those indigents from entering the jurisdiction solely to obtain greater benefits.\(^9\) The Court found this argument fundamentally unacceptable, for "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."\(^10\) In short, when a citizen moves from state to state she is exercising a constitutional right, and the Equal Protection Clause does not permit classifications penalizing the exercise of that

\(^{22}\) See id. at 627 (noting that there existed no dispute as to the effect of the laws).
\(^{23}\) See id.
\(^{24}\) See id.
\(^{25}\) See id. at 629.
\(^{26}\) Id.
\(^{27}\) See id. at 631. "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.'" Id. (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).
\(^{28}\) See id.
\(^{29}\) See id.
\(^{30}\) Id.
right.\textsuperscript{31} Such classifications, therefore, are unconstitutional "unless shown to be necessary to promote a compelling governmental interest."\textsuperscript{32}

\textit{Shapiro} represented something new in the Court's right to travel jurisprudence and it left many questions unanswered.\textsuperscript{33} For instance: When are restraints on interstate movement permissible; what criteria should a court use for determining whether a restriction is a "penalty"; and what would constitute a compelling state justification?\textsuperscript{34} \textit{Dunn v. Blumstein}\textsuperscript{35} was the first case to shed some light on the implications of \textit{Shapiro}.\textsuperscript{36} In \textit{Dunn}, the Court invalidated a Tennessee one-year durational residency requirement for voting.\textsuperscript{37} The law, the Court concluded, impinged not only on a citizen's "fundamental political right," but also on another "fundamental personal right, the right to travel."\textsuperscript{38} Tennessee, attempting to avoid "the clear command of \textit{Shapiro}," argued that its voting requirements did not seek to deter, and did not actually deter, migration into the state.\textsuperscript{39} Justice Thurgood Marshall, writing for the court, characterized this view as a "fundamental misunderstanding of the law."\textsuperscript{40} He insisted that "\textit{Shapiro} did not rest upon a finding that denial of welfare actually deterred travel"; rather the Court in \textit{Shapiro} found that classifications penalizing citizens for exercising their right to travel triggered strict scrutiny.\textsuperscript{41} Basically, \textit{Dunn} continued along the \textit{Shapiro} line, explaining that the penalty notion does not necessarily rest on the legislative purpose or the effect of the durational residency requirement.\textsuperscript{42}

\textit{Shapiro} was then revisited in \textit{Memorial Hospital v. Maricopa County}.\textsuperscript{43} Justice Marshall again delivered the opinion of the Court, which invalidated an Arizona statute mandating a year of county residence as a prerequisite to receiving state funded nonemergency medical care and hospitalization.\textsuperscript{44} Upon this return to \textit{Shapiro}, it emerged that

\begin{itemize}
\item \textsuperscript{31} See id. at 634.
\item \textsuperscript{32} Id. (emphasis omitted).
\item \textsuperscript{33} See GUNTHER & SULLIVAN, supra note 19, at 906.
\item \textsuperscript{34} See id.
\item \textsuperscript{35} 405 U.S. 330 (1972).
\item \textsuperscript{36} See GUNTHER & SULLIVAN, supra note 19, at 906.
\item \textsuperscript{37} See Dunn, 405 U.S. at 332-33.
\item \textsuperscript{38} Id. at 336, 338.
\item \textsuperscript{39} See id. at 339.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} See id. at 339.
\item \textsuperscript{42} See GUNTHER & SULLIVAN, supra note 19, at 906.
\item \textsuperscript{43} 415 U.S. 250 (1974).
\item \textsuperscript{44} See id. at 253.
\end{itemize}
not all durational residency requirements would be deemed unconstitutional.45 Shapiro, the Court noted, involved the right to travel in only a limited sense because there the Court was primarily concerned with the right to migrate.46 If travel merely meant movement, then even a bona fide residence requirement would hinder a citizen's right to travel; but, Shapiro did not foreclose all such requirements, only those tantamount to a "penalty."47 Justice Marshall acknowledged that the degree of impact required to constitute a penalty, thus giving rise to strict scrutiny, was not made clear.48 Nonetheless, the Shapiro Court did provide some context for the term "penalty" in finding that the denial of the "basic necessities of life" amounted to one.49 Justice Marshall contrasted that determination with the Court's refusal to strike down state statutes that conditioned lower tuition at state universities on a one-year residency requirement.50 From those opinions, Justice Marshall reasoned that the nature of the benefits denied determined whether a residency requirement was a "penalty."51 He concluded, "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."52 Finally, the Court had no trouble rejecting Arizona's argument that Shapiro was distinguishable because it involved a complete denial of benefits, whereas the statute at issue in Memorial Hospital provided for some medical services, namely, emer-

45. See id. at 256. Justice Marshall reached this conclusion by seizing and expanding on a caveat contained in footnote 21 in Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969). He stated: "The [Shapiro] Court's holding was conditioned by the caveat that some "waiting-period or residence requirements ... may not be penalties upon the exercise of the constitutional right of interstate travel." Memorial Hosp., 415 U.S. at 256 (quoting Shapiro, 394 U.S. 618, 638 n.21) (citation omitted).

46. See Memorial Hosp., 415 U.S. at 255. The Shapiro Court described it as the right "to migrate, resettle, find a new job, and start a new life." Shapiro, 394 U.S. at 629.

47. See Memorial Hosp., 415 U.S. at 256-57.

48. See id. at 257-58.

49. See id. at 259.

50. See id. (citing Vlandis v. Kline, 412 U.S. 441 (1973)).

51. See id. at 259-61. The Court found:

Whatever the ultimate parameters of the Shapiro penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Id. at 259 (footnote omitted); see GUNTER & SULLIVAN, supra note 19, at 907.

52. Memorial Hosp., 415 U.S. at 261.
The Court declared that such a distinction could not "save the challenged provision from constitutional doubt."54

Since the Shapiro decision, the Court has upheld only one durational residency requirement. The case was Sosna v. Iowa,55 and the durational residency requirement related to the issuance of divorce decrees. In consideration of the long-standing presumption that domestic relations are within the province of state authority, the Court readily distinguished Shapiro, Dunn, and Memorial Hospital.56 In a six to three decision, the Court held that Iowa’s one-year residency requirement, for petitioners seeking a divorce decree when the respondent is not an Iowa resident, did not offend the Constitution.57 Then Justice William H. Rehnquist, delivering the opinion of the Court, rejected the challenge grounded in the Shapiro line of cases. He noted that none of those cases even intimated that a state could never impose a durational residency requirement, adding that such a proposition, in fact, was outrightly disclaimed.58 The Shapiro line of cases addressed attacks on laws justified only by state budgetary concerns, which were held to be insufficient to outweigh the constitutional rights of the citizens affected.

In Sosna, on the contrary, Iowa could employ a number of other rationales to defend its law.59 For example, aside from the overarching principle that domestic law is properly within the individual state’s domain, a residency requirement, like the one in Sosna, can ensure that a state does not interfere in a matter when another state has a paramount interest. Incident to that purpose is a state’s legitimate interest in shielding divorce decrees that it issues from collateral attack.60 Iowa’s concerns, moreover, did not permanently foreclose newcomers from obtaining divorce decrees; newcomers were merely delayed access to the courts until they could demonstrate a modicum of attachment to the state.61 Justice Rehnquist concluded: “A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for un-

53. See id. at 259-61.
54. Id. at 260. The Court also found that the State’s interest in protecting its financial stability was weak, insufficient, and it could not justify the discrimination against newcomers: “The conservation of the taxpayers’ purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.” Id. at 263.
55. 419 U.S. 393 (1975).
56. See id. at 406.
57. See id. at 396.
58. See id. at 406.
59. See id.
60. See id. at 407.
61. See id. at 406-07.
happy spouses,” who have long resided elsewhere and only recently arrived in the state. Additionally, Sosna permits an understanding that a citizen’s interest in a speedy divorce is not of the magnitude required to constitute a penalty on interstate migration.

Similar to the residency requirement it upheld for divorce decrees, the Court also has upheld residency requirements denying in-state tuition to newly arrived resident students for a period of one year. These cases are of diminished importance because the Court has viewed tuition criteria not as durational in nature, but as a reasonable way for a state to determine the bona fide residence of university students. Furthermore, the Court has consistently dealt with tuition cases by summarily affirming the one-year waiting periods. In Memorial Hospital, Justice Marshall noted that the lower courts had often contrasted in-state tuition with the “necessities of life.” At length, he quoted one district court that explained: “While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. Shapiro involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children.”

Tuition cases do not present such exigencies, but they do present special problems that necessitate the existence of waiting periods. Public education is a portable benefit acquired during a finite period, and college students coming from out of state to attend a state university tend to be transient. Therefore, the specific benefit that brings students to the state, coupled with the nature of students, creates ambiguity and makes it difficult to determine the legitimacy of their residence. Under those circumstances, a one-year waiting period is rational. The plaintiffs in such cases are not denied the right to obtain higher education; they

62. Id. at 407.
65. See Green, 811 F. Supp. at 520 n.9 (citing Vlandis v. Kline, 412 U.S. 441, 452-53 & n.9 (1973)).
66. See cases cited, supra note 64.
69. See id.
70. See Vlandis, 412 U.S. at 452.
71. See Memorial Hosp., 415 U.S. at 260 n.15.
are merely required to wait a relatively short period before receiving a benefit from their new state.\(^7\) Otherwise, the state takes a substantial risk that the student will take its money, earn a degree, and move elsewhere, affording another state the opportunity to exploit the educating state’s investment. In contrast, welfare benefits are not portable and expire once a person leaves the state.\(^7\)

Later, in *Zobel v. Williams*, Shapiro’s equality principle was expanded to invalidate an Alaska law that distinguished residents based on their length of residency without incorporating a durational residency requirement.\(^7\) Alaska created a scheme for the distribution of income, derived from its abundant natural resources, to all adult citizens, and it based the size of the award entirely on years of residency.\(^7\) Although the statute did not impose any threshold waiting period for the receipt of benefits, the Court held that the measure violated the equal protection rights of newer state citizens.\(^7\) Further, the Court found that the provision could not even withstand mere rationality review.\(^7\) If a state were permitted to structure the disbursement of cash dividends based on time spent living in its territory, then what would prevent other states from using length of domicile to limit access to public facilities, eligibility for civil service jobs, government contracts, or student loans?\(^7\)

The Court warned: “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.”\(^7\)

*Zobel* has more to do with the unconstitutionality of creating classes of residents based solely on the time they have spent living in the state, and less to do with the right of interstate migration.\(^8\) Yet *Zobel*, and the cases that followed, made clear that the Supreme Court held firmly to the proposition that the Equal Protection Clause would not countenance distinctions based only on a citizen’s term or incipiency of residence.\(^9\) Accordingly, this solid thirty-year line of equal

\(^7\) See id.
\(^7\) See id.
\(^7\) 457 U.S. 55 (1982).
\(^7\) See id. at 56.
\(^7\) See id. at 58-59, 65.
\(^7\) See id. at 65.
\(^7\) See id. at 64.
\(^7\) Id.
protection cases could have been used by the Court to decide *Saenz v. Roe*, as Part II.B demonstrates.

**B. Saenz v. Roe: An Equal Protection Analysis**

In 1992 the California Legislature voted to modify its Aid to Families with Dependent Children program and enacted section 11450.03 of the State Welfare Institutions Code. This new provision to the California welfare laws created a two-tiered structure that limited the benefits of new residents, for the first year they lived in the state, to the benefits they would have received in their state of prior residence.

In light of the cases discussed in the preceding Section, this durational residency requirement was a violation of the Fourteenth Amendment's Equal Protection Clause. Similar to the provision in *Shapiro*, the California provision placed a penalty on a citizen's decision to migrate to California, primarily, because it limited the basic necessities of life and denied new citizens the right to be treated equally with existing residents. Although California's residency requirement did not amount to

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82. California has participated in several welfare programs partially funded by the Federal Government and authorized by the Social Security Act of 1935. See *Saenz v. Roe*, 119 S. Ct. 1518, 1521 (1999). Aid to Families with Dependent Children ("AFDC") is an example of such a program. See id. In order to be effective, section 11450.03 had to be approved by the United States Secretary of Health and Human Services. See id. at 1521-22. In October 1992, the Secretary approved the statute in the form of a waiver. See id. at 1522. The California statute provides:

(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.

CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999).

83. See § 11450.03; *Saenz*, 119 S. Ct. at 1521. In actuality, the California scheme is more than two-tiered; it is multi-tiered. See *Saenz*, 119 S. Ct. at 1527. The Supreme Court described the challenged classifications:

The favored class of beneficiaries includes all eligible California citizens who have resided there for at least one year, plus those new arrivals who last resided in another country or in a State that provides benefits at least as generous as California's. Thus, within the broad category of citizens who resided in California for less than a year, there are many who are treated like lifetime residents. And within the broad subcategory of new arrivals who are treated less favorably, there are many smaller classes whose benefit levels are determined by the law of the States from whence they came.

Id.

84. See *Green*, 811 F. Supp. at 521.

85. See id.
a complete bar to receiving benefits, as the measure in Shapiro did, this fact standing alone could not preserve the constitutionality of the law.86 Memorial Hospital provides the vital link between Shapiro and Saenz because it stands for the proposition that a statute cannot be saved merely because it provides for some, but not all, benefits.87 When a measure materially diminishes benefits necessary for sustaining a family’s existence, it cannot be constitutional, even if it does not entirely eliminate those benefits.88

Contrary to this conclusion, California claimed that its measure did not penalize newcomers because the statute did not deny them benefits; it merely limited their benefits to what they would have been entitled to in their former state.89 Thus, the State argued, the law did not penalize newcomers, because their migration did not leave them worse off.90 From a factual standpoint that assertion is incorrect. The limitation penalized most citizens resettling in California because the law failed to account for the disparities in the cost of living between the State of California and other states.91

Switching to a legal perspective, the problem with California’s analysis is that it compared new residents to residents of the state from which they came.92 Under Supreme Court precedent, however, this is not the relevant comparison. When it decided Shapiro and Memorial Hospital, the Court did not inquire whether citizens, after exercising their right to migrate, were placed in positions worse than the positions they occupied in their former states.93 Nothing in the Court’s jurisprudence would even remotely suggest that to be the appropriate inquiry. Instead, the Court has consistently examined the newcomer’s situation and the long-term resident’s situation, asking whether the law treated the former less favorably than the latter.94 In constitutional terms, the question posited is whether the law “creates a classification which constitutes an invidious discrimination denying [newcomers] equal protection of the

86. See id.
87. See id.
88. See id.
90. See Petitioners’ Brief, supra note 89, at *17.
91. See Green, 811 F. Supp. at 521. The District of Columbia and 44 states have benefit levels lower than California’s. See Saenz v. Roe, 119 S. Ct. 1518, 1523 n.8 (1999).
92. See Green, 811 F. Supp. at 521.
93. See id.
tests.95 If the courts were to adopt the comparison suggested by California, then the results in previous cases would be inexplicable.96 In Zobel, for example, Alaska was the only state providing a bounty to its citizens; so, in that respect Alaska treated new residents better than their former states treated them.97 This fact, though, was irrelevant. If the nonemergency medical care that Maricopa County provided was far superior to what a citizen could find elsewhere, then it was likewise irrelevant.98 In those cases, it was of no significance that new residents might have been treated better in their new state; what was significant was that the measures treated recent residents different from other residents.99 Accordingly, the California welfare provision is an impermissible penalty on migration because it involves the basic necessities of life, and it treats newcomers to the state markedly different from other Californians.100

The mode of analysis set out in Shapiro dictates that once a court finds that a state statute penalizes a citizen’s right to migrate the statute must fall, unless the state can show that it advances a compelling state purpose.101 The interests advanced by California did not meet that standard.102 Under Shapiro and its progeny, a state’s fear of becoming a “welfare magnet”103 is not an acceptable justification for penalizing indigent newcomers to the state.104 California, however, disavowed any desire to fence out the poor; instead the State squarely relied on monetary justifications for the law, asserting that enforcement of the statute would save it approximately $10.9 million a year.105 The Supreme Court has never upheld a durational residency requirement enacted by a state with the purpose of preserving the state’s limited resources.106 Additionally, any type of contributory rationales, purporting to distribute benefits based on past tax contributions to the state, have been consis-

96. See Green, 811 F. Supp. at 521.
97. See id.
98. See id.
99. See id.
100. See id. California also argued that section 11450.03 did not actually deter migration. See id. at 521 n.12. In the past, the Court found an absence of actual deterrence to be insignificant, as long as a statutory classification existed that served to penalize migration into the state. See id.
102. See Green, 811 F. Supp. at 521.
103. See Shapiro, 394 U.S. at 628-29, 631-32; Respondents’ Brief, supra note 94, at *8, *31-*33.
104. See Green, 811 F. Supp. at 521-22.
106. See Green, 811 F. Supp. at 522.
tently rejected. A state cannot claim one segment of society as its own and provide those comprising that segment with the basic necessities of life to the detriment of equally needy newcomers. As the Court noted in *Shapiro*, contributory reasoning "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens." A state’s legitimate interest in protecting its purse provides no justification for its decision to divide equally eligible citizens into distinct classes for the purpose of discriminating among them. Such a division among bona fide state residents violates Fourteenth Amendment equal protection principles; therefore, the California law is unconstitutional.

The Supreme Court could have followed the line of reasoning set out in this Section when it decided *Saenz v. Roe*. Instead, the Court chose to carve out a new path, and rightfully so, because a fundamental flaw plagued its established framework.

III. THE MISSING LINK: IN SEARCH OF A CONSTITUTIONAL ANCHOR FOR THE RIGHT TO TRAVEL

The Court’s failure to anchor the right to travel in a specific constitutional provision created the fundamental flaw in the *Shapiro* line of cases. In *Shapiro*, the Court simply stated that it had “no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.” The Court deemed this extra step unnecessary because:

108. *See Green*, 811 F. Supp. at 522 (citing many of the cases in the *Shapiro* line).
111. *See Green*, 811 F. Supp. at 522. The *Green* court also found that “if the measure were viewed not as a penalty but as similar to the bounty in *Zobel*, it would still be impermissible under the analysis in *Zobel*.” *Id*. California claimed that its law could be distinguished from the law in *Zobel* because its law established a temporary class system, whereas the *Zobel* scheme established a permanent class system. *See Respondents’ Brief, supra note 94, at *30*. Such a distinction is inconsistent with the Court’s reasoning in *Zobel*. *See id.* The Court based its decision not on the permanency of the classification but on the existence of a statute that drew “‘distinctions between residents based on when they arrived in the State.’” *See id.* (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)). Therefore, it is the existence of an unjustified scheme, and not the length of that scheme, that offends the Constitution.
112. *Shapiro*, 394 U.S. at 630; *see also id.* at 630 n.8 (citing cases in which the right to travel was found in various provisions of the Constitution, including the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, as well as the Commerce Clause).
"The constitutional right to travel from one State to another... occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

"... [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."113

Inasmuch as a mobile citizenry is vital to the survival of the Union, the right to travel becomes a necessary inference from the overall structure of the Constitution.114 The concept of travel as an inference from federalism, however, seems somewhat inadequate when the real right at issue is not merely the right to travel but the right to migrate.115 When migration is desired—that is, when a citizen seeks more than just travel to, or passage through a state, but seeks to settle within a state’s territory on equal terms with those already established there—something more is required.116 In order for this aspect of the Court’s jurisprudence to obtain legitimacy, the Court had to locate the right of migration in the Constitution. In 1982, Justice Sandra Day O’Connor first acknowledged this lacuna in the Court’s previous cases, and she constructed an approach, which she believed would legitimize the Court’s reasoning, squarely placing the right to migrate in the Constitution.117

While the word “travel” appears nowhere in the Constitution,118 words alluding to the right were present in Article IV of the Articles of Confederation.119 The clause guaranteed a citizen’s right of “free ingress and regress to and from any other State,”120 and served as the predecessor for Article IV of the Constitution.121 In the Constitution, the first sentence of Article IV, Section 2 provides: “The Citizens of each State

113. Id. at 630-31 (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966)).
115. See Amar, supra note 2, at 15.
116. See id.
119. See id. at 1525 & n.13.
120. ARTICLES OF CONFEDERATION OF 1781, art IV.
121. See Zobel, 457 U.S. at 79 (O’Connor, J., concurring in judgment) (discussing the history of Article IV).
shall be entitled to all Privileges and Immunities of Citizens in the several States.”

Justice O’Connor sought to reunite the right to travel with this Clause of the Constitution in her concurring opinion in

Zobel v. Williams. In her view, the Court’s reluctance to articulate and explain the textual sources of the right to travel tended to “establish[] an uncertain jurisprudence.” She therefore believed it imperative that the Court return to the Constitution in order to ascertain the origins of the right.

The basic notion of privileges and immunities is that it protects fundamental rights identifiable in history and in the common law. Traditional privileges and immunities jurisprudence teaches that the Clause “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.”

Early on the Supreme Court recognized and explained the importance of such a provision:

[W]ithout some provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Since then the Court has held the Clause to protect a nonresident’s right to work, hunt commercial game, and procure medical services in any state of the Union. Justice O’Connor declared that if the Clause

122. U.S. CONST. art. IV, § 2.
123. See Zobel, 457 U.S. at 73-74 (O’Connor, J., concurring in judgment).
124. Id. at 73 (O’Connor, J., concurring in judgment).
125. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit). Writing his classic explication in Corfield v. Coryell, Justice Bushrod Washington stated that Article IV, Section 2 should be confined to:

[T]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

Id. at 551; see also Supreme Court of N.H. v. Piper, 470 U.S. 274, 279 (1985) (stating that Article IV refers to “those “privileges” and “immunities” bearing on the vitality of the Nation as a single entity”’ (quoting Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 383 (1978))).
129. See Toomer, 334 U.S. at 385.
131. See Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (declaring that the Privileges and Immunities Clause “plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; [and] to take and hold real
protects those privileges, then it should logically protect the rights of a citizen who ventures into another state to settle and establish a home.132 Acknowledging the argument that the Privileges and Immunities Clause is not triggered when a state discriminates among classes of residents, as opposed to discriminating between residents and nonresidents, Justice O'Connor concluded that the distinction is not dispositive.133 In her view, a scheme that forces new residents to accept a position inferior to the status of long-time residents cannot be saved from scrutiny under the Privileges and Immunities Clause simply because the discrimination unfolds after residency is established.134

Once the violation of a fundamental right is established—and for Justice O'Connor it was difficult to imagine a right more vital to the Union as a whole than the right to establish residence in a new state—the constitutionality of the discriminating law must be tested.135 To determine whether a law is constitutional under the Privileges and Immunities Clause of Article IV, courts use a standard two-part test.136 First, the state must show that nonresidents are """"a peculiar source of the evil"""" addressed by the statute.137 Second, the state must demonstrate a """"substantial relationship' between the evil and the discrimination practiced against the noncitizens.""""138 Justice O'Connor reasoned that Article IV would have provided a secure foundation, which had been noticeably absent, for many of the right to travel and right to migrate claims discussed in the Court's prior opinions.139

133. See Zobel, 457 U.S. at 74 (O'Connor, J., concurring in judgment) (""""A fortiori, the Privileges and Immunities Clause should protect the 'citizen of State A who ventures into State B' to settle there and establish a home."""").
134. See id. at 75 (O'Connor, J., concurring in judgment).
135. See id. (O'Connor, J., concurring in judgment).
136. See id. at 76-77 (O'Connor, J., concurring in judgment).
137. See id. (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948)).
138. Zobel, 457 U.S. at 76-78 (O'Connor, J., concurring in judgment) (quoting Hicklin, 437 U.S. at 527). Justice O'Connor explained in Zobel: """"Just as our federal system permits the states to experiment with different social and economic programs, it allows the individual to settle in the State offering those programs best tailored to his or her tastes."""" Id. at 77 (citation omitted).
139. See Zobel, 457 U.S. at 78-79 (O'Connor, J., concurring in judgment) (noting that the Privileges and Immunities Clause of Article IV has enjoyed a long association with the rights of interstate travel and migration). In a dissenting opinion from Attorney General v. Soto-Lopez, 476 U.S. 989, 918-19 (1986), Justice O'Connor again urged the Court that the Privileges and Immunities Clause of Article IV provides the appropriate basis of analysis, rather than some """"free float-
Ultimately, the Court did not adopt Justice O'Connor's reasoning; instead, it resurrected a long forgotten clause, forging new ground on the constitutional landscape.\textsuperscript{140}

IV. \textsc{Saenz v. Roe: The Revival of the Fourteenth Amendment’s Privileges or Immunities Clause}

In 1992, California created the impetus for change when it enacted section 11450.03,\textsuperscript{141} which set into motion a web of complex litigation that would span over seven years and eventually alter the course of the Supreme Court’s right to travel jurisprudence.\textsuperscript{142} The essence of California’s law was simple: It created a two-tiered, or more accurately a multi-tiered, class structure for the distribution of welfare benefits.\textsuperscript{143} New residents entitled to benefits, but living in the state for less than one year, were limited to the amount they would have received from "right to migrate." See \textit{Soto-Lopez}, 476 U.S. at 918-920. This time Justice Rehnquist and Justice Stevens joined her opinion. See \textit{id.} at 918.


\textsuperscript{141} See \textit{supra} note 82.

\textsuperscript{142} In 1992, newly arrived California residents, eligible for welfare benefits, challenged the constitutionality of the law. See \textit{Saenz}, 119 S. Ct. at 1522. The District Court preliminarily enjoined implementation of the statute, concluding that the statute placed "a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." \textit{Id.} (quoting \textit{Green v. Anderson}, 811 F. Supp. 516, 521 (E.D. Cal. 1993)). The Court of Appeals summarily affirmed for the reasons stated by the District Court. \textit{See id.} The Supreme Court granted the State’s petition for certiorari. \textit{See id.} The Court was unable to reach the merits because a separate proceeding, \textit{Beno v. Shalala}, 30 F.3d 1057 (9th Cir. 1994), invalidated the Secretary of Health and Human Services’ approval of section 11450.03. \textit{See Saenz}, 119 S. Ct. at 1522. As a result, the Supreme Court found that the constitutionality of the statute no longer presented a justiciable controversy. \textit{See Anderson v. Green}, 513 U.S. 557, 559-60 (1995) (per curiam). The Court vacated the judgment and directed that the case be dismissed. \textit{See Saenz}, 119 S. Ct. at 1522. In 1996, the Secretary refused to renew the waiver. \textit{See id.} at 1522 n.4. Consequently, the statute remained inoperative until Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996. \textit{See id.} at 1522. The enactment of PRWORA replaced the AFDC program with Temporary Assistance to Needy Families ("TANF"). \textit{See id.} The federal statute authorized any state that received a TANF block grant to "apply to a family the rules (including benefit amounts) of the [TANF] program . . . 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) (1994 ed., Supp. II). The federal statute paved the way for section 11450.03 to take effect because it eliminated the need for specific approval from the Secretary of Health and Human Services. \textit{See Saenz}, 119 S. Ct. at 1522. After section 11450.03 became law, an action was again filed in the Eastern District of California essentially restating the claims asserted by the plaintiffs in \textit{Anderson v. Green}, but also challenging the constitutionality of PRWORA. \textit{See id.} at 1522. As it had done in the previous case, the District Court issued a temporary restraining order and certified the case as a class action. \textit{See id.} The judge affirmed his conclusion in \textit{Green}, finding that the existence of the federal statute did not alter his legal analysis and his holding that the California law was unconstitutional. \textit{See id.}

\textsuperscript{143} \textit{See supra} note 83.
their state of former residence. When the case arrived at the Supreme Court, the law was struck down, and the decisions of the lower courts were affirmed. Remarkably, the reasoning began anew.

The Supreme Court opened this new chapter in constitutional law with a comment that the word “travel” is absent from the text of the Constitution. Nevertheless, the Court acknowledged the constitutional right to travel as a structural imperative, deeply embedded in its case history. In the past, the Court had never paused to identify the constitutional source of this unquestionable right. This time, however, the Court decided to bridge the gap in its reasoning and focus in on the source of this right, so often relied on by plaintiffs. Justice John Paul Stevens, writing for the Court, initially noted that the right to travel embodies at least three discrete components. First, it protects a citizen’s right to leave his or her own state and enter another state. Second, upon arrival, the citizen has a right to be treated as a welcome visitor when passing through or sojourning in the second state. Finally, for those citizens who elect to take up permanent residency, the right to travel also embraces the right to be treated equally with other citizens of the chosen state. Justice Stevens quickly handled the first two elements. Since section 11450.03 did not erect barriers to a citizen’s entry into California territory, the Court had no need to identify the source of the right to free interstate movement in the Constitution. Instead, the Court simply stated that “[t]he right of ‘free ingress and regress to and from’ neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”

144. See supra notes 82-83 and accompanying text.
145. See Saenz, 119 S. Ct. at 1524.
146. See id.
147. See id. The right to travel is so vital that it can be “assert[ed] against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.” Id. (quoting Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)).
148. See id.
149. See id. at 1525.
150. See id.
151. See id.
152. See id.
153. See id.
154. See id.
155. Id. (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).
In contrast, the second component of the right to travel is rooted in the text of the Constitution, expressly protected by the Privileges and Immunities Clause of Article IV, Section 2. This provision removes the burden of alienage from the citizen who travels from her home state into another state with the intent to return at the end of her journey. The protections that such a provision affords, however, are not absolute, because a state may have good reason for discriminating against transients. Even so, the Court has yet to identify an acceptable reason for discrimination between residents and those nonresidents who exercise their right to move to another state and establish a home, thereafter, becoming residents. After finding none of the permissible justifications for discriminating against residents and nonresidents applicable in Saenz, the Court declined Justice O'Connor's prior invitation to rely exclusively on the second element of the right to travel and Article IV. Rather unexpectedly, the Court moved into new territory when it examined the third aspect of the right to travel, the right at issue in the case.

At issue in Saenz was the right of a citizen to enter a state and settle on equal ground with those already established there. The Constitutional fountainhead for this particular right, declared the Court, is the Privileges or Immunities Clause of the Fourteenth Amendment. The Fourteenth Amendment opens with these words: "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."

Under this portion of the Fourteenth Amendment, the Court found new residents entitled to the same privileges and immunities that other residents enjoy in the same state. Protection of this right is afforded not only by virtue of the new arrival's status as a state citizen, but also by virtue of her status as a United States citizen. The Court then as-

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156. See id.; Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit) (stating that the fundamental rights protected by Article IV's Privileges and Immunities include "the right of a citizen of one state to pass through, or to reside in any other state").
157. See Saenz, 119 S. Ct. at 1525; Paul v. Virginia, 8 Wall. 168, 180 (1868).
158. See Saenz, 119 S. Ct. at 1526.
159. See id.
160. See id.
161. See id.
162. U.S. CONST. amend. XIV. The remaining portion of the section provides: "[N]or 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." Id.
163. See Saenz, 119 S. Ct. at 1526.
164. See id.
serted that, despite differing views of the Privileges or Immunities Clause, it has been commonly understood to protect the third component of the right to travel, that is, the right to migrate.\footnote{165} In support of this proposition, Justice Stevens quoted the majority and the dissent in the \textit{Slaughter-House Cases},\footnote{166} the same Court that had eviscerated and buried the Clause in the first place.\footnote{167} Regarding the demise of Fourteenth Amendment privileges or immunities, a brief explanation would foster greater understanding of why its return is profoundly significant.

The antebellum experience of the United States warned that Article IV would not be strong enough to protect the rights of newly freed Blacks in post Civil War America.\footnote{168} For example, before the Civil War, southern states excluded Black citizens and abolitionists from southern territory, readily disregarding the comity owed to northern states under Article IV, Section 2.\footnote{169} Of course, these exclusions would be unconstitutional if free Blacks were considered “citizens of each State” within the meaning of Article IV, Section 2; but the Supreme Court rejected the possibility in the infamous \textit{Dred Scott v. Sanford} decision.\footnote{170}

Ultimately, in Post Civil War America, with the oppressive Black Codes of the southern states taking hold,\footnote{171} additional action was re-

\begin{footnotes}
\item 165. See id.
\item 166. See id. at 1526-27.
\item 167. See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 175 (1998) (stating that Justice Miller’s majority opinion “rendered the privileges-or-immunities clause utterly meaningless”); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED 55 (1997) (“In the exact etymological sense, the Court annihilated the privileges and immunities of national citizens, insofar as these were to be seen as ordained by the Fourteenth Amendment.”); Richard L. Ayres, \textit{Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases}, 70 CHI.-KENT L. REV. 627, 628 (1994) (stating that “almost all sources agree that Justice Miller’s majority opinion in the \textit{Slaughter-House Cases}, or at least its dicta, “virtually scratched [the Privileges or Immunities Clause] from the [C]onstitution”” (quoting Charles Fairman, \textit{What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892}, 30 B.U. L. REV. 49, 78 (1950))); id. at 628 n.7 (citing various sources that reach the same conclusion); Michael Kent Curtis, \textit{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, 1 (1996) (“The decision in the \textit{Slaughter-House Cases} liquidated the Privileges or Immunities Clause of the Fourteenth Amendment.”).
\item 168. See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 48 (1988) (“Taken together, the problems connected with the restoration of the South to the Union and the protection of freedmen’s rights called for yet another constitutional amendment.”); Constitutional Law Professors’ Brief, \textit{supra} note 114, at *4-5.
\item 169. See Constitutional Law Professors’ Brief, \textit{supra} note 114, at *4-5.
\item 170. 60 U.S. (19 How.) 393 (1857).
\item 171. See, e.g., 2 BRUCE ACKERMAN, \textit{WE THE PEOPLE: TRANSFORMATIONS} 165 (1998) (stating that “one Southern state after another enacted Black Codes that consigned the ‘freedmen’ to serf-like status”); AMAR, \textit{supra} note 167, at 175 (noting that “[a]lthough the Thirteenth Amendment
\end{footnotes}
quired to secure fundamental privileges and immunities for all Americans.\footnote{172} The Fourteenth Amendment was intended to fulfill the promise of the Civil War—the promise of freedom. The first sentence, the Citizenship Clause, overruled \textit{Dred Scott} and ensured the rights of newly freed Black citizens by guaranteeing them citizenship in the state wherein they resided.\footnote{173} The second sentence, the Privileges or Immunities Clause, fortified that right; specifically, it precluded the state from abridging a Black citizen's rights of national citizenship.\footnote{174} Thus, the Framers of the Amendment began with a clause echoing the Privileges and Immunities Clause of Article IV. This new Clause, the Privileges or Immunities Clause, "was designed to make the Constitution what its preamble promised—a guarantee of liberty."\footnote{175} The new Amendment was intended to be an able combatant against the Black Codes of the South, a remedy for egregious civil rights violations and "a durable bulwark of freedom" for all citizens.\footnote{176} Moreover, the Fourteenth Amendment was submitted to the states with this nonnegotiable condition attached: Any state having joined the Confederacy could not be re-admitted to the Union without ratifying the Amendment.\footnote{177} The Fourteenth Amendment was ratified in 1868.\footnote{178}

Just four short years after the ratification of the Fourteenth Amendment, a sharply divided Supreme Court essentially read the promising Privileges or Immunities Clause out of the Constitution in the \textit{Slaughter-House Cases} of 1873.\footnote{179} In its short-sighted opinion, which

\footnote{172. See NELSON, supra note 168, at 48.}
}
\footnote{174. See id. It should be remembered that "the Northern Republicans drafting this grand language meant not merely to provide for the rights of blacks and loyal white Unionists in the South but also to enable Northerners to relocate to Southern states free from discrimination against "Yankees" and 'carpetbaggers.'" Amar, supra note 2, at 14; see Ayres supra note 167, at 645 ("[T]he debates are replete with indications that the Fourteenth Amendment was also intended to protect Southern white Unionists, Northerners moving South, and aliens.").
}
\footnote{175. Curtis, supra note 167, at 2.
}
\footnote{176. See Bolick, supra note 5, at 19.
}
\footnote{177. See BLACK, supra note 167, at 47-48. "Section 1 [of the Fourteenth Amendment] is therefore the salient, substantive provision of the treaty of peace ending our great Civil War. Its ratification was imposed on the rebelling States as the price of their reunion." \textit{Id.} at 48.
}
\footnote{178. U.S. CONST. amend. XIV.
}
\footnote{179. 83 U.S. (16 Wall.) 36 (1873) (5-4 decision); see Saenz, 119 S. Ct. at 1535 (Thomas, J., dissenting) (reminding that "[u]nlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court all but read the Privileges and Immunities Clause out of the Constitution in the \textit{Slaughter-House Cases}")}; see, \textit{e.g.}, sources
blatantly ignored evidence to the contrary, the Court ruled that the Clause guarded against state encroachment of only those rights deriving from national citizenship.\(^{180}\) Hence, the majority relegated the Clause to protecting such rights as habeas corpus and freedom of travel on the high seas; the majority steadfastly refused to acknowledge any significant restraint on state police power.\(^{181}\) Justice Stephen Field wrote in dissent that as construed by the Court, the Privileges and Immunities Clause "was a vain and idle enactment, which accomplished nothing."\(^{182}\)

Although the \textit{Saenz} Court revived the Privileges or Immunities Clause of the Fourteenth Amendment, it did not expressly overrule \textit{Slaughter-House} precedent. Somewhat ironically, Justice Stevens used the words of the \textit{Slaughter-House} Court to bring back the Clause that it had killed. As mentioned above, he asserted that the Privileges or Immunities Clause unquestionably protects the right to travel, citing only to \textit{Slaughter-House}.\(^{183}\) He quoted Justice Samuel F. Miller's explanation that one of the privileges conferred by the 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 \textit{bona fide} residence therein, with the same rights as other citizens of that State."\(^{184}\)

The \textit{Saenz} Court, based only on the words of \textit{Slaughter-House}, made the Fourteenth Amendment whole again by reconnecting its first two clauses. The Citizenship Clause and the Privileges or Immunities

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\item[cited \textit{supra} note 167.]
\item[180.] See \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 36-37.
\item[181.] See id.; \textit{BLACK, supra} note 167, at 63-66 (listing the rights stated by the Court and commenting that "all those are 'rights' already secured by national law, without reference to the Fourteenth Amendment 'privileges and immunities' clause").
\item[182.] \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).
\item[183.] In the Court's view the privileges and immunities clause of the Fourteenth Amendment has added nothing, that this great resounding clause, which seemed, just after the Civil War, to be summing up the moral result of that war—"one nation indivisible"; "a new birth of freedom"—actually had no operative force whatsoever, and was to be a mere dead letter.
\item[BLACK, \textit{supra} note 167, at 68-69.
\item[185.] \textit{Id.} at 1526 (quoting \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 80). Justice Stevens also quoted from Justice Joseph P. Bradley's dissent, who he noted made the same point using stronger language:
\begin{quote}
"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 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."
\end{quote}
\textit{Id.} at 1526-27 (quoting \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 112-13 (Bradley, J., dissenting)).
\end{enumerate}
\end{footnotesize}
Clause form a complex entity within the Fourteenth Amendment: "To be a citizen of the State wherein you reside is a privilege annexed to and flowing from national citizenship." The Saenz Court recognized and clarified this point. It found that the Citizenship Clause gives all Americans a federal constitutional right to citizenship in the state wherein they reside; and the Privileges or Immunities Clause prevents states from infringing on a citizen’s national rights, which includes prohibiting discrimination against newcomers. In the words of the Court: "That newly arrived citizens 'have two political capacities, one state and one federal,' adds special force to their claim that they have the same rights as others who share their citizenship."

Once the Court secured the right to migrate in the Constitution, it rejected all arguments for any standard of review less than strict scrutiny. Specifically, when a state rule of law discriminates against some of its citizens for a reason as arbitrary as length of residence, mere rationality, or some intermediate standard of review, will not suffice to judge the constitutionality of that law.

With the standard of review articulated, the Court proceeded to evaluate the constitutionality of section 11450.03. First, the Court quickly disposed of California’s argument that the law merely had an incidental effect on the right to travel interstate. Justice Stevens found this point to be moot, since the case involved discrimination against citizens who had completed their travel. He also pointed out that the argument characterizing a partial withholding of benefits as less intrusive on the right to travel, in contrast to an outright denial, would only be persuasive if the Court’s sole concern was the actual deterrence of migration. In light of the revelation that a citizen’s right to travel embraces her right to equal treatment in her new home state, the Court found that the discriminatory classification was indeed a penalty.

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186. See Saenz, 119 S. Ct. at 1525-27; Amar, supra note 2, at 15.
188. See id. California had argued for a rational basis review. See id. at 1525. It asserted that the law did not penalize a citizen’s right to travel because, unlike the law at issue in Shapiro, new arrivals were not ineligible for benefits during their first year in California. See id. at 1524-25 (discussing the novel argument, proposed by the United States as amicus curiae, for an intermediate standard of review).
189. See id. at 1527.
190. See id.
191. See id.
192. See id.
Second, the Court noted that those challenging the law were bona fide residents of California, an undisputed fact, and that their need, and that of their families, for welfare benefits was unrelated to their time spent domiciled in the state.\textsuperscript{193} The Court, therefore, declined to consider the weight it would give to duration of residence in a case attacking the bona fides of a person's state citizenship.\textsuperscript{194} Additionally, the Court concluded that the recognition of welfare claims does not present any of the dangers related to recognizing claims for readily portable benefits, such as university education or divorce decrees, which may encourage citizens of other states to take up residency in California just long enough to obtain those benefits.\textsuperscript{195}

The threshold considerations aside, it then became necessary for California to justify its law. In doing so, the State had to explain not only the sound economic policy reasons behind its inferior treatment of newcomers, but also its reasons for applying multiple rules within the disfavored class.\textsuperscript{196} Section 11450.03 created a variety of classifications based on length of residency and location of prior residence.\textsuperscript{197} The favored class comprised all eligible Californians meeting the durational residency requirement, as well as those who last resided in a foreign country, or a state with welfare benefits equal to or higher than California's.\textsuperscript{198} Consequently, the broad class of newcomers included many individuals who received the same treatment as long-term residents; while the broad subcategory of disfavored newcomers comprised even smaller classes of individuals, whose former state of residence determined their benefits.\textsuperscript{199}

Facing constitutional challenge, California advanced a purely economic justification for this multi-tiered framework, the enforcement of which would save the State approximately $10.9 million a year.\textsuperscript{200} The issue, as framed by the Court, was not whether saving state dollars was a legitimate purpose, but whether the State's discriminatory plan was an acceptable means of realizing that end.\textsuperscript{201} The Court concluded that arbitrary discrimination was an unacceptable method of saving money, especially when an evenhanded, across-the-board reduction of approxi-
mately seventy-two cents per month for all recipients would have accomplished the same desired results. Justice Stevens emphasized that the Court's conclusion did not rest on the weakness of the State's financial justification. Instead, he declared: "It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence [and] 'that Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.'" Accordingly, a state's legitimate interest in guarding its purse provides no justification for its decision to create a multi-tiered scheme designed to discriminate among equally eligible citizens. In the absence of a compelling state interest, the Court struck down the California law, and declared that all citizens of the United States, regardless of their socioeconomic status, are entitled to claim state citizenship where they reside. "The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" The Court concluded with those words, an echo from the past, upon the dawn of a new beginning—the return of the Fourteenth Amendment's Privileges or Immunities Clause.

V. CONCLUSION

Saenz v. Roe was a seven to two decision. In dissent, Chief Justice Rehnquist offered his view that there is no significant difference between a one-year residence requirement applied to the level of subsidies for state university tuition, and the same requirement applied to the level of state welfare benefits. On the contrary, the courts have recognized a difference. As Justice Marshall explained in Memorial Hospital v. Maricopa County, "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements." Undoubtedly, there is great value in attaining higher educa-

202. See id.
203. See id.
204. Id. (quoting Zobel v. Williams, 457 U.S. 55, 69 (1982)).
205. See id.
206. See id. at 1530.
207. Id. (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).
208. See id. at 1533 (Rehnquist, C.J., dissenting).
tion; however, it simply cannot be equated with the attainment of food, clothing, and shelter.\textsuperscript{210}

The days following \textit{Saenz} revealed that both conservatives and liberals have embraced the Court’s decision. Conservatives heralded the decision as paving the way for the advancement of greater economic liberties;\textsuperscript{211} while liberals celebrated because they believe that fundamental rights may have now found a more secure home in the Constitution, and, therefore, could be afforded greater protections in the future.\textsuperscript{212} \textit{Saenz} standing alone makes it difficult to predict the Court’s direction, particularly because there were no concurring opinions to elaborate on the majority’s analysis. Since the Justices remained silent as individuals, their reasons for coming together and their expectations for the future are not known and may be entirely different from one another.\textsuperscript{213} As a result, the \textit{Saenz} Court left many questions unanswered and an important task unfinished. If the Court intends to restore the Fourteenth Amendment’s Privileges or Immunities Clause to full constitutional vitality, then \textit{Slaughter-House} must be explicitly overruled; otherwise, the promise of the Clause will never be fully realized.\textsuperscript{214} While some Justices may be weary about reading rights into the Constitution,\textsuperscript{215} they should not be so timid as to move too far in the other direction and ignore those rights that are there. The Supreme Court should never engage in the form of judicial activism adopted by the \textit{Slaughter-House} Court;

\begin{footnotesize}
\begin{enumerate}
\item See id. at 260 n.15; \textit{supra} text accompanying notes 64-73.
\item See Bolick, \textit{supra} note 5, at 19.
\item See Amar, \textit{supra} note 2, at 14 (“If the Court means to revive the clause in any intellectually defensible way, it must kill \textit{Slaughter-House} once and for all.”). Charles L. Black, Jr. has declared that in his view “no sorrier opinion was ever written than the \textit{Slaughter-House} opinion, and that case should be thrown into the rustiest trash-can of legal history.” \textit{BLACK, supra} note 167, at 39.
\item See, e.g., \textit{Saenz v. Roe}, 119 S. Ct. 1518, 1538 (1999) (Thomas, J., dissenting) (remarking that the majority’s failure to consider certain questions “raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights”). Justice Clarence Thomas also stated his belief “that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence,” and, as a result, he “would be open to reevaluating its meaning in an appropriate case.” \textit{Id.} Chief Justice Rehnquist joined Justice Thomas in his dissent.
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\end{footnotesize}
for reading rights out of the Constitution, as opposed to reading rights into the Constitution, is a far more dangerous endeavor.\textsuperscript{216}

\textit{Stacey L. Winick*}

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\textsuperscript{216} "[O]ne of the canons of construction never to be lost sight of is to give effect, if possible, to every word of the written law." \textit{Cong. Globe}, 42d Cong., 1st Sess. 9 (1871) (referring to the Act of April 10, 1869, statement of John A. Bingham, author of the Fourteenth Amendment, during the 1871 debate over the question of whether Mississippi Representatives should be seated); \textit{see also} Bolick, \textit{supra} note 5, at 19 (advocating a complete revival of the Fourteenth Amendment's Privileges or Immunities Clause).

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