
FREE MOVEMENT: A FEDERALIST REINTERPRETATION

JIDE NZELIBE*

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INTRODUCTION

On May 17, 1999, the U.S. Supreme Court decided *Saenz v. Roe*.¹ Superficially, the case appears to have broken no new ground other than as a belated attempt to revive the Privileges and Immunities Clause of the Fourteenth Amendment² in the context of the right to travel.³ Upon closer examination, however, we glean a more subtle development: the Supreme Court's attempt at closure to one of the

* Associate, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, D.C. The author recently completed a clerkship with Judge Stephen F. Williams, U.S. Court of Appeals for the D.C. Circuit; J.D., *Yale Law School*, 1998.

1. 119 S. Ct. 1518 (1999).

2. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

3. See Thomas E. Baker, *Traveling Back in Time: Privileges and Immunities Clause Unearthed to Strike Down State Welfare Law*, LEGAL TIMES, July 12, 1999, at S24 (stating that the *Saenz* Court "revived the privileges and immunities clause after 130 years of judicial desuetude").

modern constitutional sagas—a constitutional home for the so-called “right to travel.” Over the past fifty years, the Court has canvassed the bailiwick of constitutional law in search of a meaningful underpinning for the right to travel. When an oblique, non-textual doctrine based upon the general notion of political unity fizzled,⁴ the Court sought refuge under due process⁵ or equal protection analysis.⁶

In addition to, or in spite of, these two vastly different jurisprudential doctrines, the Court has suggested that the right to travel could be traced to a concept of national citizenship, independent of the Fourteenth Amendment,⁷ the Privileges and Immunities Clause of Article IV (The “Comity Clause”),⁸ the Privileges and Immunities Clause of the Fourteenth Amendment,⁹ and the Commerce Clause.¹⁰ The right to travel—the ubiquitous right in search of a sure constitutional footing—has found a new home in a long-dormant clause of the Fourteenth Amendment. Despite its insecure origins, the right to travel never has been questioned seriously.¹¹ Its implications may have been debated, but the right almost always has been taken for granted. Unlike abortion or other due process privacy right issues, there appears to be no important political group that has campaigned for or against this

4. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 41 (1867) (declining to uphold the constitutionality of a state-levied tax on interstate travelers because doing so would be inconsistent with the rights belonging to citizens of other states).

5. See *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (“[T]he Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of [a state] for one year at the time their applications are filed.”).

6. See *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982) (holding that a state dividend plan that shares state funds with its citizens based on minimum residency violates the Equal Protection Clause).

7. See *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring) (asserting that the right to travel is constitutionally protected independent of the Fourteenth Amendment).

8. See *id.* at 630 n.8 (noting that in other cases from the latter half of the nineteenth century, the right to travel was based on the Privileges and Immunities Clause of Article IV); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) (stating that the Privileges and Immunities Clause protects the right of a citizen of one state to travel into another state in order to engage in commerce, trade, or business); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) (holding that the Privileges and Immunities Clause provides “the right of free ingress into other states, and egress from them”).

9. See *Shapiro*, 394 U.S. at 629 (noting that the Court has long recognized that Americans are free to travel uninhibited by rules or regulations); *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) (stating that the Privileges and Immunities Clause protects the “right to move freely from State to State”).

10. See *Edwards*, 314 U.S. at 172 (stating that the transportation of persons is “commerce” within the meaning of the Commerce Clause).

11. See *United States v. Guest*, 383 U.S. 745, 759 (1966) (observing that although there is no consensus as to the right’s source, there is consensus as to the existence of the right).

widely embraced “right.” The irony, however, in the popular capitulation to this new “right” is that although the discussion of interstate travel and migration always has been mired in the language of personal rights and discrimination, the policy rationale for the “right” usually has been put forth as a means of promoting the federal union. How then did a rights-based perspective of constitutional theory come to supplant the federalist origins of the limitations of states to restrict interstate travel?

This Article attempts to dispel the notion that the limitation on a state’s power to restrict interstate travel and migration is based upon a notion of a personal right to travel. Instead, this limitation, like the dormant Commerce Clause,¹² is traceable to an idea of conserving the political and economic union against provincial state interests. Viewed from this perspective, the constitutional value that protects free interstate movement is one grounded purely in our federalist structure and is not traceable to the spirit of specific provisions in the Bill of Rights.¹³ As set forth below, the original cases that explored the limitation on state power implicitly endorsed such a restrictive notion of free interstate movement. The early introduction of individual “rights” terminology, however, hampered its development as a doctrine. Indeed, subsequent decisions continue to recognize that the policy basis of the right is encapsulated in a federalist promotion norm.

Interestingly, as the modern right to travel has evolved, it rarely has done so as a stand-alone right, and it is most often used to buttress other constitutional interests or rights.¹⁴ Stripped of those other constitutional interests, there hardly seems to be any special solicitude for personal protection against state power embodied in a “right to travel.” Instead of a right to travel, a more apt description of this constitutional principle would be a “free movement doctrine.” This phrase properly captures the essence of the principle as one that promotes the political and economic union by limiting interstate conflict, and not as the fountain of an individual right to travel.

12. See *infra* notes 21-26 and accompanying text.

13. See U.S. CONST. amends. I-X.

14. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259-60 (1974) (addressing the right to medical care); *Dunn v. Blumstein*, 405 U.S. 330, 339-41 (1972) (describing the right to vote); *Shapiro*, 394 U.S. at 629 (tying the right to travel to welfare benefits).

I. THE CONSTITUTIONAL VALUE OF LIMITATIONS BASED ON
FEDERALIST PRINCIPLES

A. *The Comity and Commerce Clauses*

Not all limitations on state power, even those embodying anti-discrimination principles, are based on individual rights. Some limitations, such as the dormant Commerce Clause and the Comity Clause, limit the powers of states against other states or against the federal government in order to promote a political, social, and economic union.¹⁵ To understand whether an anti-discrimination principle is properly an issue of interstate unity rather than of individual rights,¹⁶ one must look to its underlying political theory.

Hamilton described the core political value of the Comity Clause as “the basis of the union,”¹⁷ which suggests that the goal of the Comity Clause was to reduce interstate conflict. The Commerce Clause purportedly intended to limit conflict among the states on issues of trade.¹⁸ Both clauses have historical origins traceable to the Articles of Confederation, which were drafted at a time when the Framers’ main objective seemed to be the promotion of commercial relations among the states, not the protection of individual rights.¹⁹

It is no coincidence that the modern “right to travel” also has been

15. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526-28 (1935) (finding that a state may not impose sanctions that burden interstate commerce). The restriction of state power to prevent burdening interstate commerce, however, does not stem from any explicit language in the Constitution. See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949) (indicating that although the Constitution gives Congress the power to regulate commerce, it does not say what states may or may not do in the absence of congressional action).

16. See Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 46 (1988) (stating that the concern of the Framers regarding an economic union among the states “arose from conflicts among the states . . . , not from disputes between the states and individual merchants”). Collins uses the phrase “intergovernmental rights” to describe those limitations on state power intended primarily to limit interstate conflicts. See *id.*

17. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

18. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), the Court characterized the standard for violating the Commerce Clause: “[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” *Id.* at 274 (citations omitted); see also Collins, *supra* note 16, at 45 (claiming that economic union was a principal aim of the Framers).

19. See Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 487-89 (1981) (stating that Article IV of the Articles of Confederation “declared the principle that each state generally must treat the residents of sister states as it would treat its own”); see also Collins, *supra* note 16, at 52-55 (acknowledging that the emphasis in the Articles of Confederation on commercial unity among the states was carried over to the Constitution).

traced to the same provision in the Articles of Confederation.²⁰ Subsequent originalist interpretations by members of the Court justify the interpretation that, in enacting these clauses, the Founding Fathers targeted discriminatory policies driven by state parochialism.²¹ In clarifying the purpose of the Commerce Clause, for example, Justice Jackson observed that after the Revolutionary War:

[A] drift toward anarchy and commercial warfare between states began. “[E]ach State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.” This came “to threaten at once the peace and safety of the Union.”²²

Fifteen years prior to Justice Jackson’s comments, Justice Cardozo expressed similar sentiments in *Baldwin v. G.A.F. Seelig, Inc.*²³ in which he stated that “a chief occasion of the commerce clause was ‘the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.’”²⁴ In the same case, Justice Cardozo noted that the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together.”²⁵ The propriety of the Court’s usage of the dormant Commerce Clause to strike down state legislation that discriminates against commerce has had its share of controversy.²⁶ None of these commentators, however, seem to dispute that the animating principle behind the Commerce Clause is to secure the cohesion of the union.

In analyzing the purpose of the Comity Clause in *Baldwin v. Fish &*

20. See *infra* notes 36-40 and accompanying text (describing the origins of the free movement principle).

21. For other commentary on some of the Founding Fathers’ sentiments at the time of the Constitutional Convention, see M. FARRAND, *THE FATHERS OF THE CONSTITUTION* 96-208 (1921) (observing that tensions and conflicts among the states disrupted commerce); JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 217-25 (1966) (discussing the dangers of establishing a government that allows too much state power over other states).

22. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 259, 260 (1833)).

23. 294 U.S. 511 (1935).

24. *Id.* at 522.

25. *Id.* at 523.

26. See *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (stating that “the Court for over a century has engaged in an enterprise that it has been unable to justify”); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting) (“The Commerce Clause is, after all, a grant of authority to Congress, not to the courts.”); J. THAYER, *CASES ON CONSTITUTIONAL LAW* 2090-91 (1895); see also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 428 (1982) (proposing a “radically diminished role for both the dormant commerce clause and the Court as its interpreter”).

Game Commission,²⁷ Justice Blackmun held that certain distinctions made by a state between residents and non-residents “are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.”²⁸ More than one hundred years prior to Justice Blackmun’s statement, Justice Field recognized that the Comity Clause’s primary goal was “to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”²⁹ By understanding the clause as no more than a union-promoting value that limits the power of states to discriminate against other states, we escape the temptation to improperly classify any anti-discrimination value as an individual right.

As a constitutional norm antecedent to the Bill of Rights, the values embraced by both the Commerce and the Comity Clauses are distinct from those embraced in the Bill of Rights. Judging from the Supreme Court’s pronouncement on the issue, the “norm of comity” value in the Privilege and Immunities Clause simply displaces any idea that the clause is a source of “natural rights.”³⁰ Indeed, to suggest that the clause itself is a fountain of federal rights would render the clause redundant.³¹ Federal rights can be enforced directly against the states under the Supremacy Clause³² and the incorporation principle embedded in the Fourteenth Amendment.³³ As Justice Blackmun held in *Baldwin*, it is only those interests or activities that are “basic to the maintenance and well-being of the Union” that are triggered under the anti-discrimination principle of the Comity Clause.³⁴

27. 436 U.S. 371 (1978).

28. *Id.* at 383.

29. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

30. *See Baldwin*, 436 U.S. at 382 (stating that the Privileges and Immunities Clause “establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment”) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975)).

31. *See Varat*, *supra* note 19, at 513 (arguing that if the Supreme Court took a “fundamental equal protection interest” to trigger the Privileges and Immunities Clause, the clause would become superfluous).

32. *See* U.S. CONST. art. VI, § 2 (declaring that state judges must hold U.S. laws above conflicting state laws).

33. As Professor Varat makes clear, the fundamental rights and interests protected under the Fourteenth Amendment clearly are narrower than the interests protected under the Privileges and Immunities Clause. *See Varat*, *supra* note 19, at 513-14 (stating that the standard used to interpret the application of the Privileges and Immunities Clause “is not as rigid as that applicable to classifications impinging on equal protection fundamental interests”).

34. *See Baldwin*, 436 U.S. at 388 (holding that a state’s right to impose higher fees on non-residents for an activity that is not a fundamental right is constitutional).

B. *The Free Movement Principle*

Although the Comity Clause is not coextensive with the Commerce Clause,³⁵ there is a special kinship between the two clauses that “stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism.”³⁶ As previously mentioned, both clauses share a common objective of promoting the union of “a single nation—one and the same people.”³⁷ The free movement principle—the freedom “to travel throughout the length and breadth of our land”³⁸—also shares a common heritage with these other two clauses. It, too, is mentioned expressly in the Fourth Article of the Articles of Confederation.³⁹ In adapting language from the Fourth Article of the Articles of Confederation into the Constitution’s Comity Clause, however, the drafters omitted language relating to interstate travel and the privileges of trade.⁴⁰ Even in the abbreviated version adopted in the Constitution, the relevance was clear: “the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation.”⁴¹ In *Crandall v. Nevada*,⁴² the Court concluded that the principle of free interstate movement was

35. The Privileges and Immunities 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.” *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The main objects of the dormant Commerce Clause, however, are “statutes that discriminate against interstate commerce.” *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). Justice Field concluded that corporations were not citizens for purposes of the Privileges and Immunities Clause, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 178 (1868), but the Court permits corporations to bring challenges to discriminatory state laws under the Commerce Clause. *See Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 893 (1988) (holding that if a state denies “like privileges to out-of-state persons or corporations engaged in commerce,” the state law is reviewed under the Commerce Clause). Not all commentators embrace this distinction of the scope covered by the two clauses. Professor Eule argues that the Privileges and Immunities Clause alone can counter the constitutional problems with commercial isolationism, and that the “legal underpinnings” of the Commerce Clause are “no longer sound.” Eule, *supra* note 26, at 451.

36. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (citations omitted).

37. *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

38. *Shapiro v. Thompson*, 394 U.S. 608, 629 (1969).

39. *See* ARTICLES OF CONFEDERATION art. IV (1777) (ensuring the right of people to travel freely from one state to another “to secure and perpetuate mutual friendship . . . among the people of the different states”).

40. *See* U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

41. *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975). Charles Pinckney, one of the delegates to the Constitutional Convention, also claimed that the Comity Clause was “formed exactly upon the same principles of the 4th article of the present Confederation.” 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (M. Farrand ed., 1911).

42. 73 U.S. 35 (6 Wall.) (1867).

predicated on the notion that “we are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”⁴³ In *United States v. Guest*,⁴⁴ Justice Stewart expanded upon the union-promoting norm in *Crandall* by asserting that the freedom to move interstate “occupies a position fundamental to the concept of our Federal Union [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the *stronger Union* the Constitution created.”⁴⁵

Interestingly, the common heritage and policy norm shared by the free movement principle with the Comity and Commerce Clauses often led the Court to trace the source of a “right to travel” to these two clauses.⁴⁶ That the Comity Clause may be the basis of the free movement principle seems uncontroversial, especially if a state erects actual barriers to travel to or within the state by non-residents.⁴⁷ This theory, however, only holds water if one of the privileges and immunities protected includes the freedom to travel.⁴⁸ Alternatively,

43. *Id.* at 49.

44. 383 U.S. 745 (1966).

45. *Id.* at 757-58 (emphasis added).

46. See *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969) (noting that the Court has used both the Privileges and Immunities Clause and the Commerce Clause to guarantee the right to interstate travel), *overruled in part on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Edwards v. California*, 314 U.S. 160, 172-73 (1941) (using the Commerce Clause to invalidate a California law that impeded the free interstate movement of an indigent). In *Edwards*, the Court opined that transportation of a person was commerce and thus subject to the Commerce Clause. See *id.* at 172. Expounding broadly on union-promoting values, Justice Byrne held that California could not isolate itself from the difficulties common to all states “by restraining the transportation of persons and property across its borders.” *Id.* at 173.

47. In this context, the state clearly would be discriminating between residents and non-residents—an activity generally at odds with the Commerce Clause. See *Baldwin v. Fish & Gaming Comm’n*, 437 U.S. 371, 483 (1978).

48. In the early case of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,320), Justice Washington stated that some of the privileges protected by the clause included “[t]he right of a citizen of one state to pass through, or to reside in any other state.” *Id.* at 552. Justice Douglas, however, called into question the notion that the Article IV clause had enough muster to protect a “right to travel” when he stated in *Edwards* that the Privileges and Immunities Clause “is primarily concerned with the incidents of citizenship . . . so that a citizen of one State is not in a condition of alienage when he is within or when he removes to another state.” 314 U.S. at 180 (Douglas, J., concurring) (internal quotes omitted). Moreover, Justice Douglas argued that the Privileges and Immunities Clause could not explain the *Crandall* decision because “[t]he statute in that case applied to citizens of Nevada as well as to citizens of other States. That is to say Nevada was not discriminating against citizens of other states in favor of its own.” *Id.* at 180-81 (Douglas, J., concurring) (internal quotes omitted). Justice Douglas’ opinion embraces the idea that the Privileges and Immunities Clause is a non-discriminating norm limiting the states and not a

the Comity Clause may protect the free movement principle indirectly because a non-resident denied travel by a host state may also be denied other privileges and immunities protected by that clause.⁴⁹

If the “right” or norm is asserted, however, by a resident who believes that he or she is being treated unfairly because of some durational residency requirement, the clause does not afford significant relief because its constitutional protection does not extend to residents.⁵⁰ It is in this latter context—where the newly arrived resident seeks to be treated on equal footing with long-term residents—that a more expansive norm of free movement beyond the Comity Clause becomes necessary. Furthermore, it is this particular understanding on which this Article attempts to shed some light. Leaving aside for a moment the question of textual sources for a “right to travel,” the freedom-to-move principle, the Commerce Clause, and the Comity Clause constitute a “trio” of union-conserving norms. The union-conserving norm should govern how we analyze the scope of constitutional restrictions. Assuming, as Justice Brennan argued, that efforts to assign the principle of free movement some textual source in the Constitution are “both inconclusive and unnecessary,”⁵¹ how do we define coherent parameters for this principle? This Article proffers that we look to the union-promoting norm for the necessary guidance.

II. THE SCOPE OF FEDERALIST LIMITATIONS

It seems that every anti-discriminatory, union-promoting principle embedded in the Constitution has been cast at one time as a personal or individual right. Prior to the New Deal Era, the Supreme Court declared that the right to carry on interstate commerce was “a right which every citizen is entitled to exercise under the Constitution and laws of the United States.”⁵² Similarly, early slaveholders professed a fundamental right under the Comity Clause to move their slave

separate source of substantive rights.

49. See David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 836 (1987) (arguing that because a citizen is given certain rights in another state by the Privileges and Immunities Clause, any restriction on travel would deny the citizen those rights).

50. See *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (noting that the Privileges and Immunities Clause guarantees that the citizen of one state who enters into another state has the same privileges as citizens of that other state).

51. *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring).

52. See *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) (finding that interstate commerce is not a right granted by a state and therefore, cannot be taken away by a state).

property through non-slaveholding territory.⁵³ The idea that Article IV could be an independent source of fundamental rights, however, was dispensed with early. For example, in the *Slaughterhouse Cases*,⁵⁴ the Court confined its scope to anti-discriminatory, union-promoting principles when it proclaimed that:

[the clause] did not create those rights, which it called privileges and immunities of the citizens of the States Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.⁵⁵

Likewise, in *Corfield v. Coryell*,⁵⁶ Circuit Justice Washington attempted to imbue the Article IV clause with a norm of substantive rights that citizens of all states would enjoy.⁵⁷ The Supreme Court in *Baldwin v. Fish & Game Commission*⁵⁸ later rejected that classification, thereby making clear that the relevant standard tested whether a state disadvantaged residents relative to non-residents.⁵⁹ In *Baldwin*, the Court held that the clause protected a specific interest if such interest was “fundamental,” that is, if the interest had any “bearing upon the vitality of the Nation as a single entity.”⁶⁰ The Court then ruled that the interest at issue, elk hunting, was not such a fundamental interest.⁶¹

53. See *Lemmon v. People*, 20 N.Y. 562 (1860) (rejecting a slaveholder’s claim that the state did not give him his entitled privileges and immunities, as he was given all the rights of a New York citizen).

54. 83 U.S. (16 Wall.) 75 (1873).

55. *Id.* at 77.

56. 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,320).

57. In Justice Washington’s view:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52.

58. 436 U.S. 371 (1978).

59. See *id.* at 381-83 (noting that the Privileges and Immunities Clause is meant to prevent one state from burdening citizens of another state).

60. *Id.* at 383.

61. See *id.* at 388 (“Equality in access to Montana Elk is not basic to the

Although commentators have criticized the Court's delimitation of the Privileges and Immunities Clause's protection to fundamental interests,⁶² the Court's focus on the underlying norms protected by the clause has remained consistent—non-discrimination and union-promotion. Similarly, nothing in the clause is particularly solicitous to individual rights. For example, one commentator has argued that the history of the drafting of the clause militates against any such notion that it is the source of fundamental rights common to all.⁶³ As such, the Comity Clause's normative vision is federalism, not individualism.⁶⁴

The types of interests protected by the Comity Clause vary from obtaining a job and acquiring property to equality in taxation.⁶⁵ In each case, the Court has been careful to scrutinize the relevant interest based upon its relative significance on the cohesiveness of a national union of several states.⁶⁶ On the other hand, fundamental individual rights—those rights under the Equal Protection Clause that are implicitly or explicitly guaranteed by the Constitution—require no such analysis.⁶⁷ Finally, the liberty to pursue a common calling, which is an interest the Court has labeled “one of the most fundamental of those privileges protected by the [Article IV]

maintenance or well-being of the Union Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause[,] elk hunting by non-residents in Montana is not one of them.”).

62. See Gary J. Simson, *Discrimination against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 385 (1979) (describing the highly speculative nature of “the relationship between the fundamental or nonfundamental character of a privilege or immunity and the amount of interstate friction generated by its selective denial to non-residents”); Varat, *supra* note 19, at 515 (stating that the result of the Court's approach is “to denigrate the constitutional concern with the use of state residence as a basis for classification and to shift the focus to the fundamentality of the activity in dispute”).

63. See Bogen, *supra* note 49, at 843 (arguing that the privileges and immunities contained in the clause were to be those rights separately granted by each state).

64. See John M. Gonzales, Comment, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism?*, 15 CAP. U. L. REV. 493, 499 (1986) (explaining that a state may not create obstacles to federalism).

65. See, e.g., *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 217-23 (1984) (finding non-residents' interests in employment in a state to be fundamental); *Blake v. McClung*, 172 U.S. 239, 246-55 (1898) (holding that an out-of-state creditor of a corporation must be afforded the same entitlements as an in-state creditor); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430-32 (1871) (finding that a state may not discriminate by imposing higher taxes on non-residents of the state).

66. See, e.g., *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280-81 (1985) (determining that the right to practice law comes within the Privileges and Immunities Clause because the practice of law is important to the national economy).

67. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-59 (1973) (finding no violation of the Equal Protection Clause because the state's system had a rational connection to a legitimate state purpose).

Clause,⁶⁸ was rejected as a fundamental individual right under equal protection analysis.⁶⁹

In the Commerce Clause context, the “individual rights” approach has been less of an issue, although it has had its adherents.⁷⁰ One commentator has exposed the flaws in the logic of such esoteric theories,⁷¹ and this Article is not the appropriate forum in which to embark on a critique of the political process theory of individual rights. Even those who subscribe to the political process theory acknowledge, however, that the Commerce Clause is an equality-based, and not a substantive, limitation.⁷² In other words, the Commerce Clause only would prohibit unequal treatment under state law, but would not look to the substance of the law’s contents.⁷³

The proper scope of the Commerce Clause was one issue in *Edwards v. California*.⁷⁴ In *Edwards*, the Supreme Court held that a California statute that made it a misdemeanor to bring, or assist in bringing, into the state any indigent non-resident imposed an unconstitutional burden on interstate commerce.⁷⁵ In their concurrences, Justices Douglas and Jackson insisted that, irrespective of the statute’s violation of interstate commerce principles, the statute violated a fundamental right—the right to travel—which the Justices located in the Privileges and Immunities Clause of the Fourteenth Amendment.⁷⁶ Justice Douglas was concerned that the majority decided the case under Commerce Clause principles when the issues actually involved a “right [that] occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”⁷⁷ Justice Jackson similarly opined that “[t]o hold that the measure of [a human

68. *United Bldg.*, 465 U.S. at 219 (explaining that most cases involving the Privileges and Immunities Clause deal with a fundamental activity).

69. *See id.* (stating that the right to government employment is not fundamental).

70. *See Collins*, *supra* note 16, at 45 n.18 (discussing process-based theory of constitutional law).

71. *See id.* at 110-16 (criticizing various arguments that apply personal rights of non-residents under political process theory to Commerce Clause).

72. *See Eule*, *supra* note 26, at 448 (noting that there is no reason that litigation under the Commerce Clause or the Privileges and Immunities Clause ought not to be played out on an equality-oriented stage).

73. *See John Harrison, Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387-88 (distinguishing substantive and equality-based constitutional limitations).

74. 314 U.S. 160 (1941).

75. *See id.* at 174 (finding that a state may not prohibit the transportation of indigents across its borders).

76. *See id.* at 177-85 (Douglas, J., concurring) (explaining that the right to move freely is fundamentally protected from a state’s interference).

77. *Id.* at 177-78 (Douglas, J., concurring) (noting that the right to travel between two states was protected as the right of “national citizenship”).

being's] rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."⁷⁸ Even though the Justices' views about the relative statures of individual rights versus federalist interests may be debatable, their separate analyses, that there is a distinction between the two principles, seems unimpeachable. Ironically, although both Justices were willing to distinguish the sorts of protection conferred by the Comity Clause and the Commerce Clause from fundamental individual rights,⁷⁹ they lumped the free movement principle into the latter category.⁸⁰

The free movement principle, as noted previously, has its origins in the same Article of Confederation as the Commerce and Comity Clauses.⁸¹ As such, the Comity Clause, the Commerce Clause, and the free movement principle share a common normative goal: to protect and promote the cohesiveness of the federal union. After the textual reference to the free movement principle was omitted from the final version of the Constitution, however, the courts somehow had to fashion this protection from scratch. In addition, without referring to any real historical support regarding its origins, the modern Supreme Court has surmised unambivalently that the right to travel always has been recognized and protected.⁸² Strangely enough, in its modern incarnation, this unwritten principle has managed to draw on a more expansive constitutional norm than its written counterparts—the Commerce and Comity Clauses. Instead of a union-promoting principle of federalist origins, it is now cast as a fundamental right. Nevertheless, the Court has continued to label the norm protected by this right as a union-conserving principle.⁸³

The battle over the constitutional interests embraced by the "right to travel" came to the fore in *Zobel v. Williams*.⁸⁴ The *Zobel* Court held that Alaska's income distribution plan that favored long-term residents over recent ones failed to qualify as a legitimate state

78. *Id.* at 182 (Jackson, J., concurring).

79. *See id.* at 178-80 (Douglas, J., concurring) (arguing that the right to travel was protected before the Fourteenth Amendment was passed because it is a fundamental right that is implied as a national right).

80. *See id.* at 181 (Douglas, J., concurring) (stating that a historical perspective shows that one's national citizenship grants the right of freedom of movement).

81. *See supra* notes 35-39 and accompanying text.

82. *See Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (stating that "the right to travel was grounded upon the Privileges and Immunities Clause") (citing *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

83. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (observing that the federalist structure makes the "government more responsive by putting the States in competition for a mobile citizenry").

84. 457 U.S. 55 (1982).

purpose under the minimal rational standards of the Equal Protection Clause.⁸⁵ There was a split, however, among the Justices as to whether the right to travel was a relevant inquiry and what norm the right was protecting. Chief Justice Burger, writing for the majority, referred to the analysis applied under the right in a footnote as “little more than a particular application of equal protection analysis.”⁸⁶ The Chief Justice’s cavalier dismissal of reliance on any “right to travel” analysis reveals the Burger Court’s discomfort with a constitutional principle imbued with uncertain applications and an incoherent scope.⁸⁷ In a separate concurrence, Justice Brennan, after acknowledging the federalist promotion norm underlying the right to travel, delved into an analysis of the illegitimacy of state purposes in passing durational-residency laws.⁸⁸ Such illegitimacy, he concluded, was subject to a different analysis from the “right to travel” and had a heritage that “reflects not the structure of the Federal Union but the idea of constitutionally protected equality.”⁸⁹ Therefore, whatever Justice Brennan’s objections to the majority’s opinion were, clearly he thought that the right to travel was a liberty interest derived from our federalist structure.

Similarly, of interest in *Zobel* was Justice O’Connor’s separate concurring opinion stating that the “right to travel” ought to be measured against “the principles implementing the privileges and immunities clause [of Article IV].”⁹⁰ Justice O’Connor’s concurrence was rich in historical detail about both the origin and scope of the Comity Clause and the right to travel.⁹¹ O’Connor’s quest to ground the right to travel in its historical context acknowledges that its proper boundaries ought to be provided by its union-conserving norms. In limiting the scope of the free movement principle to the Comity Clause, however, Justice O’Connor’s analysis may have been

85. *See id.* at 64-65 (finding that there is no legitimate state interest if a state divides its citizens into classes when determining benefits).

86. *Id.* at 60 n.6.

87. *See id.* (describing the nature and the source of the right to travel as “obscure” and noting that “[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis”).

88. *See id.* at 66-68 (Brennan, J., concurring) (determining that although Alaska’s statute threatens interstate travel and, thus, violates the Commerce Clause, the right to travel is established more fully under the guise of equal protection).

89. *See id.* at 68 (Brennan, J., concurring) (noting that the Constitution places all citizens on level ground, regardless of the individual citizen’s length of residency).

90. *Id.* at 74 (O’Connor, J., concurring).

91. *See id.* at 78-81 (O’Connor, J., concurring) (noting that although the Framers omitted the freedom of “egress and ingress,” they maintained that freedom in the Privileges and Immunities Clause).

too restrictive. As mentioned earlier, in the context of durational residency requirements, Article IV's limitations are inapplicable.⁹² Justice O'Connor attempted to deal with this problem by merging the non-resident and new resident classifications.⁹³ An interpretation, however, that holds that the Comity Clause also requires the state to treat all of its citizens equally conflates equality-based limitations with substantive ones. For, if the measure of equality is based on how the state treats its own citizens versus outsiders, such a measure collapses when the state treats its own citizens unequally. Likewise, if the premise is that some interests are so fundamental that the state may not even deprive its own citizens of them, then it is the same as stating that the Comity Clause imposes substantive limitations on the states. In any event, to avoid this jurisprudential difficulty all that may be required is to suggest that, in addition to the equality-based limitations of the Comity Clause, there are separate limitations inherent in a distinct free movement principle that shares a common heritage with the Comity Clause.

Justice Brennan's concurring opinion in *Zobel*, although agreeing with the majority's rational basis analysis, expounded on the federalist norms associated with the right to travel.⁹⁴ Alaska's rent division scheme would be invalid even prospectively, Brennan reasoned, because of its inconsistency with the structure of our federal union.⁹⁵ For if each state were to indulge in such a scheme to award its citizens on the basis of residency, then "the mobility so essential to the economic progress of our Nation . . . would not long survive."⁹⁶ Despite Justice Brennan's description of the constitutional policy underpinnings of the right to travel in such strong federalist terms, he nevertheless accepted, without qualification, the *Shapiro* language of fundamental rights without any analysis of how a purely federalist restriction could translate into such a right.⁹⁷

92. See *supra* note 50 and accompanying text.

93. See *Zobel*, 457 U.S. at 75 (O'Connor, J., concurring). O'Connor states that: Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier. The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that 'the citizen of state A who ventures in [Alaska]' to establish a home labors under a continuous disability.

Id. (citation omitted).

94. See *id.* at 66-68 (Brennan, J., concurring) (recognizing that states may engage in limited forms of healthy rivalry for purposes of attracting citizenry).

95. See *id.* at 68 (Brennan, J., concurring) (stating that "the acknowledged illegitimacy of [the] state purpose has a different heritage—it reflects not the structure of the federal union but the idea of constitutional equality").

96. *Id.* (Brennan, J., concurring).

97. See *id.* at 67 (Brennan, J., concurring) (accepting that the "principle of free

In subsequent cases, the Court has invoked the federalist underpinnings of this non-discriminatory principle, although it continues to confound this principle with the language of rights. In *Gregory v. Ashcroft*,⁹⁸ the Court held that one of the benefits of our federalist structure included “mak[ing] government more responsive by putting the States in competition for a mobile citizenry.”⁹⁹ In *Attorney General of New York v. Soto-Lopez*,¹⁰⁰ the plurality regarded the right as one that could be “inferred from the federal structure of our Constitution.”¹⁰¹ In addition, in *Saenz v. Roe*,¹⁰² the Court alluded to strong federalist principles in grounding the right to travel in the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁰³ The Court’s most explicit federalist pronouncement of the free movement principle, however, may be found in *Bray v. Alexandria Women’s Health Clinic*.¹⁰⁴

In *Bray*, certain abortion clinic and abortion rights organizations applied for an injunction against anti-abortion protesters, claiming, *inter alia*, that the protesters’ demonstration violated the interstate travel rights of women seeking access to the clinic.¹⁰⁵ In response, the Court briefly summarized the two sets of burdens that the right protected: “the erection of actual barriers to interstate movement” and “‘being treated differently’ from intrastate travelers.”¹⁰⁶ After observing that the only restriction of movement would have been in the vicinity of the clinic and hence, purely intrastate, Justice Scalia concluded that such a restriction would not “implicate the right to interstate travel, even if applied intentionally against travelers from other states, unless it is applied *discriminatorily* against them.”¹⁰⁷ In

interstate migration” is fundamental).

98. 501 U.S. 452 (1991).

99. *Id.* at 458. The Court also enumerated three other advantages of the federalist structure, stating that such a structure “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; [and] it allows for more innovation and experimentation in government.” *Id.*

100. 476 U.S. 898 (1986) (plurality opinion).

101. *See id.* at 902 (stating that the textual source of the right to travel is found in the Privileges and Immunities Clause of Article IV, the Commerce Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment).

102. 119 S. Ct. 1518 (1999).

103. *See id.* at 1527 n.17 (linking the right to travel with the federalism that the Framers crafted by “split[ting] the atom of sovereignty” and creating a government in which “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other”) (quoting *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

104. 506 U.S. 263 (1993).

105. *See id.* at 266-67.

106. *See id.* at 277 (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)).

107. *Id.*

this terse but sweeping statement, Justice Scalia dispensed with the idea that the right was a substantive norm capable of being invoked on its own terms.¹⁰⁸ In treating the right to travel as an equality-based restriction, the *Bray* Court implicitly rooted the right in the same framework as the Comity Clause and, in so doing, de-linked the right from the analysis applicable to other conventional rights. In other words, there was no right to travel as such; there was only a non-discriminatory principle that the travel opportunities of insiders and outsiders be treated equally.¹⁰⁹ Unfortunately, despite the holding in *Bray*, the Court's right to travel jurisprudence tottered along its confusing path.

Trying to distinguish an individual right and a non-discriminatory principle designed to foster federalist values may seem like a hair-splitting exercise. After all, both are broad restrictions against state power usually vindicated in courts by individuals.¹¹⁰ This may be in part why the Court has found it unnecessary to develop a constitutional typology to distinguish these principles. In practice, however, these distinct constitutional norms can have different consequences even if vindicated in a similar manner. The Court could have elucidated such alternative consequences in at least three different ways.

First, the Court may properly decide whether a non-discriminatory principle is violated only after it has adequately considered the constitutional value being protected by the principle. For example, a court may find that although a state has violated some non-discriminatory principle stemming from our federal structure, the context of the violation and the nature of the interest may dictate against finding a constitutional "violation" because there may be no threat to the underlying norm of promoting federalism, which is the norm that the principle is trying to protect.¹¹¹ As mentioned earlier,

108. *See id.*

109. *See id.* (finding that the interstate travel right does not arise for out-of-state travelers faced with an intrastate restriction unless the restriction is applied discriminatorily against them).

110. In some contexts, states may sue directly to vindicate the values embraced by these principles. *See, e.g.,* *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding that a New Jersey statute prohibiting importation of solid or liquid waste originating outside the territorial limits of the state violates the Commerce Clause); *Pennsylvania v. West Virginia*, 262 U.S. 553, 600 (1923) (holding a West Virginia act that compelled retention within the state of all natural gas produced therein to violate the Commerce Clause).

111. This kind of balancing is implicit in the Court's test for Comity Clause violations, which does not apply to all laws discriminating against non-residents, but only to those that affect fundamental interests. *See infra* notes 114-16 and accompanying text (discussing the two-part test for evaluating violations of fundamental rights).

fundamental rights issues under the Equal Protection Clause do not permit such analysis.¹¹²

Second, whether there is an individual right at stake may help define the proper level of scrutiny for reviewing discriminatory action. For example, under the Comity Clause, the Court has adopted a two-part test that is considerably less burdensome than the approach it uses to evaluate violations of fundamental rights.¹¹³ In the first step, the Court must determine whether the state rule involves a privilege and immunity of state citizenship—that is, whether it bears upon the “vitality of the Nation as a single entity.”¹¹⁴ The Court must then determine whether the differing treatment is justifiable—that is, whether the “restriction is closely related to the advancement of a substantial state interest.”¹¹⁵ Thus, where the first prong of the analysis requires courts to weigh the norm of union-promotion to assess fundamentality, which is not a requirement under conventional individual rights analysis, the second prong only requires that the relationship between the means and ends be substantial, unlike the compelling interest requirement under fundamental rights analysis.

In the context of the Commerce Clause, the standard only requires that the discriminatory statute “serve a legitimate state purpose,”¹¹⁶

112. See *supra* notes 66-69 and accompanying text (commenting on the absence of a federalism analysis relative to fundamental individual rights).

113. Under the fundamental rights analysis, the Court employs strict scrutiny in which the state must show that the infringing action promotes a compelling state interest. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (concluding that Oklahoma failed to show a compelling state interest that would be sufficient to override the equal protection concerns).

114. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

115. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 65 (1988) (citing *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985)); see also *Toomer v. Witsell*, 334 U.S. 385, 396-99 (1948) (holding a South Carolina shrimp fishing statute in violation of the Privileges and Immunities Clause because there was no reasonable state purpose for the discrimination against non-resident fishermen). In *Toomer*, the Court declared:

[The Privileges and Immunities Clause] does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Id. at 396 (citation omitted).

116. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (observing that part of the general analysis articulated in precedent governing Commerce Clause questions is to determine whether the statute serves a legitimate local purpose).

and that no non-discriminatory means to achieve the same end may exist.¹¹⁷ As mentioned earlier, some commentators have criticized the first prong of the Court's Article IV jurisprudence, not because they believed the clause solicitous of individual rights or interests, but because they found that the Court's analysis did not go far enough in promoting federalist ideals.¹¹⁸

Third, if we assume that Congress can, by legislation, modify or remove constitutional limits on state power stemming from federalist concerns but not limitations affecting constitutionally protected fundamental rights, then the Court's interpretive power may be limited depending on whether or not the constitutional limitation is classified as a fundamental right. This Article will examine these implications in greater depth.

Other than the consequences listed above, deciding whether or not certain anti-discriminatory principles are fundamental rights raises thorny political theory issues. For instance, what exactly is the individual merchant's role when he seeks to vindicate an anti-discriminatory norm under the dormant Commerce Clause or the Comity Clause? Questions also arise regarding the recently arrived migrant who faces discriminatory policies in the receipt of government benefits and then sues the state under a "right to travel." In the Commerce Clause context, Professor Collins argues that such a merchant acts, in effect, as a private attorney general, enforcing his right not as an individual, but as a surrogate for the state.¹¹⁹ Professor Collins' loose classification, which I shall call "surrogate rights," also provides a fitting description of those other constitutional protections derived from federalist promotion norms, such as the Comity Clause and the "right to travel." Extending the analogy to these other situations implies that, for example, when an individual sues under a "right to travel," he sues as a private enforcer of a norm designed to promote federalism, not as a bearer of a fundamental right. The individual may suffer from the discriminatory rule, not as an individual *per se*, but as an outsider—a resident of some other state that is the intended beneficiary of the federalist norm.

Surrogate rights thus differ from fundamental individual rights in that unlike the latter, the primary purpose is not to safeguard a

117. *See id.* (stating that an additional part of Commerce Clause analysis is whether "alternative means could promote [the] local purpose as well without discriminating against interstate commerce").

118. *See supra* note 62 and accompanying text (referencing critiques by Professors Stimson and Varat).

119. *See Collins, supra* note 16, at 46 (noting that the Commerce Clause is grounded in intergovernmental rights rather than in personal rights).

sacred realm for individuals against state intrusion. For a practical definition, surrogate rights can be considered those interests asserted by the individual against the state to protect values that are essential to the existence of one union, as opposed to values that presume there are certain liberties inherent to the individual upon which the state may not infringe.¹²⁰ Thus, the constitutional analysis relevant to one principle may not be germane to the other. In contrast, values that promote the federalist goal of union cohesion may co-exist quite comfortably with values that promote tyranny—an unlikely outcome in the case of fundamental individual rights.¹²¹

In its analysis of “right to travel” cases, however, the Supreme Court appears to blend the two approaches, often mixing and confounding the norms protected under the surrogate rights principles with those of individual fundamental rights.¹²² The result has been a jumbled and incoherent jurisprudence over the proper constitutional yardstick to measure the free movement doctrine, with inconsistencies both in the constitutional values protected as well as in the relevant standards of scrutiny. When the Court cloaks the “free movement doctrine” in the language of individual rights, there often are other constitutional interests at stake—interests that may be particularly solicitous of the individual as such, but lack the historical foundation to qualify as independent fundamental rights.

The next section of this Article examines the peculiar problems that arise from the Court’s attempt to juxtapose what are often two distinct constitutional values in its right to travel cases. This Article then suggests that a solution to this constitutional quagmire may be to adjudicate right to travel cases under the same or similar standards used under either the Comity Clause or the dormant Commerce Clause. This method would restore the “free movement doctrine” to its proper constitutional place as a federalism-promoting norm.

120. See Melanie Beth Oliveiro, *Human Needs and Human Rights: Which are More Fundamental?*, 40 EMORY L.J. 911, 920 (1991) (“[F]undamental rights presume an obligation on the state not to infringe certain basic freedoms. This creates a tension between the state and its citizens.”).

121. For example, it is not difficult to imagine a political order with a decentralized power structure that also has a regime that exercises arbitrary and absolute power.

122. See *infra* notes 165-73 and accompanying text.

III. STANDARDS OF REVIEW

A. *Of Fundamental Interests and Penalties*

Many cases regarding the “free movement doctrine” suggest a heritage that transcends federalism. In *Williams v. Fears*,¹²³ Chief Justice Fuller identified this “right of locomotion” as “an attribute of personal liberty . . . secured by the Fourteenth Amendment and by other provisions of the Constitution.”¹²⁴ The Chief Justice’s premonitions about the expansive scope of the doctrine proved not to be fortuitous. Barely forty years later, in his concurring opinion in *Edwards v. California*,¹²⁵ Justice Douglas referred to a “right of free movement,”¹²⁶ which he described as a principle of “mobility which is basic to every guarantee of freedom of opportunity.”¹²⁷ Subsequently, the Court in *Shapiro v. Thompson*¹²⁸ paved the way for the modern principle’s lofty constitutional position when it declared unequivocally that regardless of its origins, the right to travel was a fundamental right.¹²⁹

If the “right to travel” was really a fundamental right and an “attribute of personal liberty,” it would be entitled to the same protection as other similar fundamental rights, such as the freedom of association, speech, and religion. Equal in stature to those other rights, it always would be subject to the strictest scrutiny with a compelling means-end test of state interest.¹³⁰ It would be subject to these higher standards regardless of the nature of some other interest affected by the discriminatory action. That, however, has not been the fate of the right to travel. In evaluating whether there has been a violation and whether strict scrutiny is warranted, the Supreme Court

123. 179 U.S. 270 (1900).

124. *Id.* at 274.

125. 314 U.S. 160 (1941).

126. *See id.* at 180 (Douglas, J., concurring) (observing that “free movement of persons throughout this nation [is] a right of national citizenship”).

127. *See id.* at 181 (Douglas, J., concurring).

128. 394 U.S. 618 (1969).

129. *See id.* at 629-31 (construing the right to free movement from constitutional concepts of personal liberty).

130. *See* *Roe v. Wade*, 410 U.S. 113, 155 (1973) (asserting that where certain fundamental rights are involved, the Court has held that any regulations limiting these rights are justified only by a compelling state interest); *Shapiro*, 394 U.S. at 634 (announcing that “any classification which serves to penalize the exercise of [a] right, unless shown to promote a *compelling* governmental interest, is unconstitutional”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (considering whether a compelling state interest justifies the substantial infringement of appellant’s right to religious freedom).

has looked instead to other ancillary interests that may have affected the right to travel—a position more consistent with Comity Clause than with fundamental rights analysis.

Substantive due process and equal protection are the two conventional doctrinal bases in the Fourteenth Amendment for protecting fundamental rights. The substantive due process variant of fundamental rights protection targets the state's interference with an individual's fundamental liberty interest, regardless of how others are treated.¹³¹ Equal protection focuses on whether there is disparity in treatment among a class of individuals on the basis of the exercise of a fundamental right.¹³² Although the wisdom of having two independent strands of fundamental rights protection has had its share of controversy,¹³³ it has, for better or worse, become a staple of our modern constitutional jurisprudence.

In *Shapiro*, the Court chose to adopt the equal protection approach for its analysis of the right to travel and held that any classification that penalized the right to travel by discriminating among residents based upon duration of residency would trigger the strict scrutiny standard.¹³⁴ In *Dunn v. Blumstein*,¹³⁵ the Court clarified that the penalty factor promoted in *Shapiro* would have to burden recent migrants in a discriminatory fashion,¹³⁶ and decided that whether the

131. See *Ross v. Moffit*, 417 U.S. 600, 609 (1974) (characterizing the due process analysis as "emphasiz[ing] fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated").

132. See *id.* (describing the equal protection analysis as "emphasiz[ing] disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding unlawful a municipal ordinance making discriminations founded on the differences of race between otherwise similarly situated persons).

133. Justice Harlan had such misgivings in the right to travel context:

[When] a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.

Shapiro, 394 U.S. at 659 (Harlan, J., dissenting); see also Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1075 (1979) ("The Court could have done exactly what it did in *Shapiro* by relying on the constitutional right to interstate migration . . . without any reference whatsoever to equal protection.").

134. See *Shapiro*, 394 U.S. at 634 (stating that any classification that penalizes the right to travel is unconstitutional unless it is necessary in promoting a compelling state interest).

135. 405 U.S. 330 (1972).

136. See *id.* at 342 n.12 (explaining that there is no equal protection problem where an interstate migrant loses his driver's license due to the state's new higher

durational residence requirement actually deterred travel was irrelevant.¹³⁷ Infused in this idea of a penalty would be all sorts of jurisprudential baggage that would haunt any coherent development of this right.

In a qualifying statement meant to clear up the scope of the right to travel, the Court in *Memorial Hospital v. Maricopa County*¹³⁸ declared that “[a]lthough any durational residence requirement imposes a potential cost on migration[,] some ‘waiting period[s] may not be penalties.’”¹³⁹ Therein lies the riddle of the modern right to travel. For how does one distinguish between potentially costly but non-qualifying penalties and real penalties?¹⁴⁰ In response, the Court delineated two categories of qualifying penalties: (1) the deprivation of fundamental political rights, and (2) the deprivation of “necessities of life.”¹⁴¹ As to the first example, the Court previously had applied a fundamental rights penalty test in *Dunn v. Blumstein*,¹⁴² in which the Court invalidated as unconstitutional a state durational requirement for voting.¹⁴³ The necessities of life standard was applied in *Shapiro* and *Maricopa*.¹⁴⁴ The Court’s attempt to weigh the relevance of other ancillary interests in determining whether there was a violation of the right to travel had several important implications.

The first fundamental error in the Court’s penalty analysis in the right to travel cases lies in its inexplicable shift toward connecting the standard of review to the importance of some ancillary interest or to the extent to which the fundamental right has been impinged. Traditionally, fundamental rights cases did not require any such analysis.¹⁴⁵ As the Court held in *San Antonio Independent School District*

age requirement because the requirement is imposed equally on all residents, new and old).

137. See *id.* at 339 (announcing that “[i]t is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel”).

138. 415 U.S. 250 (1974).

139. *Id.* at 258-59 (citing *Shapiro*, 394 U.S. at 638 n.21).

140. Justice Rehnquist raised this concern when he questioned the majority’s reasoning in *Maricopa County*. See 415 U.S. at 284 (Rehnquist, J., dissenting). For academic commentary critical of the Court’s penalty analysis, see generally Thomas McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or “Newcomers” as a Suspect Class?*, 28 VAND. L. REV. 987, 996-1023 (1975).

141. See *Maricopa County*, 415 U.S. at 259 (discussing denial of life necessities under penalty analysis).

142. 405 U.S. 330 (1972).

143. See *id.* at 333.

144. See *Maricopa County*, 415 U.S. at 259 (noting that *Shapiro* found denial of a basic necessity of life). On the other hand, the Court noted that a previous Supreme Court case held that deprivation of in-state tuition rates from recent migrants did not constitute a penalty because in-state tuition rates did not qualify as a necessity of life. See *id.* at 259 n.12 (citing *Vandis v. Kline*, 412 U.S. 441, 452-53 n.9 (1973)).

145. See Note, *Durational Residence Requirements from Shapiro Through Sosna: The*

v. Rodriguez,¹⁴⁶ the “social importance [of the right] is not the critical determinant for subjecting state legislation to strict scrutiny.”¹⁴⁷ Rather, the relevant question is whether the right is “explicitly or implicitly guaranteed by the Constitution.”¹⁴⁸ To the extent the Court has tethered its right to travel analysis to some notion of penalty before it applies strict scrutiny, the Court forces the relevant inquiry to the nature and social importance of the benefit denied or harm inflicted, rather than to the right to travel itself. According to *Maricopa County*, the penalty does not have to be any previously recognized constitutional interest, and it does not have to actually deter travel.¹⁴⁹ Justice Rehnquist presciently observed that in developing its penalty analysis, the *Maricopa County* majority resorted to *ipse dixit*.¹⁵⁰ In cases following *Maricopa County*, the Court employed rational basis review rather than strict scrutiny review in analyzing right to travel claims that had used durational residence classifications.¹⁵¹ In *Attorney General of New York v. Soto-Lopez*,¹⁵² a plurality applied strict scrutiny to a civil service preference to Vietnam veterans with residency at the time they entered military service,¹⁵³ but two concurring Justices would have applied rational review to strike down the legislation.¹⁵⁴ In her dissent, Justice O’Connor chastised the plurality for rejecting rational basis review without explaining why strict scrutiny was more appropriate.¹⁵⁵ Justice O’Connor also berated the concurring Justices for wanting to strike down the law under rational basis review and then holding incorrectly that a desire to reward citizens was not a legitimate state

Right to Travel Takes a New Turn, 50 N.Y.U. L. REV. 622, 624 n.14 (1975) (defining “fundamental right” and setting out examples).

146. 411 U.S. 1 (1973).

147. *Id.* at 32.

148. *Id.* at 33-34.

149. See *Maricopa County*, 415 U.S. at 257-59; see also *Dunn v. Blumstein*, 405 U.S. 330, 339 (1972) (stating that the *Shapiro* Court did not base its findings on whether denial to welfare actually deterred travel).

150. See *Maricopa County*, 415 U.S. at 285 (Rehnquist, J., dissenting) (accusing the majority of declaring, rather than demonstrating, that the right at issue fell within the protected class of rights).

151. See *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (employing rational basis review in striking down a legislative scheme to distribute surplus oil revenues to citizens based on duration of residency); *Hooper v. Bernadillo County Assessor*, 472 U.S. 612, 618 (1985) (applying rational basis review in striking down a limited property tax exemption for Vietnam veterans with residency established prior to a certain date).

152. 476 U.S. 898 (1986) (plurality opinion).

153. See *id.* at 904.

154. See *id.* at 912-13 (Burger, C.J., concurring) (asserting that the legislation should be struck down based on its irrationality); *id.* at 916 (White, J., concurring) (same).

155. See *id.* at 918-19 (O’Connor, J., dissenting).

purpose.¹⁵⁶ The inconsistency in standards of review applied by members of the Court illustrates the unease that certain members have with the idea of the fundamentality of the right to travel. It also demonstrates the confusion wrought by the *Shapiro, Dunn*, and *Maricopa County* line of cases in using penalization analysis to determine the relevant standard of scrutiny rather than referring to the underlying fundamental right itself.

In due time, an expected twist in right to travel jurisprudence was bound to occur. This happened in *Sosna v. Iowa*.¹⁵⁷ In *Sosna*, Justice Rehnquist, a dissenter in *Shapiro, Dunn*, and *Maricopa County*, wrote the majority opinion. At issue was an Iowa law requiring one year of residency to file for divorce.¹⁵⁸ Shunning the scrutiny set forth in the *Shapiro* line of cases, Justice Rehnquist held that the plaintiff's delay in obtaining a divorce did not "irretrievably foreclose[] her from obtaining some part of what she sought,"¹⁵⁹ as was the case in *Shapiro, Dunn*, and *Maricopa County*. For this reason, Justice Rehnquist did not apply the same scrutiny standards and penalty analysis as in the *Shapiro* line of cases.¹⁶⁰ More importantly, without specifying the relevant standard of scrutiny, Justice Rehnquist held that the state's need to control and regulate domestic relations was sufficient to justify the burdensome law.¹⁶¹ In dissent, Justice Marshall criticized the majority's analysis as an "ad hoc balancing test" that weighed the importance of the state's interest against the individual harm suffered by the discriminatory legislation.¹⁶²

Commentators have suggested that *Sosna* was an anomaly—a mistaken and confusing departure from the Court's right to travel jurisprudence.¹⁶³ In some ways, however, *Sosna* was in line with the spirit, if not the literal word, of *Shapiro* and its progeny. It is in part the indeterminacy of what exactly constitutes a penalty that permits

156. See *id.* at 919-20 (O'Connor, J., dissenting) (criticizing Chief Justice Burger for assuming that the state's purpose is illegitimate).

157. 419 U.S. 393 (1975).

158. See *id.* at 395 (citing a state law that required a person seeking a divorce to be a resident for at least one year prior to filing for it).

159. *Id.* at 406.

160. See *id.* at 409.

161. See *id.* at 408-09 (holding that enacting residency requirements clearly falls within a state's domestic relations jurisdiction).

162. See *id.* at 419 (Marshall, J., dissenting) (expressing concern regarding the consequences of the Court's new approach to equal protection analysis).

163. 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, 904-05 (1997) (noting that the Court established a new ad hoc balancing test in *Sosna*, but never applied the test to any subsequent case involving the right to travel); Note, *supra* note 145, at 665-67 (expressing confusion about the *Sosna* Court's departure from precedent in its application of an ad hoc balancing test).

courts to incorporate their own idiosyncratic values and engage in the kind of ad hoc balancing test that Justice Marshall criticized.¹⁶⁴ Thus, determining which activities qualify as protected “necessities of life” may require such balancing especially when the Court has not set out a clear baseline against which one can measure the importance of the activity. The state’s interest may be a relevant factor in determining such a baseline. For example, if a state has wide latitude in dispensing a certain kind of benefit in any manner it deems fit, it seems logical that denial of that benefit probably would not infringe on some necessity of life. To an extent, however, examining how the state dispenses a benefit reveals something about the state’s interest in administering the program. This kind of information, in turn, may be useful in assessing the fundamentality of the activity.

The irony in most right to travel cases is that although some of the relevant jurisprudence has been framed in terms of fundamental rights, in practice it often comes closer to the analysis performed under the Comity Clause. For example, under traditional fundamental rights analysis, the social importance of the right is irrelevant in determining the level of scrutiny.¹⁶⁵ All that is required to invoke strict scrutiny is that the right be implicitly or explicitly protected by the Constitution.¹⁶⁶ Like the first prong of the analysis under the Comity Clause, however, current right to travel analysis requires some assessment of the fundamentality of the interest affected before employing a higher level of scrutiny.¹⁶⁷ Moreover, like Comity Clause analysis, current right to travel analysis has been subject to significant criticism for imposing a fundamentality requirement.¹⁶⁸

It is not just the treatment of fundamentality of interests that links the modern jurisprudence of the two principles. In practice, the way some courts apply the compelling state interest requirement under right to travel cases is more similar to the substantial interest test of

164. In this context, the majority in *Sosna* may have considered the interest in divorce not substantial enough to constitute a penalty on travel, a conclusion with which Justice Marshall disagreed. See *Sosna*, 419 U.S. at 419-20 (Marshall, J., dissenting) (asserting that denial of the right to obtain a divorce “clearly” meets the standard of what constitutes a penalty on interstate travel).

165. See *supra* notes 145-48 and accompanying text.

166. See *supra* notes 147-48 and accompanying text.

167. See *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (declaring the state’s interest fundamental before applying a strict scrutiny standard).

168. See, e.g., Note, *supra* note 145, at 668-69 (criticizing the Court’s use of “severity of the penalty” analysis, which focuses on whether the benefit denied is fundamental and the extent to which the restriction deters travel).

the Comity Clause than it is to conventional compelling interest analysis.¹⁶⁹ For example, one lower court found that the state goal of preserving a responsive government could withstand strict scrutiny, even though it was not clear that the resulting burden on travel was the least drastic means for achieving that end.¹⁷⁰ In addition, the *Sosna* Court appeared to adopt a less demanding level of scrutiny, although it never said so explicitly.¹⁷¹

The same analogy applies when the Court employed rational basis analysis in the right to travel cases. In practice, the results have more closely resembled the more exacting substantial interest test than conventional rational basis analysis.¹⁷² Justice O'Connor was correct in chastising the plurality in *Soto-Lopez* and the majority in *Zobel* for examining the right to travel under the rational basis standard of equal protection doctrine and then finding that a state's interest in compensating its citizens for past contributions fell short under those standards.¹⁷³ Justice O'Connor recognized that, although the "principle of free movement" deserved more rigorous treatment than would be available under rational basis analysis, it would be an error to correct this doctrinal mistreatment by increasing the standards for what constituted a legitimate state purpose.¹⁷⁴ Thus, in *Zobel*, Justice O'Connor surmised that the majority achieved the correct result but

169. One court explicitly stated that intermediate scrutiny applies to the right to intrastate travel. See *Lutz v. City of York*, 899 F.2d 255, 269-70 (3d Cir. 1990).

170. See *Chimento v. Stark*, 353 F. Supp. 1211, 1218 (D.N.H. 1973) (upholding a seven-year residency requirement for gubernatorial candidates and rejecting the plaintiff's argument that the requirement impinges on a candidate's fundamental right to interstate travel).

171. See *Schumacher v. Nix*, 965 F.2d 1262, 1267 n.8 (3d Cir. 1992) (observing that the standard applied by the *Sosna* Court more closely resembled rational basis review than strict scrutiny).

172. Under the rational relationship test of equal protection, courts usually show considerable deference to legislative judgment. See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). As stated by the *McGowan* Court:

The constitutional safeguard [of the Fourteenth Amendment] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it.

Id. But cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (declaring that some state goals, such as a "desire to harm a politically unpopular group, . . . are not legitimate state interests.").

173. See *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 919 (1986) (plurality opinion) (O'Connor, J., dissenting) (disagreeing with the plurality for utilizing an unclear standard of equal protection review); *Zobel v. Williams*, 457 U.S. 55, 73 (1982) (O'Connor, J., concurring) (criticizing the majority for assuming that the state's declared interest was "wholly illegitimate").

174. See *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring).

used the wrong label.¹⁷⁵ It was a change to the relevant doctrine that was necessary, not a change of the standards under the wrong doctrine.¹⁷⁶

B. *An Instrumental Right?*

Other evidence of the right to travel's questionable status as a fundamental right is that it rarely, if ever, is invoked as a stand-alone right or interest in the core cases dealing with interstate movement. One commentator has gone so far as to describe the right to travel as a mere "instrumental" right . . . trigger[ing] the application of strict scrutiny only when linked to the infringement of other fundamental rights, such as voting.¹⁷⁷ Many right to travel cases arise in the context of states' efforts to protect their welfare budgets from indigent migrants;¹⁷⁸ thus, a recurring theme in those cases has been the right of indigents to public assistance. In some cases, it is difficult to surmise whether the Court's core constitutional concern is the right to travel or the right to public benefits.¹⁷⁹ In his dissent in *Dandridge v. Williams*,¹⁸⁰ Justice Marshall argued that *Shapiro* should be read as holding that the right to welfare benefits was fundamental for the purposes of strict scrutiny under equal protection analysis.¹⁸¹ Justice Marshall reasoned that when benefits are "necessary to sustain life, stricter constitutional standards . . . are applied to the deprivation of that benefit."¹⁸² Justice Marshall's perspective is understandable given the *Shapiro* Court's elevation of access to

175. *See id.* at 71-81 (O'Connor, J., concurring) (concluding that the majority's decision should have been reached by examining the state legislation under the Privileges and Immunities Clause).

176. *See id.* (O'Connor, J., concurring) (advocating the use of the Privileges and Immunities Clause rather than the doctrine of equal protection).

177. Note, *supra* note 145, at 671.

178. *See Saenz v. Roe*, 119 S. Ct. 1518, 1521-30 (1999) (adjudicating a California law denying welfare benefits to indigents); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 262 (1974) (rejecting Arizona's asserted protection of the public fisc as a valid reason to draw distinctions between classes of citizens); *Shapiro v. Thompson*, 394 U.S. 618, 622-27 (1969) (striking down a statute that prohibited benefits to residents of less than one year on grounds that it discriminated against the indigent); *Edwards v. California*, 314 U.S. 160, 173 (1941) (declaring as unconstitutional a state statute that punished a person for bringing indigents into the state).

179. In *Shapiro*, Justice Harlan, in dissent, suggested that the majority was trying to invent a right to public benefits when he stated: "I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." 394 U.S. at 662 (Harlan, J., dissenting).

180. 397 U.S. 471 (1970).

181. *See id.* at 520 (Marshall, J., dissenting) (citing *Shapiro* as an example of a case in which the Court required the state's interest to be "compelling" because the state's legislation implicated a fundamental right).

182. *Id.* at 522 (Marshall, J., dissenting).

welfare benefits to a “fundamental” interest. Indeed, some early commentators on *Shapiro* viewed the case as establishing indigence as some sort of suspect class under an equal protection analysis.¹⁸³ In view of the Court’s willingness to approve state residence requirements in other contexts such as in-state tuition rates,¹⁸⁴ divorce,¹⁸⁵ and the right to vote in primary elections,¹⁸⁶ the Court’s lack of deference to the state on the issue of welfare payments makes one wonder whether the right to travel is just a subterfuge in cases where the Court is more concerned with the constitutional status of the indigent.

The irony in the Court’s apparent solicitude for the indigent in the context of the freedom to travel is that paupers or indigents historically have been excluded from the doctrine’s protection. The power of local communities to exclude paupers from their territory was a feature of the early common law that was embraced by the colonies.¹⁸⁷ Moreover, the Articles of Confederation—the historical antecedent of the modern right to travel—specifically excepted paupers, vagabonds, and fugitives from the privileges and immunities of free citizens as well as from free travel.¹⁸⁸ In *New York v. Miln*,¹⁸⁹ an 1837 case, the Court upheld a New York statute requiring masters of vessels arriving in New York to report the names of foreign passengers (these included passengers from other states) so as to “prevent them from becoming chargeable as paupers.”¹⁹⁰ Observing that New York had a unique problem with the heavy influx of foreign immigrants, the Court declared it within the state’s police power to protect its citizens from the evil of “being subjected to a heavy charge in the maintenance of those who are poor.”¹⁹¹ In *Edwards v.*

183. See Margaret K. Rosenheim, *Shapiro v. Thompson: “The Beggars are Coming to Town,”* 1969 SUP. CT. REV. 303, 331-32 (arguing that earlier cases relied on standard suspect criteria, including race, in analyzing equal protection claims, while the Court in *Shapiro* focused on indigence in its equal protection inquiry).

184. See *Starns v. Malkerson*, 401 U.S. 985 (1971) (upholding without opinion a one-year residency requirement for in-state tuition).

185. See *Sosna v. Iowa*, 419 U.S. 393, 395-96 (1975) (adjudicating durational residency requirements related to filing for divorce).

186. See *Rosario v. Rockefeller*, 410 U.S. 752, 753-62 (1973) (finding that a state’s time limit to enroll for voting in primary elections was legitimate).

187. See Raoul Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 854-58 (1981).

188. See *supra* note 19 and accompanying text.

189. 36 U.S. (11 Pet.) 102 (1837).

190. *Id.* at 133.

191. *Id.* at 141 (noting that New York had more immigrants arriving than any other city in the United States). In the *Passenger Cases*, 48 U.S. 283 (7 How.) (1849), Justice Wayne, although agreeing that a state statute levying a tax upon aliens arriving at its ports was an unconstitutional regulation of interstate commerce, reasoned that the state still had the power to fence out paupers:

California,¹⁹² the Court eventually rejected the idea endorsed by *Miln* that a state could fence out poor people because they constituted a "moral pestilence."¹⁹³ The Court observed that the problem of indigence was now a national as well as local problem,¹⁹⁴ and that it did not feel bound by outdated thinking that appeared to connect poverty with immorality.¹⁹⁵ Any notion that *Edwards* and *Shapiro* effectively had extended a special right of basic needs of life to the poor, however, was obliterated by a line of cases starting with *Dandridge v. Williams*.¹⁹⁶

The vestiges of *Shapiro* remain, however, and the Court continues to give heightened constitutional status to a range of human activities it deems fundamental.¹⁹⁷ In the context of free interstate movement, the Court's peculiar treatment of these "fundamental" human activities that do not otherwise qualify as constitutionally protected rights has led to a sort of quasi-rights regime.¹⁹⁸ In some sense, the

But I have said the States have the right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men. . . . Paupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment as convicts The States may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off.

Id. at 426 (Wayne, J., concurring). In dissent, Justice Taney expressed similar sentiments. *See id.* at 466-67 (Taney, J., dissenting) (noting that states may prevent people from entering if they are injurious to the state's welfare); *see also* *Missouri, Kan. & Tex. Ry. v. Haber*, 169 U.S. 613, 629 (1898) (noting that a state may legislate to exclude convicts, paupers, idiots, lunatics, persons likely to become a public charge, and persons infected by contagious disease); *Plumley v. Massachusetts*, 155 U.S. 461, 478 (1894) (stating that states may exclude from their territories paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious disease in order to promote the health, safety, and morals of citizens); *Hannibal & St. J. R.R. v. Husen*, 95 U.S. 465, 471 (1877) (observing that states may exclude convicts, paupers, idiots, lunatics, persons likely to become a public charge, and persons afflicted with contagious disease).

192. 314 U.S. 160 (1941).

193. *Id.* at 177 (finding that no one seriously would contend that an unemployed or poor person was necessarily immoral).

194. *See id.* at 175 (illustrating that the relief of the needy has become the common responsibility and concern of the whole nation).

195. *See id.* at 177 ("Poverty and immorality are not synonymous.").

196. 397 U.S. 471, 484 (1970) (holding that there is no right to receive welfare benefits); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (holding that a right to education is not guaranteed by the Constitution); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no constitutional guarantee to access to housing).

197. *See* Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 80-88 (1982) (discussing the Supreme Court's methods for determining fundamental rights)

198. *See* Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to*

values embedded in many of these interests do not separately rise to constitutional magnitude, but they somehow do so when another constitutionally protected interest is implicated—no matter how remotely.¹⁹⁹ Deciphering which interest is more pertinent is confusing. Thus, in denial of benefit cases, the Court often drifts from arguments stressing the importance of free movement across the country to arguments lamenting the state's inhospitable treatment of the poor.²⁰⁰ In *Dunn*, *Maricopa County*, and *Sosna*, for example, there may have been scant, if any, evidence of deterrence to actual travel itself,²⁰¹ but the Court struck down the denial of benefits as unconstitutional penalties on the exercise of the right to travel.²⁰²

In blending the sound doctrinal issues of one constitutional interest with the strong factual predicates of another, the Court somehow was able to make whole one constitutional violation. Thus, the claim of a right to travel provided a judicial vehicle for righting the wrong of legislative apathy towards the poor by the states—a judicial power that otherwise was limited by *Dandridge*. Although this instrumental value may be worthy enough, it complicates any meaningful understanding of the contours of the right to travel. So far, as a personal right, such contours are blurry and ill-defined. More promising would be to restore to the free movement principle its original understanding as a limitation of interstate conflict as expressed in the Articles of Confederation.²⁰³

Travel Cases, 21 WM. MITCHELL L. REV. 457, 458 (1995) (noting that “the right to travel remains somewhat of an enigma—an ill-defined right emanating loosely from various penumbras within the Constitution”).

199. As previously mentioned, the penalty analysis under *Shapiro* and *Maricopa County* does not require any meaningful deterrence to the individual's ability to travel. See *supra* note 149 and accompanying text.

200. The *Shapiro* Court's reasoning that any distinction between classes of migrating indigents based on the amount of welfare payments sought was untenable underscores the Court's concern with poverty in that case. See *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969). In *Edwards*, Justice Douglas observed that denial of benefits to poor people would undermine national unity—a federalist goal, but he also noted that it would “introduce a caste system utterly incompatible with our system of government.” *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring).

201. See *supra* note 149 and accompanying text. In *Maricopa County*, the Court even noted that there was no evidence on the record that anyone was ever deterred from travel by the restriction. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974). *Dunn* clarified that in *Shapiro*, the compelling state interest requirement “did not rest upon a finding that denial of welfare actually deterred travel.” *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972).

202. See, e.g., *Maricopa County*, 415 U.S. at 258 (noting that a classification that operates to penalize those who have exercised their right to travel must be justified by a compelling state interest).

203. See *Shapiro*, 394 U.S. at 630-31 (suggesting that the right to travel emanates from the very federal structure that the Constitution sought to create); accord Kathryn D. Katz, *More Equal than Others: The Burger Court and the Newly Arrived State*

This Article has advanced the idea that the free movement doctrine is purely a vestige of our federalist structure and not a fundamental right.²⁰⁴ There is, of course, a middle ground between these two positions—the doctrine could be both an attribute of our federalist structure in addition to a fundamental personal right.²⁰⁵ If there is a unifying theme to the Court's right to travel jurisprudence, it is probably that there is this duality of values embodied in this "right."²⁰⁶ Although the Court has latched on to the terminology of personal rights in describing this principle, it never has advanced a basis in our early constitutional history to support its analysis.²⁰⁷ As a value antecedent to the Constitution and spelled out in the Articles of Confederation, the free movement principle shares the same origin with two other principles that embody purely federalist values.²⁰⁸ In addition, there is no principled basis to segregate these various doctrines from the underlying norm that binds them—the promotion of a stronger federal union.²⁰⁹ Although the Court has paid lip service to this federalist norm in all of its right to travel cases, its personal rights analysis has all but obscured this norm from attaining any meaningful constitutional importance.

Resident, 19 N.M. L. REV. 329, 370 (1989) (noting that the primary values supporting the unconstitutionality of legislation disadvantaging newer residents are those arising from our federal structure).

204. *But see* Paul Ades, *The Unconstitutionality of "Antihomless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 606-08 (1989) (reviewing Supreme Court decisions and concluding that the right to travel is a fundamental right grounded in either the Due Process or Equal Protection Clauses).

205. *See* *Durational Residency Requirements for Health Care for Indigents*, 88 HARV. L. REV. 112, 115-16 (1974) [hereinafter *Durational Residency*] (referring to the right to travel as a fundamental right originating from federalist values).

206. *Compare* Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 901 (1986) (plurality opinion) (describing the long-time recognition of the freedom to travel as a basic right under the Constitution), *with id.* at 902 (noting the important role that "the principle of free interstate migration . . . has played in transforming many States into a single Nation").

207. *See* Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 332 (noting that the right to travel remains elusive because the Supreme Court has not definitively located the origin of the right); Karin Fromson Segall, *It's Not Black and White: Spencer v. Casavilla and the Use of the Right of Intrastate Travel in Section 1985(3)*, 57 BROOK. L. REV. 473, 481 (1991) (observing that the Court has declined to find a source for the right to travel).

208. *See supra* notes 37-39 and accompanying text.

209. *Cf. Durational Residency, supra* note 205, at 116-17 (describing state sovereignty and the individual right to travel as "competing values").

IV. IMPLICATIONS

Because state power to discriminate against non-residents or recently arrived residents is in tension with the constitutional goals of a cohesive federal union and an open economy, it seems obvious that the objectives of interstate equality often may trump that of a state's particular interests. By contrast, it is less clear why congressional powers to limit interstate movement should be similarly restricted. The current Court, however, views the free movement principle as an inherent personal right that is able to be asserted against the states as well as the federal government. For example, in *Saenz v. Roe*,²¹⁰ the Court struck down California's attempt to administer a durational residence requirement for welfare benefits, despite the plan's authorization by Congress.²¹¹ Upon review, the Court held that federal permission for states to implement durational residence schemes was of no consequence because it had "consistently held that Congress may not authorize the States to violate the Fourteenth Amendment."²¹² In theory, the Court's analysis is consistent with its prior decisions that the right to travel is a right inherent to the individual. But when viewed as a limitation on interstate conflict, it is illogical to construe the free movement principle also as a limitation on the powers of the national government.

Both the Commerce Clause and the Comity Clause apply to state and municipal decisions that attempt to discriminate against non-residents or interstate commerce.²¹³ The federal government is appropriately exempt from these limitations because the norm

210. 119 S. Ct. 1518 (1999).

211. *See id.* at 1528-30. In 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Act of 1996, 42 U.S.C. §§ 601-619 (Supp. III 1997), which replaced the Federal Aid to Families with Dependent Children program with a program of block grants to the states called the Temporary Assistance to Needy Families. Under this new program, welfare benefits devolved from being a federal entitlement to being administered by the states. *See id.* § 601(b). As part of the program, Congress also allowed states to adopt durational residence requirements in their various plans. *See id.* § 604(c).

212. *See Saenz*, 119 S. Ct. at 1528 (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)). In *Shapiro*, the Court held that a federal statute that approved one-year residency requirements in state welfare programs was invalid because Congress was "without power to enlist state cooperation in a joint federal-state program by legislation which authorize[d] the States to violate the Equal Protection Clause." *Shapiro*, 394 U.S. at 641.

213. *See Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978) (holding that the Comity Clause prohibits discrimination against non-residents that burdens an essential activity or the exercise of a basic right); *Cooley v. Board of Wardens*, 53 U.S. (9 How.) 299, 317-19 (1851) (stating that the Commerce Clause limits state regulation of interstate commerce even when competing federal law exists).

underlying these constitutional provisions is to restrict “state” activities that are disruptive to our federal structure. As previously mentioned, the primary norm of the free movement principle is essentially coextensive with those of these other two clauses.²¹⁴ If the federal government is exempt from the reach of such federalist restraints on the states, should it not be able to allow the states to adopt the limitations directly?

Professor Cohen has refined the argument made above that where constitutional restrictions against state action stem solely from distribution of power in the federal system, Congress should be able to remove such restraints without offending the Court’s interpretive powers.²¹⁵ His thesis is simple: if Congress is allowed to make certain laws or pursue certain policies entrusted to it under the Constitution, then it is unnecessary for the courts to protect that federal authority from being delegated by the same body to which it is entrusted.²¹⁶ Professor Cohen’s logic is supported by the inference that if Congress can otherwise make the same policy choices reached by the states directly, then it ought not matter if it delegates those powers to the states.²¹⁷ As Professor Cohen notes, any danger of excessive delegation is mitigated by the improbability that Congress willingly would give away the crux of its federal powers to the states.²¹⁸ Furthermore, it is unlikely that any standard to check Congress delegation of power would be coherent.²¹⁹

The current jurisprudence of the Commerce Clause allows Congress to make such delegations.²²⁰ In *Prudential Insurance Co. v. Benjamin*,²²¹ for example, the Court held that Congress’ power to sanction discrimination by the states under the Commerce Clause was virtually unlimited.²²² Given the underlying thread that links the

214. See *supra* notes 44-46 and accompanying text.

215. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 388 (1983).

216. See *id.* (arguing that “Congress should be able to remove constitutional limits on state power if those limits stem solely from divisions of power within the federal system”).

217. See *id.* at 408-09.

218. See *id.* at 408 (stating that “Congress is unlikely to give away the store”).

219. See *id.* at 408-10 (concluding that identifying a viable standard for checking excessive delegation is an insuperable task and impossible to apply).

220. See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982) (“It is indeed well settled that Congress may use its powers under the Commerce Clause to ‘[confer] upon the States an ability to restrict the flow of interstate commerce.’”) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980)).

221. 328 U.S. 408 (1946).

222. The Supreme Court held that the plenary scope of the Commerce Clause gave Congress the power:

[N]ot only to promote but also to prohibit interstate commerce That

Commerce Clause to the Comity Clause and free movement principle, the analysis under these three doctrines should be similar. Dissenting in *Shapiro*, Chief Justice Warren recognized this link when he stated that “[t]he issue before us must therefore be framed in terms of whether Congress may create minimal residence requirements, not whether the States, acting alone, may do so.”²²³ Justice Warren approached the question in *Shapiro* in the same light as the *Edwards* case: as a possible Commerce Clause violation instead of a violation of some kind of fundamental individual right.²²⁴ He then concluded that Congress could mandate such residency requirements on the basis of its power to control interstate commerce.²²⁵ Again, although the free travel principle may not be a mere extension of the Commerce Clause, the relationship between the two sufficiently justifies Justice Warren’s approach.

Ironically, when faced with the same question, Professor Cohen toyed with the idea that the right to interstate travel might fall under the rubric of limitations that exist against both state and federal intrusion alike.²²⁶ That outlook, however, was informed by the Court’s prior precedent that the free interstate travel doctrine was a “right” protected under the Equal Protection Clause.²²⁷ As argued previously in this Article, that assumption is incorrect. Understanding the free travel principle as just another limitation of our federalist structure, there should be no basis for the separate treatment of discrimination against interstate commerce and discrimination against interstate travel.

Unfortunately, the perspective expounded upon by Professor Cohen and being promoted here—that Congress ought to be able to delegate to the states powers that it is not constitutionally restrained from exercising itself—is not altogether consistent with Supreme

power does not run down a one-way street or one of narrowly fixed dimensions. . . . This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.

Id. at 434-35 (citations omitted).

223. *Shapiro v. Thompson*, 394 U.S. 608, 647-48 (1969) (Warren, C.J., dissenting).

224. “Although the Court dismisses [the statute at issue] with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residency requirements.” *Id.* at 654 (Warren, C.J., dissenting).

225. *See id.* at 652 (Warren, C.J., dissenting).

226. *See Cohen, supra* note 215, at 417 (noting the strong arguments that the right of interstate travel is protected from both federal and state intrusion).

227. *See id.* at 417 & n.140.

Court precedent. In *Knickerbocker Ice Co. v. Stewart*,²²⁸ the Court held that Congress delegation to the states of the power to set compensation laws governing maritime injuries was invalid because congressional power to set regulatory policy on maritime affairs was exclusive, and the constitutional requirement for uniformity mandated that such power could not be delegated to the states.²²⁹ The Court reached the same conclusion in *Washington v. W.C. Dawson & Co.*²³⁰ Although Professor Cohen has dismissed these cases as constitutional anomalies that were decided incorrectly,²³¹ at least one commentator has gone to great length to question the historical and structural basis of Cohen's thesis.²³² According to this commentator, the delegates to the Constitutional Convention never intended Congress to have the power to approve discrimination by one state against interstate trade or against the citizens of another state.²³³ Even if we assume that Congress is precluded from delegating some of its policy-making authority to the states, surely it should be able to legislate on its own welfare policies that discourage states from becoming welfare magnets. Not only does the federalist nature of the freedom of travel endorse this position, it also makes good policy sense. For it is Congress, not the courts, that is better positioned to weigh the trade-off between a compromise in certain federalist restrictions against the states and a countervailing need to promote other national policy goals, such as the disbursement of welfare benefits.²³⁴ One commentator has suggested that the Court's attempt to weigh this balance on its own has been a disastrous experiment that could lead to a race to the bottom among state welfare policies.²³⁵

The other implications of adopting a purely federalist interpretation of the free movement principle have been discussed

228. 253 U.S. 149 (1920).

229. *See id.* at 164-65 (holding that the subject of maritime law was entrusted to Congress and that delegating this power would disrupt the harmony and uniformity that the Constitution intended to establish).

230. 264 U.S. 219 (1924). The *W.C. Dawson* Court held that Congress cannot delegate its power to alter, amend, or revise the maritime law. *See id.* at 227.

231. *See* Cohen, *supra* note 215, at 405 (asserting that Congress has the power to delegate to the states according to *Prudential Insurance Co.*).

232. *See* George Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 358-59 (1988) (arguing that the Framers limited Congress' commerce powers such that only the Supreme Court could enforce the Privileges and Immunities Clause).

233. *See id.* at 373-77.

234. *But see id.* at 375-77 (arguing that the delegates to the Constitutional Convention vested the power of preventing state discrimination in the judicial branch because they did not trust the task to the political will of Congress).

235. *See* Zubler, *supra* note 163, at 930-32 (explaining that federalism allows states to race to the bottom regarding policies that deal with externalities, such as welfare).

elsewhere in this Article.²³⁶ In sum, such an understanding would bring the treatment of the standards of review under the right to travel closer to those of other federalist limitations, such as the substantial interest test of the Comity Clause. This would reduce the inconsistent standards that have marred the review of the “right to travel” since *Shapiro* and bring those same standards closer to vindicating the doctrine’s federalist values. Returning the free movement principle to its federalist origins also would clarify what norm the principle is designed to protect: the limitation of interstate conflict through the promotion of a coherent federal union. Various members of the Court have attributed all kinds of norms to the “right to travel,” ranging from free commerce to that of a special liberty interest. This confusing legacy stems from the Court’s reluctance to ground the principle in any coherent constitutional framework.

CONCLUSION

The scope of the so-called “right to travel” depends on whether the right is considered a fundamental right inherent to the individual or a federalist restriction on the power of the states. The Supreme Court’s current jurisprudence is an unwieldy blend of federalist principles and individual rights—a combination that does not find support in the historical antecedents of the free movement doctrine. As applied against the states, the free movement doctrine is not based on individual rights, but on constitutional limitations that promote federalism—limitations that are presumably inapplicable to the federal government. Other constitutional limitations that share a common heritage with this doctrine include the Commerce Clause and the Comity Clause of Article IV. With barely any analysis, however, the Court has held summarily that Congress is without power to impose any such restrictions that may burden interstate travel. The Court’s treatment of the free movement doctrine as a personal right has led to two other complications that continue to haunt the doctrine’s development: inconsistencies in the applicable standard of scrutiny, as well as confusion as to the underlying constitutional norm being protected. To halt this confusion, the Court should restore to the free movement principle its stature as a constitutional limitation rooted in our federalist structure of government.

236. See *supra* notes 110-18 and accompanying text.