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Right Road, Wrong Vehicle? Rethinking Thirty Years of Right to Travel Doctrine: Saenz v. Roe, 119 S. Ct. 1518 (1999)

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RIGHT ROAD, WRONG VEHICLE?: RETHINKING THIRTY YEARS OF RIGHT TO TRAVEL DOCTRINE: *Saenz v. Roe*, 119 S. Ct. 1518 (1999)

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I. INTRODUCTION

"California is not only one of the largest, most populated, and most beautiful States in the Nation; it is also one of the most generous."[1] However, not all of the California state lawmakers are comfortable with the idea of the state being so generous. Such discomfort at least seemed apparent in 1992 when the California legislature enacted a statute under the guise of "welfare reform" which would have made the state a little less generous with respect to recent immigrants to the state.[2] In an effort to reduce its welfare expenditures, California placed a limitation on the monetary benefit that a family might receive under the Aid to Families with Dependant Children program ("AFDC").[3] In doing so, California imprudently infringed upon the affected families' right to travel[4] - the substantive right at issue in *Saenz v. Roe*.[5]

Specifically, the statute limited a family's benefit for the first twelve months of its residency in California to the lesser of either the maximum benefit for which the family would have been eligible in the state of its prior residence, or the amount for which longer term California residents were eligible.[6] The positive effect of the statute was a projected annual savings of close to eleven million dollars on California's welfare rolls.[7] On the other hand, the effect on those citizens who bore the brunt of the

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[1] Saenz v. Roe, 119 S. Ct. 1518, 1521 (1999).

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

[3] *See id.*; *see also* Green v. Anderson, 811 F.Supp. 516, 517 n.1 (E.D. Cal. 1993).

AFDC is a cooperative federalism program created by the Social Security Act of 1935. 42 U.S.C. §§ 601-609 (1982). AFDC benefits are financed jointly by the federal government and the states. The program is administered by the states under a plan approved by the Secretary of Health and Human Services. 42 U.S.C. § 601 (1982).

Id.

[4] *Saenz*, 119 S. Ct. at 1527.

[5] *Id.* at 1518.

[6] *Id.* at 1521. The statute at issue provides:

(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

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

[7] *Saenz*, 119 S. Ct. at 1528.

legislation would have been an inability to find housing, given California's high housing costs.[8]

In May of 1999, the United States Supreme Court declared the California law unconstitutional in *Saenz v. Roe*.[9] The Court found that under the language of the statute, welfare recipients would be unjustly classified according to their length of residency in California.[10] Residents who had resided in California for fewer than twelve months would be further classified based on their state of prior residence.[11] The Court held that such classifications, and the limited welfare benefits which would result, impermissibly restricted the fundamental right of a United States citizen to travel to, and relocate in, California.[12]

Finding that the statute could not survive the scrutiny typically applied to laws which abridge fundamental rights of United States citizens,[13] the Court followed in the footsteps of strong precedent in striking down the law.[14] Indeed, the leading case involving facts

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[8] *See, e.g.*, Roe v. Anderson, 966 F. Supp. 977, 981 (E.D. Cal. 1997) (discussing the disparity between the benefits available to respondents in this case and the cost of housing in California).

[9] 119 S. Ct. at 1518.

[10] *Id.* at 1528.

[11] *Id.* at 1527. The Court found that the law effectually divided citizens into forty-six different classifications for welfare benefit purposes, subject to forty-six disparate benefit levels. *Id.* One group represented citizens who had resided in the state for more than twelve months. *Id.* Included in that first group were new citizens who were either of foreign origin or who had migrated from states with higher benefit levels than California, who would also receive the regular California benefit. *Id.* Forty-five additional groups represented new citizens arriving from any of the forty-four other states or the District of Columbia which offered lower welfare benefits than California. *Id.*

[12] *Id.* at 1527-28.

[13] It is not within the scope of this Note to offer a thorough analysis of the various "levels of scrutiny" the Supreme Court applies to statutes challenged on Fourteenth Amendment grounds. Briefly, "[s]trict scrutiny [under the Equal Protection Clause] . . . is reserved for state 'classifications based on race or national origin and classifications affecting fundamental rights.'" United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)). Under such a scrutiny, the government usually loses the case. *See* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: the Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1153 (1992). On the other hand, if the challenged statute does not classify impermissibly, it will be subject to "rational basis scrutiny." *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and will prevail if "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 319-20. Under rational basis review, the government usually prevails. Chemerinsky, *supra*, at 1154. *See also* Shapiro v. Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting). For a heralded commentary on "strict scrutiny" analysis, see Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972).

[14] *See, e.g.*, *Shapiro*, 394 U.S. at 618 (striking down state statutes denying welfare benefits to needy families for the first twelve months of state residency).

practically identical to those in *Saenz*, *Shapiro v. Thompson*,[15] necessitated that the Court hold as it did, lest it decide to overturn much of the right to travel doctrine which has evolved over the past thirty years.[16]

However, the intrigue of *Saenz* does not rest on the substantive holding, but rather on the fact that the Court found that the right to travel is protected by the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Equal Protection Clause.[17] Thus, for the first time in sixty-four years, a majority of the Court struck down a state law using a clause which has for the most part laid dormant since the *Slaughter-House Cases*[18] decision in 1872.[19]

As far as the substantive holding of *Saenz* is concerned, the Court made the correct decision, in light of precedent on similar facts, in striking down the California statute.[20] However, in choosing to find protection for the right to travel under the Privileges or Immunities Clause of the Fourteenth Amendment, the Court jettisoned its established source for resolving such a dispute – the Equal Protection Clause.[21] This Note discusses how such a doctrinal shift was both unnecessary[22] and unexplained,[23] and why it is problematic to future Fourteenth Amendment jurisprudence.[24]

Part II of this Note examines the events leading up to *Saenz*, as well as the actual holding of the *Saenz* Court.[25] While acknowledging that the substantive decision was correct, Part III will discuss three flaws that the *Saenz* Court made in deciding the case under the Privileges or Immunities Clause of the Fourteenth Amendment.[26] First, the Court had no reason to abandon the equal protection rationale laid out in earlier cases, most

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[15] *Id.*

[16] *See infra* notes 106-19 and accompanying text.

[17] *Saenz*, 119 S. Ct. at 1526.

[18] 83 U.S. 36 (1872). As Justice Thomas stated, "the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*." *Saenz*, 119 S. Ct. at 1535 (Thomas, J., dissenting).

[19] *C.f.* Colgate v. Harvey, 296 U.S. 404 (1935) (striking down a state banking regulation for violating the Privileges or Immunities Clause of the Fourteenth Amendment), *overruled in part by* Madden v. Kentucky, 309 U.S. 83 (1940).

[20] *See infra* notes 106-19 and accompanying text.

[21] *See infra* note 154 and accompanying text.

[22] *See infra* notes 169-76 and accompanying text.

[23] *See infra* notes 177-202 and accompanying text.

[24] *See infra* notes 203-28 and accompanying text.

[25] *See infra* notes 33-97 and accompanying text.

[26] *See infra* notes 98-228 and accompanying text.

notably *Shapiro*.[27] Second, even if it had a reason, it utterly failed to explain what that reason was.[28] Third, despite deciding the case under the rubric of the Privileges or Immunities Clause, the analysis was identical to the Equal Protection Clause fundamental rights analysis used in *Shapiro* and its progeny.[29] Thus, it is unclear whether the Court has truly given new (and autonomous) life to the long-forgotten Privileges or Immunities Clause, or rather created a surrogate for Equal Protection Clause fundamental rights analysis.[30] Part IV of this Note concludes that the *Saenz* Court has left Fourteenth Amendment jurisprudence more nebulous than it was prior to the case.[31] By usurping established Equal Protection Clause analysis with something that looks just like it, but which is now termed the Privileges or Immunities Clause analysis, the Court has created a fork in the road of Fourteenth Amendment jurisprudence without indicating which path lower courts should follow. Given the already complicated framework of current Fourteenth Amendment jurisprudence,[32] whatever the vicissitudes one ought to expect from the Supreme Court, a doctrinal shift of this caliber will not likely be a simple shift for lower court judges to accommodate.

II. BACKGROUND

A. Anderson v. Green*: The First Salvo*

In 1992, California passed a statute that would have limited certain AFDC benefits available to families which had resided in California for fewer than twelve months.[33] As was required under federal law, the statute[34] was approved by the United States Secretary of Health and Human

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[27] *See infra* note 154 and accompanying text; *see also infra* notes 169-76 and accompanying text.

[28] *See infra* notes 177-202 and accompanying text.

[29] *See infra* notes 203-28 and accompanying text.

[30] For a brief discussion of "fundamental rights" see *supra* note 13.

[31] *See infra* notes 229-30 and accompanying text.

[32] *See, e.g., infra* notes 193 and 207.

[33] Saenz v. Roe, 119 S. Ct. 1518, 1521 (1999).

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

Services.[35] After its enactment, the statute was challenged by three recent arrivals to California whose benefits were curtailed by the statute.[36]

The United States District Court for the Eastern District of California was sympathetic, and in *Green v. Anderson*,[37] the court enjoined the statute from taking effect on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[38] The district court found that the deterrent effect the statute might have on citizens thinking of moving to California from other states unlawfully impinged upon a citizen's fundamental right to relocate permanently without fear of discriminatory treatment in California once he or she arrived.[39] In so ruling, the district judge offered a thorough explanation of the case law supporting his opinion.[40] The Ninth Circuit summarily affirmed the decision[41] and the Supreme Court granted certiorari.[42] The Supreme Court, however, was unable to reach the merits in *Anderson v. Green*[43] because the issue was rendered moot by other proceedings.[44] Thus, the lower court opinions were vacated.[45] The issue would shortly present itself again to the Court in *Saenz*.[46]

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[35] *Saenz*, 119 S. Ct. at 1522.

[36] *Id.* (referring to Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993)).

[37] 811 F. Supp. 516 (E.D. Cal. 1993).

[38] *Id.*

[39] *Id.* at 521.

[40] *Id.* at 518-23.

[41] Green v. Anderson, 26 F.3d 95 (9th Cir. 1994).

[42] 513 U.S. 922 (1994).

[43] Anderson v. Green, 513 U.S. 557 (1995).

[44] *Id.* Because the AFDC is a federally administered program, state administration of the plan is subject to approval by the United States Secretary of Health and Human Services. *See* Beno v. Shalala, 30 F.3d 1057, 1061 (9th Cir. 1994). As noted in *Beno*, 42 U.S.C. § 1396(a)(1) requires that the Secretary not approve any State plan for medical assistance (e.g., Medicaid) if the state's AFDC payment levels are below the payment levels in effect under the plan on May 1, 1988. *Id.* Because California's AFDC payment schedule did reduce benefit payments to below May 1988 levels, CAL. WELF. & INST. CODE ANN. § 11450.03 (West Supp. 1999) jeopardized California's fourteen billion dollar Medicaid program. *Id.* This roadblock was removed by the Secretary's waiver of the restrictions in October 1992. *Id.* at 1062.

[45] *Anderson*, 513 U.S. at 559. *Beno* vacated the waiver. 30 F.3d at 1076. California capitulated that CAL. WELF. & INST. CODE ANN. § 11450.03 (West Supp. 1999) would not take effect. *Id.* The lower court decisions were, thus, vacated by the Supreme Court for being moot. *Id.* at 560.

[46] Saenz v. Roe, 119 S. Ct. 1518 (1999).

B. Congress Pushes States to Pass Durational Residency Requirements

At the time the Supreme Court was vacating the appellate court decision in *Green v. Anderson* as moot[47], all California citizens were back on equal footing as far as AFDC benefits were concerned.[48] California also let the matter drop for the time being.[49] In 1996, however, the Congress of the United States enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").[50] PRWORA replaced the AFDC program with the Temporary Assistance to Needy Families program ("TANF").[51] Two changes of potential importance were incorporated into the PRWORA which would differentiate the TANF program from the AFDC program: 1) Congress authorized the states to enact durational residency requirements, like that of California's, to limit TANF payments to families for up to their first twelve months of residency;[52] and 2) Congress removed the requirement that states get approval for their programs from the Secretary of Health and Human Services.[53]

C. Saenz v. Roe

Because, under PRWORA, California was no longer required to get federal approval to enact its TANF program,[54] California announced that Cal. Welf. & Inst. Code Ann. § 11450.03 (West Supp. 1999) would go into effect, statewide, on April 1, 1997.[55] On that same day, Brenda Roe and Anna Doe (using fictitious names) filed an action challenging the constitutionality of section 11450.03.[56] As part of their action, the plaintiffs challenged the constitutional right of Congress to authorize the enactment of section 11450.03 via PRWORA.[57]

Both of the plaintiffs in *Roe v. Anderson* (respondents before the Supreme Court in *Saenz*) averred that they moved to California to obtain

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[47] *Anderson*, 513 U.S. at 560 (vacating Green v. Anderson, 26 F.3d 95 (9th Cir. 1994).

[48] *Saenz*, 119 S. Ct. at 1522.

[49] *Id.*

[50] 42 U.S.C. § 604(c) (1996).

[51] *Saenz*, 119 S. Ct. at 1522.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Roe v. Anderson, 966 F. Supp. 977 (E.D. Cal. 1997).

[57] *Saenz*, 119 S. Ct. at 1523.

employment, without the intent to take advantage of higher welfare benefits.[58] This fact was not disputed by California, which admitted that the plaintiffs were bona fide citizens of the state.[59] Thus, the question presented to the district court was whether the state could classify residents for welfare distribution purposes based only on how long they had lived in California.[60] Having addressed the identical question in *Green v. Anderson*,[61] and noting that nothing had changed doctrinally in the over four-year interim since *Green*, the district court judge granted the plaintiffs' request for an injunction.[62] Finding that the trial court did not abuse its discretion in granting the injunction, the Ninth Circuit affirmed without discussion of the merits.[63]

D. A Seven to Two Decision by the Supreme Court

1. The Arguments of the Parties

As petitioners before the Supreme Court, the State of California argued throughout the litigation that section 11450.03 did not violate or restrict any constitutional or fundamental right except, perhaps incidentally, the right to travel.[64] California argued that the motivation for the statute was to save money and that it was neither the purpose nor effect of the statute to impede immigration.[65] In addition, the State tried to distinguish the facts from those in *Shapiro v. Thompson*[66] by pointing out that, under section 11450.03, new citizens did not face a total deprivation of benefits and were in fact in no worse position in terms of income than they were prior to their arrival in California.[67] As a proper economic

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[58] *Roe*, 966 F. Supp at 980.

[59] *Saenz*, 119 S. Ct. at 1527.

[60] *Roe*, 966 F. Supp. at 978.

[61] 811 F. Supp. 516 (E.D. Cal. 1993).

[62] *Roe*, 966 F. Supp at 978-79 (stating that "[b]ecause the controlling legal principles and precedents have remained unchanged, the court reaches the same conclusion and again finds that [section] 11450.03 makes an unconstitutional distinction between California residents based on the length of their residency").

[63] Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998).

[64] *Saenz*, 119 S. Ct. at 1527.

[65] *Id.* at 1524-25.

[66] 394 U.S. 618 (1969).

[67] *Saenz*, 119 S. Ct. at 1523.

regulation, California argued that the statute passed muster under rational review analysis.[68] For its part, the United States, an amicus for California, argued that PRWORA provided California the endorsement it needed to enact section 11450.03.[69]

Brenda Roe and Anna Doe, respondents before the Supreme Court, argued that section 11450.03 infringed upon their fundamental right to travel.[70] They suggested that their right to travel was rooted in either or all of the Equal Protection Clause, the Citizenship Clause, the Privileges or Immunities Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, section 2, and the structure of the American constitutional scheme.[71]

2. The Majority Opinion

The Supreme Court held in a seven to two decision that section 11450.03 violated respondents' right to travel and affirmed the lower court's rulings.[72] However, the Court did not confine its opinion to the exact legal reasoning of the lower courts. Quite exceptionally, the Court departed from the precedent upon which the lower courts had granted (and affirmed) the injunction,[73] and found the basis for respondents' right to travel in the Privileges or Immunities Clause of the Fourteenth Amendment.[74] Noting that it had long recognized the right to travel as a fundamental right of somewhat unknown origin, the Court set about defining the right in tripartite fashion.[75] The first component of the right to travel is the right to travel *simpliciter* (i.e., the right to cross state borders).[76] The second component is the right to enjoy the benefits of the another state's citizens while visiting that other state.[77] The third

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[68] *Id.* For an explanation of rational basis review see *supra* note 13.

[69] *Saenz*, 119 S. Ct. at 1525.

[70] Brief for Respondents at *11, Saenz v. Roe, 119 S. Ct. 1518 (1999) (No. 98-97), LEXIS 1998 U.S. Briefs 97, Doc. 4.

[71] *Id.* at Question Presented No. 1.

[72] *Saenz*, 119 S. Ct. at 1530.

[73] *See supra* notes 38, 62-63 and accompanying text.

[74] *Saenz*, 119 S. Ct. at 1526.

[75] *Id.* at 1525.

[76] *Id.*

[77] *Id.*

component is the right to relocate and enjoy the benefits of state citizenship immediately upon becoming a bona fide citizen.[78]

It was this third component – the right to relocate without deprivation of equal rights within the new state of citizenship – that the Court found was implicated and violated by the California law.[79] The violation of this right, therefore, constituted a violation of the Privileges or Immunities Clause, the substantive constitutional provision to which the Court ascribed protection for the third component of the right to travel.[80] Applying strict scrutiny fundamental rights analysis, the Court noted that the law failed on every ground presented by the State.[81] First, although California denied its purpose was to deter migration, the Court noted that the lower courts believed a deterrent effect was the "apparent purpose" of the statute.[82] If such were the case, it was unconstitutional for that reason alone.[83] Furthermore, the Court noted that even if the purpose was purely economic, despite welfare savings being a compelling reason, the law was not strictly tailored to serve its purpose.[84] Because California did not contend that the respondents were not bona fide citizens, the Court found it impermissible to make one group of citizens (shorter-term residents) bear the entirety of the cost-savings law on no other grounds than duration of residency.[85] The Court also readily dismissed the Solicitor General's claims that California was authorized to enact such a law by virtue of PRWORA, stressing that Congress cannot authorize a state to violate the Constitution.[86]

3. The Dissents

Chief Justice Rehnquist argued that the Privileges or Immunities Clause was an ill-advised judicial tool in *Saenz* for two reasons: first, there was no precedent for its use under similar facts;[87] second, there was very

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[78] *Id.*

[79] *Id.* at 1526.

[80] *Id.*

[81] *Id.* at 1527-28.

[82] *Id.* at 1528 n.19.

[83] *Id.* at 1528.

[84] *Id.* The Court noted that the evidence indicated that a monthly per beneficiary reduction of seventy-two cents would have netted the same result as the statute. *Id.*

[85] *Id.* at 1527-28.

[86] *Id.* at 1528.

[87] *Id.* at 1532 (Rehnquist, C.J., dissenting). Having first discussed prior right to travel cases which have found the right in the Equal Protection Clause, notably Shapiro v. Thompson, 394 U.S.

little precedent for its use in Fourteenth Amendment jurisprudence at all.[88] Pointing out that the law in no way worked to frustrate one's ability to physically pack up her belongings and move to California, Chief Justice Rehnquist was bewildered as to how the majority could state the right to travel was in any way impinged.[89] Finding for himself that the issue presented concerned the legitimacy of a new resident's California citizenship, the Chief Justice saw nothing wrong with the California legislature enacting what he believed to be a reasonable residency requirement.[90]

Justice Thomas, joined by the Chief Justice, chided the majority in his separate dissent for invoking the Privileges or Immunities Clause without regard for the implications of what it was doing.[91] Pointing out, as did the Chief Justice, that precedent for its use in such a case did not exist,[92] Justice Thomas admonished the majority for applying such a callow constitutional provision without greater investigation into the actual purpose of the Privileges or Immunities Clause.[93] Indeed, given the judicial treatments of the various clauses of the Fourteenth Amendment, Justice Thomas suggested that before the Privileges or Immunities Clause should be put to use, its place in the Fourteenth Amendment paradigm should be more thoughtfully considered.[94] According to Justice Thomas, the majority's use of the Clause contravened what he believes is the original intent of the drafters of the Clause.[95] Justice Thomas' interpretation of the Clause is that it was meant to protect fundamental rights.[96] His intimated concern was that the majority had ascribed to the Privileges or Immunities Clause a

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618 (1969), Chief Justice Rehnquist commented that, in finding the right in the Privileges or Immunities Clause, the "Court thus departs from *Shapiro* and its progeny." *Id.* *See also infra* note 154 and accompanying text.

[88] *Saenz*, 119 S. Ct. at 1530, 1532 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that "[b]ecause I do not think any provision of the Constitution – and surely not a provision relied upon for only the second time since its enactment 130 years ago – requires this result, I dissent." *Id.* at 1530.

[89] *Id.* at 1531 (stating that "[a] person is no longer 'traveling' in any sense of the word when he finishes his journey to a State which he plans to make his home").

[90] *Id.* at 1531-35.

[91] *Id.* at 1538 (Thomas, J., dissenting).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1535.

[96] *Id.* at 1538.

right to welfare – a right which he believes to be outside the realm of "fundamental."[97]

III. ANALYSIS

In *Saenz*, the Supreme Court handed down the correct substantive holding in finding that California, by denying welfare benefits to qualified and bona fide California citizens based on their length of in-state residency, violated those citizens' right to travel, and more specifically, the right to relocate. To have reached a result other than the one it did, the Court would have had to overrule thirty years of right to travel decisions.[98]

Nevertheless, in abandoning its prior Equal Protection Clause rationale for like circumstances,[99] the Court unnecessarily complicated right to travel jurisprudence. The Court replaced the established substantive guarantee (i.e., the Equal Protection Clause)[100] of at least part of the right to travel with the Privileges or Immunities Clause without any explanation for its change of posture. In so doing, the Court shifted the constitutional landscape, leaving constitutional lawyers, lower court judges, and law school professors without a clear picture of the future of right to travel doctrine.[101]

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[97] *Id.* Justice Thomas noted that the inference to be drawn from the notes of the 39th Congress along with the historical understanding of "privileges or immunities" is that "at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law." *Id.* "Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the [s]tate for less than a year in the distribution of welfare benefit appears contrary to the original understanding and is dubious at best." *Id.* For one commentator's opinion about this "right to welfare" concept, see Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?"*, WASH. U. L.Q. 405, 417 (1972) (commenting that in *Shapiro*, the Court was "only one step" from saying indigents have a right to welfare).

[98] *See infra* notes 106-19 and accompanying text.

[99] *See infra* note 154 and accompanying text.

[100] *See infra* note 154 and accompanying text.

[101] If law students learn anything about the Privileges or Immunities Clause in Constitutional Law, it is that the *Slaughter-House Cases*, 83 U.S. 36 (1872), rendered the clause virtually impotent. *See, e.g.*, Saenz v. Roe, 119 S. Ct. 1518, 1535 (1999) (Thomas, J., dissenting). At least in theory, use of the Privileges or Immunities Clause in *Saenz* throws that impotency notion into question.

A. Durational Residency Requirements Implicate the Fundamental Right to Travel

In *Saenz*, the bona fide citizenship of the respondents was not in question.[102] Therefore, the Supreme Court correctly found that California had no legitimate reason for treating equally situated citizens differently.[103] The Court also correctly held that an act of Congress cannot sanction a state law which is otherwise impermissible under the Fourteenth Amendment.[104] Furthermore, for the Court to have decided the case under either of the dissenting justices' rationales would have entailed that the Court either overlook or overrule its previous thirty years' worth of right to travel decisions.[105]

1. Where Bona Fide Citizenship Is Not at Issue

Despite the doctrinal complications rendered by the *Saenz* Court in invoking the Privileges or Immunities Clause, the substantive conclusion in the case is amply supported by case law.[106] For example, in *Shapiro v. Thompson*,[107] the Court looked at three states' welfare assistance programs which all denied certain AFDC applicants benefits.[108] In all three states, the applicants before the Court had been denied all AFDC benefits because they had resided in their respective states for fewer than twelve months.[109] In all three situations, it was not disputed that the AFDC applicants were bona fide citizens of their respective states.[110] The states, however, maintained that in the interest of the fiscal integrity of their welfare programs, the one-year waiting period was both necessary and justified.[111]

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[102] *Saenz*, 119 S. Ct. at 1527.

[103] *Id.*

[104] *Id.* at 1528.

[105] *See infra* notes 106-19 and accompanying text.

[106] For example, twelve-month residency requirements have been struck down for violating a citizen's right to travel where the respective laws operated to deny, during that one-year period, a new citizen's AFDC benefits completely, *see* Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote in state elections, *see* Dunn v. Blumstein, 405 U.S. 330 (1972), and non-emergency hospitalization or emergency care, *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

[107] 394 U.S. 618 (1969).

[108] *Id.* *Shapiro* looked at the welfare laws of Connecticut, Pennsylvania, and the District of Columbia. *Id.* For purposes of this discussion, the District of Columbia will be referred to as a "state."

[109] *Id.* at 622.

[110] *Id.* at 627.

[111] *Id.* at 627-28.

It was determined in *Shapiro* that the purpose of the statute was to deter immigration from other states.[112] That determination having been made, the *Shapiro* Court seized upon the right to travel as its vehicle for striking down the state welfare laws at issue.[113] Importantly, the Court suggested that if it upheld such a regulation within the context of welfare cost savings, then the floodgates would open in other areas where a state was looking to save some money, and "[a]ppellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection."[114]

The *Shapiro* Court held that neither the deterrence of welfare families migrating from other states, nor the imposition of limitations on new bona fide citizens, are constitutionally permissible objectives.[115] To justify such a law, the Court held that a state would be subjected to strict scrutiny analysis.[116] Two of the states in *Shapiro* argued that congressional approval[117] of the state laws justified their use.[118] The Court readily

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[112] *Id.* at 628.

[113] *Id.* at 629-30.

[114] *Id.* at 632.

[115] *Id.* at 633.

[116] *Id.* at 638. "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." *Id.* However, the Court noted:

> [w]e imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Id. at 638 n.21 (emphasis omitted).

[117] *Id.* at 638. "Connecticut and Pennsylvania argue . . . that the constitutional challenge . . . must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program." *Id.*

> Section 402(b) of the Social Security Act of 1935, as amended, 42 U.S.C. § 602(b), provides that: 'The Secretary shall approve any state assistance plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.'

Id. at 638-39.

[118] *Id.* at 638.

dismissed this argument in saying, "Congress may not authorize the States to violate the Equal Protection Clause."[119]

If there is a difference between *Saenz* and *Shapiro*, it is merely one of degree, and not substance. After all, the discrimination found in right to travel cases rests not in the dollar amount, but in the "penalty" imposed upon the individual for exercising his or her right to travel.[120] Such a penalty manifests itself when one bona fide citizen is denied the *same* benefit given to another based solely on the amount of time either citizen has resided in the state.[121] In any event, given the high cost of living of California,[122] it would often be likely that new citizens moving in from other states would face a greater deprivation in pure dollar amounts under California's partial payment plan than if they had moved to another state where benefits had been completely denied.[123]

In *Saenz*, Chief Justice Rehnquist went to some length in pointing out the inconsistencies of the Court's stance on durational residency requirements. He noted how the Court sometimes finds that durational residency requirements penalize the exercise of one's right to travel,[124] while at other times the Court finds such residency requirements do not penalize the exercise of one's right to travel.[125] The problem is a natural

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[119] *Id.* at 641.

[120] *See, e.g.*, Saenz v. Roe, 119 S. Ct. 1518, 1527 (1999). "[S]ince the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty." *Id.*

[121] *Id.*

[122] As an example of California's high cost of housing, it is interesting to note that at the time the *Saenz* case was decided in the trial court, the maximum AFDC (the precursor to the TANF program, *see* discussion *supra* note 51 and accompanying text) benefit for a family of three in fifteen states was less than half the Fair Market Rent for a *one-bedroom* apartment in California. *See* Roe v. Anderson, 966 F. Supp. 977, 981 n.10 (E.D. Cal. 1997).

[123] Although the statutes dealt with in *Shapiro* denied total benefits to new residents for the first twelve months of residency, one's monetary deprivation under California's law could be even more severe. For example, under section 11450.03, a newly arrived family of three from Louisiana would have been entitled to their Louisiana benefit level of $190. *Saenz*, 119 S. Ct. at 1522. In California, the full grant for a family of three was $641. *Id.* Plainly, this difference of $451 is greater than would be a complete deprivation of benefits suffered by the identical family moving into, for example, Louisiana.

[124] *Id.* at 1532 (citing Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974)).

[125] *Saenz*, 119 S. Ct. at 1533 (citing Starns v. Malkerson, 401 U.S. 985 (1971)); Sturgis v. Washington, 414 U.S. 1057, *aff'g* 368 F. Supp. 38 (W.D. Wash. 1973); Vlandis v. Kline, 412 U.S. 441 (1973); Sosna v. Iowa, 419 U.S. 393 (1975); Rosario v. Rockefeller, 410 U.S. 752 (1973)). The Chief Justice also noted that in a third category of cases, including Zobel v. Williams, 457 U.S. 55 (1982) and Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court determined that the respective statutes, which treated citizens differently for certain state-funded benefits based on length

one. The Court, while insisting that states cannot choose its citizens, has nevertheless maintained that such citizenship is conditional upon one's bona fide residency status.[126] As well, the Court has been reluctant to establish a bright line for what would constitute a universal bona fide residency requirement, and has opted instead to examine issues on a case by case basis where the matter is ultimately resolved on a finding of the subjective intent of the citizen involved in the dispute.[127]

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of in-state residency, violated the Equal Protection Clause but did not implicate the right to travel at all. Saenz v. Roe, 119 S. Ct. 1518, 1532 (1999) (Rehnquist, C.J., dissenting).

[126] *See, e.g., Saenz*, 119 S. Ct. at 1526-27.

[127] *See, e.g.*, Martinez v. Bynum, 461 U.S. 321 (1983). In *Martinez*, the Court stated that "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.* at 328. Such a residency requirement implicates no "suspect" classification and therefore is not subject to strict scrutiny. *Id.* at 328 n.7. However, the *Martinez* Court did not offer its own definition of bona fide residency, saying only that, in general, "residency" requires both physical presence and an intention to remain. *Id.* at 330.

The Court's cases tend to establish a couple of presumptions. If the benefit sought is portable, in that the benefit consumed may be readily taken out of the state, the presumption is that the consumer is not a bona fide citizen, and the state, therefore, can impose additional conditions on the distribution of the benefit. *See, e.g.*, Vlandis, 412 U.S. at 441 (upholding twelve-month residency requirement where the benefit sought was the in-state college tuition rate). If, on the other hand, the benefit sought is not portable and tends to implicate the basic necessities of life, the presumption is that the consumer is going to use the benefit in-state and is, thus, a bona fide citizen. *See supra* note 106 and accompanying text. The state, therefore, cannot impose additional conditions on the distribution of the benefit. *See supra* note 106 and accompanying text.

Additionally, prior to *Saenz*, where the presumption established that the new resident was a bona fide citizen, any burden placed on his or her citizenship would likely have been subjected to strict scrutiny review, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), whereas if the presumption established that the new resident was not yet a bona fide citizen then the burden would have been subject only to rational basis scrutiny. *See, e.g., Vlandis*, 412 U.S. 441.

Ostensibly, *Saenz* does away with the threshold question of what level of scrutiny to apply. For a discussion of the levels of scrutiny analysis see *supra* note 13. By articulating three separate components of the right to travel, *see* discussion *infra* notes 162-68 and accompanying text, the Court has essentially replaced the threshold level of scrutiny determination with one in which the Court must characterize the particular component of the right to travel at issue. If the new resident is presumed not to be a bona fide citizen, then he must still be an official citizen of the state whence he came. If such is the case, the analysis will now fall under the Privileges and Immunities Clause of Article IV of the Constitution. *See* Saenz v. Roe, 119 S. Ct. 1518, 1525 (1999). If the new resident is presumed to be a bona fide citizen, then the analysis will come within the penumbra of the Privileges or Immunities Clause of the Fourteenth Amendment. *See id.* at 1526.

Of course, the Article IV analysis will be commensurate to the rational basis analysis, and the Fourteenth Amendment analysis will be commensurate to the strict scrutiny analysis, but at least the troublesome classifications should fall by the wayside in the right to travel context, replaced with something that at least bears some rationally substantive concept. *Compare* Shapiro v. Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting). An interesting issue for the Court would be how to treat a new arrival to a state who both qualifies for TANF benefits and is admitted to a state university

Nevertheless, whatever merit the dispute over what constitutes a bona fide test has, the Court had no need to discuss the issue in *Saenz*. First of all, respondents' bona fide status as California citizens were neither questioned nor disputed by the State at any point in the proceedings.[128] Thus, as a procedural matter, this argument was waived.[129] Secondly, whatever need there may be for establishing a bright line bona fide residency test for citizenship cases in general, *Shapiro* clearly controlled the *Saenz* Court on the facts presented in evidence.[130] As such, it was unnecessary on the facts presented to the Court to delve into what constitutes a reasonable test for bona fide residency status.

2. Congress May Not Authorize the States to Violate the Fourteenth Amendment

The Court in *Saenz* was also correct in deciding that PRWORA did not provide a legitimate constitutional approval for California to enact section 11450.03.[131] As the Court noted, "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause."[132] In so ruling, the Court rejected the arguments set forth by the United States in its amicus brief,[133] the first of which argued that if the California law were struck down, the state would face an inundation of newcomers from other states seeking higher benefits.[134] The United States thus argued that California should be allowed to remove such incentives under the TANF program endorsed by PRWORA.[135] The Court correctly rebuffed the suggestion that removing incentives for other American citizens to move to

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and seeks in-state tuition. Perhaps such a scenario would finally compel the Court to establish a one-size-fits-all test for bona fide residency.

[128] *Saenz*, 119 S. Ct. at 1527.

[129] *Id.*

[130] *See supra* notes 106-19 and accompanying text.

[131] *Saenz*, 119 S. Ct. at 1528.

[132] *Id.* at 1528 n.21 (citing Shapiro v. Thompson, 394 U.S. 618, 641 (1969)).

[133] The United States did not participate in the trial or appellate court proceedings. *Saenz*, 119 S. Ct. at 1525. In its amicus brief to the Supreme Court, the United States argued that the Court should apply an intermediate level of scrutiny in analyzing section 11450.03, which would require that the statute be "substantially related to an important governmental objective." *Id.*

[134] *Id.*

[135] *Id.*

California was any different than penalizing them once they arrived.[136] The Court also rejected the federal government's concern that declaring the law unconstitutional would encourage states to lower their welfare benefits across the board in order to offset the increased costs of new citizens.[137] The empirical statistics found by the district court convinced the Court that such a concern lacked merit and that higher benefits would not entice an appreciably greater number of indigents to move to California.[138]

Finally, the Court rejected the argument that rather than striking down section 11450.03, the Court should entertain customizing the statute so that it only applied to new citizens who were actually on welfare in their states of prior residence.[139] The Court thought this absurd, and rightly so, since it would help defeat the state's purported interest of saving money, and because such a plan would have imposed the harshest penalty on the people who actually needed help the most.[140]

3. Missing the Point: The Dissents Ignore Thirty Years of Right to Travel Jurisprudence

Neither of the dissenting opinions is persuasive. As noted above, Chief Justice Rehnquist's divergence from the majority principally concerned two points: 1) he did not view respondents' issue as one sufficiently related to the right to travel;[141] and 2) he saw the California law as a reasonable test for establishing bona fide residency.[142] His first point, to be adopted, would require an overruling of *Shapiro* and its progeny.[143] Given the tenor of his argument, perhaps such a course would not upset the Chief Justice,[144] but unless a majority would feel the same way, *stare decisis* plainly applied in interpreting section 11450.03 as implicating the

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[136] *Id. See also Shapiro*, 394 U.S. at 631 (stating that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally").

[137] *Saenz*, 119 S. Ct. at 1529.

[138] *Id.*

[139] *Id.* at 1530.

[140] *Id.*

[141] *Id.* at 1531.

[142] *Id.* at 1534.

[143] *See supra* notes 106-19 and accompanying text. As the Chief Justice pointed out, over the past thirty years the Court has treated similar issues, such as that in *Saenz*, as impediments on the right to travel. *Saenz*, 119 S. Ct. at 1532 (Rehnquist, C.J., dissenting).

[144] *See* Saenz, 119 S. Ct. at 1532 (Rehnquist, C.J., dissenting) (noting that over the past thirty years the Court's right to travel decisions have "marked a sharp departure from the Court's prior right-to-travel cases because in none of them was travel itself prohibited").

right to travel.[145] For the reasons discussed above, the Chief Justice's argument that California had established a bona fide residency test is specious because it is superfluous to argue that a law should be given effect as a bona fide residency test where the respondents' bona fide residency status is not in question.[146]

Justice Thomas' dissent, though thoughtful, is also unpersuasive when applied to the facts of *Saenz*. Simply, Justice Thomas' dispute with the majority was not over the resurrection of the Privileges or Immunities Clause, but over the resurrection of the clause in this case.[147] Justice Thomas endorses contemplating the use of the Privileges or Immunities Clause in certain future Fourteenth Amendment issues, but would restrict its use to fundamental rights.[148] However, that is exactly what the majority did. The majority found that section 11450.03 implicated the fundamental right to travel by limiting disbursement of welfare benefits to bona fide citizens on the basis of their duration of residency in California.[149] Therefore, the difference between Justice Thomas' position and the majority in *Saenz* is not whether the Privileges or Immunities Clause should be utilized to protect a fundamental right, but rather, whether a fundamental right was in fact at stake in the case. In joining Chief Justice Rehnquist's dissent, Justice Thomas averred that the right in question was not the right to travel, but an economic interest, and that the Court should have deferred to the wisdom of the California legislature where the State's fiscal policies were concerned.[150] However, case law dictated otherwise.[151] Given the pedigree of supporting cases which the Court had at its disposal, the result in *Saenz* is what it should have been.[152] What is not clear is why the Court chose to abandon *Shapiro* and its progeny by rooting the source of the right to relocate in the Privileges or Immunities Clause instead of the Equal Protection Clause.[153]

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[145] *See supra* notes 106-19 and accompanying text.

[146] *See supra* note 128 and accompanying text.

[147] *Saenz*, 119 S. Ct. at 1538 (Thomas, J., dissenting). For an insight into Justice Thomas' views on the use of the Privileges or Immunities Clause, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

[148] *See Saenz*, 119 S. Ct. at 1538 (Thomas, J., dissenting).

[149] *See supra* notes 72-86 and accompanying text.

[150] *Saenz*, 119 S. Ct. at 1538 (Thomas, J., dissenting).

[151] *See supra* notes 106-22 and accompanying text.

[152] *See supra* notes 106-22 and accompanying text.

[153] *See infra* notes 154-228 and accompanying text.

B. *Finding the Right to Relocate in the Privileges or Immunities Clause: A Doctrinal Change*

Although the Court reached the correct substantive holding in *Saenz*, finding the basis for its holding in the Privileges or Immunities Clause was an unnecessary shift from *Shapiro* and its progeny, which had consistently found the source of protection of the right to travel in the Equal Protection Clause.[154] The Court articulated three distinctive components which make up the right to travel,[155] and found that the Privileges or Immunities Clause of the Fourteenth Amendment offers substantive protection to one of the components: the right to relocate.[156] However, the Court failed to provide a thorough explanation of how it reached such a conclusion. Moreover, in the final analysis, the Court's treatment of the right to relocate under the lens of the Privileges or Immunities Clause looks exactly like the treatment previously afforded the same issue under the Equal Protection Clause,[157] which begs the question: Why the change?

It is interesting to note that the Court expressed, in its explanation for why it granted *certiorari*, that the lower courts' treatment of similar issues were "consistent."[158] Wherein prior case law,[159] the district and circuit courts in *Saenz*,[160] and contemporary circuit courts across the board had been consistent in their treatment of right to travel issues,[161] the Court's shift was both unexpected and unnecessary.

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[154] *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (finding that "the waiting-period requirement clearly violates the Equal Protection Clause"), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). *Compare* Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) (noting that "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis" and that "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents"). "As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis." *Id.* at 67 (Brennan, J., concurring).

[155] *Saenz*, 119 S. Ct. at 1525-27.

[156] *Id.* at 1526.

[157] *Id.* at 1527-28.

[158] *Id.* at 1524.

[159] *See supra* note 106 and accompanying text.

[160] *See* Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998); Roe v. Anderson, 966 F. Supp. 977 (E.D. Cal. 1997).

[161] *See Saenz*, 119 S. Ct. at 1524.

1. The Right to Relocate is Guaranteed by the Privileges or Immunities Clause

The *Saenz* Court began its discussion of the right to travel by articulating three separate components of the right to travel, and three different sources of protection for those components.[162] The Privileges or Immunities Clause of the Fourteenth Amendment was held to be the source of protection for only one of those components.[163] The first component, the right to cross state borders, has a somewhat elusive constitutional source, and since it was not the component at issue, the Court did not articulate where it would find the source.[164] The second component, the right to enjoy the same rights as the citizens of other states while visiting those other states, was held to be protected by the Privileges and Immunities Clause of Article IV, § 2 of the Constitution.[165] This component, as well, was not at issue in *Saenz*.[166]

It was the third component, the right to be treated equally in a state after moving from another state and establishing citizenship, that was found to be at issue.[167] It was this component which was held to be protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[168]

Despite stating that "it has always been common ground that this Clause protects the third component of the right to travel,"[169] the Court did not cite a single case from the past century to support its statement. In fact, the Court had to go all the way back to the *Slaughter-House Cases*,[170] a case which is appreciated in history for its swift emasculation of the Clause,[171] to support its claim.[172] Even then, the authority the Court did

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[162] *Id.* at 1525-27.

[163] *Id.* at 1526.

[164] *Id.* at 1525; *see also* Green v. Anderson, 811 F. Supp. 516, 518 n.7 (E.D. Cal. 1993) (citing several Supreme Court decisions finding the source for the right to travel in a number of different provisions of the Constitution), *aff'd*, Green v. Anderson, 26 F.3d 45 (9th Cir. Cal. 1994).

[165] *Saenz*, 119 S. Ct. at 1525.

[166] *Id.* at 1526.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] 83 U.S. 36 (1872).

[171] *See, e.g.*, *Saenz*, 119 S. Ct. at 1535 (Thomas, J., dissenting).

[172] *Saenz*, 119 S. Ct. at 1526.

offer was only dicta from *Slaughter-House*.[173] Indeed, as noted above, the Privileges or Immunities Clause had never been used by a majority to protect any component of the right to travel,[174] and it had only been used once before by a majority to strike down a state law.[175] Without contemporary case law to support the holding that the right to travel to, and establish citizenship in, another state is substantively protected by the Privileges or Immunities Clause, the Court abandoned its prior doctrine.[176]

2. The Court Did Not Explain Why It Invoked the Privileges or Immunities Clause

Although noting that lower federal courts were "consistent" in their handling of right to travel cases,[177] the Court in *Saenz* invoked the Privileges or Immunities Clause anyway,[178] without providing an explanation for doing so. Had the Court offered an explanation for its shift, its logic underlying the doctrinal change would have likely proved helpful to lower court judges. The Court, however, invoked the Privileges or Immunities Clause without clearly articulating a reason for doing so. Without an articulated difference between the facts of *Saenz* and *Shapiro*,[179] the doctrinal underpinnings of *Shapiro* and its progeny are cast into doubt. If the Equal Protection Clause is not the right substantive source for the right to travel, then the primary deduction to make is that the Court has been erroneous in its right to travel jurisprudence over the past thirty years.[180]

As noted above, the Court stated that Privileges or Immunities Clause protection of the third component of the right to travel has always been

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[173] *Id.*; *see also Slaughter-House Cases*, 83 U.S. 36 (1872). Although Justice Miller held in *Slaughter-House* that the Court was not obliged to define the privileges or immunities of citizens of the United States until the appropriate case presented itself, he went on to enumerate a few, including the right to travel. *Id.* at 78-79. Nevertheless, the holding had already been delivered. *Id.* at 78.

[174] *See Saenz*, 119 S. Ct. at 1530 (Rehnquist, C.J., dissenting). *But see* Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) (stating that "[t]he right to move freely from state to state is an incident of national citizenship protected by the privileges [or] immunities clause of the Fourteenth Amendment against state interference").

[175] *See* Colgate v. Harvey, 296 U.S. 404 (1935).

[176] *See supra* notes 106-19 and accompanying text.

[177] *Saenz*, 119 S. Ct. at 1524.

[178] *Id.* at 1526.

[179] *See supra* notes 106-22 and accompanying text.

[180] *See supra* notes 106-19 and accompanying text.

"common ground."[181] However, as also noted above, the Court did not cite to a single case in the past 100 years to support that assertion.[182] The Court cited *Dred Scott*[183] as the foil for the Privileges or Immunities Clause of the Fourteenth Amendment.[184] In interpreting *Dred Scott* to stand for the proposition that free Blacks could not seek protection under Article IV as citizens of the states in which they had been enslaved, and interpreting the Fourteenth Amendment to have overruled *Dred Scott* in recognizing the national citizenship of Blacks, the Court proclaimed that the right to establish citizenship in any state is thus protected as a right of national citizenship.[185]

The historical underpinnings for using the Privileges or Immunities Clause to protect fundamental rights such as the right to travel may very well exist.[186] Nevertheless, given *Shapiro* and the established protocol of looking to the Equal Protection Clause for protections of fundamental rights, such as the right to travel,[187] it is surprising that the Court shifted course in its right to travel doctrine with such brief discussion.[188] In combining the *Dred Scott* decision with a short analysis of the intent of the drafters of the Fourteenth Amendment,[189] and dicta from the *Slaughterhouse Cases*,[190] the Court suddenly displaced the Fourteenth Amendment's "equal protection" safeguard given to the third component of the right to travel under *Shapiro* and its progeny.[191]

Justice Thomas was correct in suggesting that a more thoughtful analysis as to the purpose of the Privileges or Immunities Clause was warranted.[192] Without explanation, the Court has given lower courts and

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[181] *See supra* note 169 and accompanying text.

[182] *See supra* notes 169-76 and accompanying text.

[183] Dred Scott v. Sandford, 19 How. 393 (1856).

[184] Saenz v. Roe, 119 S. Ct. 1518, 1526 n.15 (1999).

[185] *Id.* at 1526.

[186] *See, e.g.*, Chemerinsky, *supra* note 13 at 1145 (claiming that "[a]lthough claims about framers' intent are always suspect, strong reasons support the belief that the Privileges or Immunities Clause was meant to protect basic rights from state infringement"); *see also* Thomas, *supra* note 147 (discussing original intent of Privileges or Immunities Clause, and suggesting that it has a place in future substantive rights-oriented Fourteenth Amendment jurisprudence).

[187] *See supra* note 154. For a discussion of the evolution of fundamental rights analysis within the context of the Equal Protection Clause, and a critique of its use, see Shapiro v. Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J. dissenting) (labeling this line of analysis as "troublesome").

[188] *Saenz*, 119 S. Ct. at 1526-27.

[189] *See supra* notes 184-85 and accompanying text.

[190] *Saenz*, 119 S. Ct. at 1526.

[191] *See supra* notes 184-85 and accompanying text.

[192] *See Saenz*, 119 S. Ct. at 1538 (Thomas, J., dissenting) (stating that "[b]efore invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment

constitutional litigators (not to mention scholars) a new source of protection for a citizen's right to travel to a new state and establish residency. It has not, however, pointed to any precedential authority to which lawyers might turn for guidance, or on which they might base their conclusions or assertions. Of course, this may not be a terrible thing for lawyers. The Court has seemingly engendered an entirely new line of Fourteenth Amendment attacks on governmental restrictions of so-called "fundamental rights." However, while this may be a boon to plaintiffs' attorneys, it will add to the burden of judges, who already have more than enough trouble sifting through the current state of fundamental rights and substantive due process rights.[193]

The Court could not have intended, as suggested by Chief Justice Rehnquist, to "clear much of the underbrush" created by prior right to travel cases.[194] There is no inconsistency between *Shapiro* and its progeny because since *Shapiro* the Equal Protection Clause has been the source of protection for what the *Saenz* Court labeled the third component of the right to travel.[195] Thus, there was no "underbrush" to clear in this area of the Court's precedent.

The "underbrush," if there is any, exists in two areas of right to travel jurisprudence not reached by the *Saenz* Court. First of all, it might be said that there is an "underbrush" amongst the right to travel cases as a whole (i.e., right to travel issues falling under any of the three components).[196] As previously noted, the Court throughout its history has cited several constitutional provisions as the source of the right to travel.[197] However, *Saenz* did not unify these cases under the Privileges or Immunities Clause. Quite to the contrary, the Court solidified the fractionalized right to travel by articulating the three components which make it up, and specifically

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thought that it meant" and that "[w]e should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence").

[193] For example, Justice Thomas considers current Fourteenth Amendment jurisprudence to be in a "disarray." *Id.* As well, Justice Scalia has referred to the levels of scrutiny analysis as being hardly scientific, with "a further element of randomness . . . added by the fact that it is largely up to us which test will be applied in each case." U.S. v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). *See also* Chemerinsky, *supra* note 13 at 1153-55 (discussing and criticizing the Court's evolutionary creation of Equal Protection Clause and Due Process Clause "levels of scrutiny" analysis); Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).

[194] *See Saenz*, 119 S. Ct. at 1532 (Rehnquist, C.J., dissenting).

[195] *See supra* notes 106-19, 154 and accompanying text.

[196] *See supra* notes 162-68 and accompanying text.

[197] *See* Green v. Anderson, 811 F.Supp. 516, 518 n.7 (E.D. Cal. 1993), *aff'd*, Green v. Anderson, 26 F.3d 95 (9th Cir. 1994).

pointing to separate places in either the Constitution or the common law which guarantee the protection of those components.[198] None of the three components was ascribed to the Equal Protection Clause. It seems, then, that it would be more accurate to say that the Court added "underbrush" to right to travel doctrine.

A second area where it might be said that there is "underbrush" is between the cases where durational residency requirements have been upheld for constituting bona fide residency tests,[199] and those cases, like *Saenz* and *Shapiro,* where the durational residency requirements have been struck down for violating a citizen's right to travel.[200] But, as has been noted, the *Saenz* Court did not reach the question of what constitutes a bona fide residency requirement,[201] and so again, any "underbrush" which may have existed prior to *Saenz* in those areas of the law still exists. Thus, nothing was accomplished substantively. Doctrinally speaking, the *Saenz* decision is a lateral progression. The Court had clear precedent with *Shapiro* for deciding this case under the Equal Protection Clause, and for no apparent reason, opted to go in a new and largely uncharted direction.[202]

3. The Equal Protection Clause Veiled as the Privileges or Immunities Clause

Before one accepts the fact that the Court rejuvenated the Privileges or Immunities Clause without explanation, one must yet consider the possibility that the Court did not do so. Although the Court invoked the Privileges or Immunities Clause in name, the analysis the Court applied was identical to the Equal Protection Clause fundamental rights analysis applied in *Shapiro* and its progeny.[203] In this regard, the flaw is that even if the Court's intent was to start Fourteenth Amendment fundamental rights jurisprudence on a new path, it has failed. Although the signpost might be different, the path remains the same.

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[198] *See supra* notes 162-68 and accompanying text.

[199] *See supra* notes 125, 127 and accompanying text.

[200] *See supra* notes 124, 127 and accompanying text.

[201] *See* Saenz v. Roe, 119 S. Ct. 1518, 1527 (1999).

[202] *See supra* notes 154-58 and accompanying text. *Compare* Colgate v. Harvey, 296 U.S. 404, 445-46 (1935) (Stone, J.,dissenting) (stating that "[s]ince the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause," and that "[u]ntil today none has held that state legislation infringed that clause").

[203] *Saenz*, 119 S. Ct. at 1527-28 (discussing the proper level of judicial scrutiny to apply).

The Court spoke of how Cal. Welf. & Inst. Code Ann. § 11450.03 classifies its welfare recipients based on their length of residency in California, and then sub-classifies the newcomers by location of prior residence.[204] The Court stated that:

> [n]either mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro* . . . but it is surely no less strict."[205]

This is classic fundamental rights language, and classic application of the strict level of scrutiny analysis established under Equal Protection Clause jurisprudence.[206] Thus, the Court has not abandoned its Equal Protection Clause fundamental rights analysis of right to travel cases, but has merely grafted the name "Privileges or Immunities Clause" on top of the analysis.

Of course, if Privileges or Immunities Clause analysis develops into nothing more than a carbon copy of fundamental rights analysis under the Equal Protection Clause, it would not be surprising given the existing overlap of the jurisprudence which has evolved around the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[207] After all, if something is a fundamental right, then it should not be denied to anyone.[208] However, if it is denied to someone, but not to all, then you have not only the denial of a fundamental right, but also an inequitable denial of that right.[209] This inevitable overlap is demonstrated by the evolution of fundamental rights analysis under the Equal Protection Clause.[210] Perhaps if Fourteenth Amendment jurisprudence had developed

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[204] *Id.* at 1527.

[205] *Id.*

[206] *See id.*; *see also* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).

[207] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942). The *Skinner* majority held that the right to have offspring was a fundamental right and could not be denied to anyone without violating the Equal Protection Clause. *Id.* Chief Justice Stone, concurring, rejected the equal protection argument and would have reached the same result under the Due Process Clause. *Id.* at 545 (Stone, C.J., concurring); *see also* Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). The Court held that a poll tax on the fundamental right to vote violates the Equal Protection Clause. *Id.* Justice Black, dissenting, accused the majority of using the Equal Protection Clause as a replacement for the "old 'natural-law-due-process formula.'" *Id.* at 675 (Black, J., dissenting); *see also* Kurland, *supra* note 97 at 407 (commenting that "due process, privileges or immunities, [and] equal protection of the laws are phrases without any intrinsic limitations").

[208] *See, e.g.*, *Harper*, 383 U.S. 663.

[209] U.S. CONST. amend. IV.

[210] *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).

along more originalist lines,[211] some of the confusion could have been avoided. It may well be true that the correct source of protection for fundamental rights should have always been the Privileges or Immunities Clause.[212] The *Saenz* Court seemed to recognize a grain of truth to this notion, at least with respect to the third component of the fundamental right to travel, by acknowledging that one's right to change state citizenship is a fundamental right embedded in national citizenship, and guaranteed by the Privileges or Immunities Clause.[213] But if this is the case, then it must be because the Court recognized that it had incorrectly applied the Equal Protection Clause in *Shapiro* and its progeny,[214] and that it should have applied the Privileges or Immunities Clause from the genesis of the "right to relocate" line of cases.

If the Privileges or Immunities Clause is the vehicle through which the Framers intended to protect fundamental rights, the Supreme Court chose an odd case to recognize such a theory. However the problem is to be dealt with ideally, on the facts of *Saenz*. Precedent dictated that *Saenz* should have been decided under the Equal Protection Clause.[215] Indeed, within the group bearing the brunt of the benefit reductions, there were forty-five sub-categories of beneficiaries.[216] Not only did California treat longer-term citizens differently from most shorter-term citizens, but amongst the shorter-term citizens the state violated equal protection of the laws forty-five more times.[217]

Having identified that the right implicated by section 11450.03 was fundamental, the Court had all it needed to proceed along its established line of precedents.[218] Several facts indicated that this case involved equal

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[211] *See, e.g.*, Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1245 (1998).

> We might assume, from its text, that the Equal Protection Clause was primarily a procedural guarantee of equal administration and enforcement of protective laws–that is, laws designed to protect citizens in their life, liberty and property. . . . [T]here seems to have been a general consensus that, whatever the Equal Protection Clause guaranteed, it was something narrower than the Privileges or Immunities Clause.

Id. (emphasis omitted).

[212] As one commentator states, "[a]lthough claims about framers' intent are always suspect, strong reasons support the belief that the Privileges or Immunities Clause was meant to protect basic rights from state infringement." Chemerinsky, *supra* note 13 at 1145.

[213] Saenz v. Roe, 119 S. Ct. 1518, 1526 (1999).

[214] *See supra* notes 106, 154 and accompanying text.

[215] *See supra* notes 106-19, 154 and accompanying text.

[216] *Saenz*, 119 S. Ct. at 1528.

[217] *Id.*

[218] *Id.* at 1527.

protection.[219] The lower court opinions said the case was about equal protection.[220] *Shapiro* and its progeny said the case was about equal protection.[221] The Court itself said the case was about equal protection.[222] Indeed, the structure of the Court's analysis even took the form of established equal protection analysis.[223]

So, by applying what looks like an equal protection fundamental rights analysis, but calling it privileges or immunities, the result from *Saenz* is that the Court has rendered the Privileges or Immunities Clause a mere appendage to the Equal Protection Clause. That is, if the Privileges or Immunities Clause only affords what the Equal Protection Clause already afforded in right to travel jurisprudence, then in this area of the law the strength of the Privileges or Immunities Clause is derived from, and hence limited by, the strength of the Equal Protection Clause.[224] If this proposition is accurate then the Court's interpretation of the Privileges or Immunities Clause directly conflicts with the Clause's intended purpose.[225] On the other hand, if this proposition distorts the Court's opinion, and the Privileges or Immunities Clause really does offer its own unique form of substantive protection, the Court's holding illustrates that the Privileges or Immunities Clause contains something more potent than what has been expected of it for the past 130 years.[226] Of course, if this is true, the holding in *Saenz* is necessarily tantamount to an admission that thirty years of right to travel jurisprudence has been wrongly decided.[227] Therefore, if the latter is true, the problem of the *Saenz* decision merely returns to the

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[219] *Id.*

[220] Roe v. Anderson, 966 F. Supp. 977 (E.D. Cal. 1997), *aff'd*, Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998), *aff'd*, Saenz v. Roe, 526 U.S. 489 (1999).

[221] *See supra* notes 106, 127, 154 and accompanying text. "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985).

[222] *Saenz*, 119 S. Ct. at 1527-28 (commenting that "[b]ut since the right to travel embraces the citizen's right to be *treated equally* in her new State of residence, the discriminatory classification is itself a penalty") (emphasis added). "In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among *equally eligible citizens*." *Id.* at 1528 (emphasis added).

[223] *See supra* notes 197-98 and accompanying text.

[224] *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting); *see also supra* note 179 and accompanying text.

[225] *See, e.g.*, Rosen, *supra* note 211, at 1242 (stating that "[t]he Privileges or Immunities Clause is 'probably the clause from which the framers of the Fourteenth Amendment expected [the] most . . . there is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless'") (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 22 (1980)).

[226] *See supra* note 18 and accompanying text.

[227] *See supra* notes 106-19 and accompanying text.

Court's failure to provide lower courts with an idea of how far-reaching the scope of the Privileges or Immunities Clause's constitutional utility should extend.[228]

IV. CONCLUSION

The substantive holding by the Supreme Court in *Saenz v. Roe* should not have surprised Supreme Court analysts and legal scholars. However, the same cannot be said for the vehicle in which the Court delivered its holding. From *Shapiro*, decided in 1969, up until the decision in *Saenz*, the source of protection for one's right to move to another state and become eligible on equal terms with longer-term residents without facing length-of-residency discrimination by the state had always been the Equal Protection Clause, and its concomitant guarantee of fundamental rights. For reasons not explained in its holding, the Supreme Court, in *Saenz*, chose to shift the source of that protection to the Privileges or Immunities Clause. Unfortunately, the Court provided no basis for why it made such a switch, and offered no blueprint for future Fourteenth Amendment and fundamental right construction.[229] If *Saenz* is the point of departure for the Supreme Court's change of attitude toward the usefulness of the Privileges or Immunities Clause, as some might hope,[230] the Court should have explained the rationale behind its holding for the benefit of the lower court judges who will be the ones encountering the ripple effects of the decision much sooner than the Supreme Court will encounter them.

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[228] *See supra* notes 177-93 and accompanying text.

[229] There is certainly no reason to think that the implications of *Saenz* on fundamental rights jurisprudence will be, in its application by lawyers, scholars, and adventurous lower court judges, limited solely to matters regarding the right to travel.

[230] Indeed, many scholars and constitutional lawyers would like to see a wider application of the Privileges or Immunities Clause. For example, Clint Bolick, co-founder of the Institute for Justice ("IFJ"), writes that the IFJ's "core mission includes reviving the privileges or immunities clause." Clint Bolick, *Revivers of the Lost Clause – Justices Resuscitate Long-Dormant Doctrine of 'Privileges or Immunities,'* FULTON COUNTY DAILY REPORT, May 27, 1999. According to another commentator, Bolick's IFJ is counting on the *Saenz* Court's *resuscitation* of the Privileges or Immunities Clause to bolster a "host of legal challenges" the group is mounting against other economic laws which the group views as violative of other fundamental economic rights. Carrie Johnson, *The Road to Saenz - How Legal Crusaders Revived Dormant Rule*, LEGAL TIMES, May 24, 1999.

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