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The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws

R. Linus Chan*

Introduction

> The vanishing began Wednesday night, the most frightened families packing up their cars as soon as they heard the news. They left behind mobile homes, sold fully furnished for a thousand dollars or even less. Or they just closed up and, in a gesture of optimism, left the keys with a neighbor. Dogs were fed one last time; if no home could be found, they were simply unleashed. Two, [five], [ten] years of living here, and then gone in a matter of days, to Tennessee, Illinois, Oregon, Florida, Arkansas, Mexico—who knows? Anywhere but Alabama.[1]

This mass exodus from Albertville, Alabama was not the result of a natural disaster or fears of an invasion by hostile forces. Instead, the residents of Albertville fled Alabama exactly in the manner the state legislators intended when Alabama passed H.B. 56. As Alabama Senator Scott Beason explained,

> [a]ll these bills are designed for people to say, you know what, they're going to try to enforce the

* Visiting Associate Professor of Clinical Law, University of Minnesota Law School. I would like to thank David Rodriguez, Mark Noferi, Allison Tirres, Anita Madalli, Hiroshi Motomura, and Matthew Lamkin, not only for

1. Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. TIMES, Oct. 3, 2011, http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html.

> law here in this state. And maybe we need to move back to our home country. Or maybe we need to move to a state that has its arms wide open for illegal aliens.[2]

Alabama's H.B. 56 is part of a legislative strategy known as "self-deportation"-a term first used to satirize an early ancestor of H.B. 56 that was passed in California as a public referendum titled, Proposition 187.[3] The satirical term transformed into public policy for states that were frustrated by a perceived lack of federal enforcement of immigration laws. The policy got national attention when Mitt Romney adopted self-deportation as part of his platform during the 2012 Presidential election campaign.[4] Despite a national discussion on immigration generally, often self-deportation legislation remains a local or state based issue. In June of 2013, the town of Fremont, Nebraska successfully defended in the Eighth Circuit Court of Appeals a set of ordinances written to prevent undocumented immigrants from living in the city.[5]

Self-deportation legislation varies as to its provisions and enforcement, but the central idea remains the same: control and prevent migration of undocumented people[6] into a state or locality with discriminating treatment. Whether it is the City of Hazleton, Pennsylvania outlawing the undocumented from

2. *This American Life: Reap What You Sow*, CHICAGO PUBLIC RADIO (Jan. 27, 2012), http://www.thisamericanlife.org/radio-archives/episode/456/transcript.

3. *See* Robert Mackey, *The Deep Comic Roots of 'Self-Deportation,'* N.Y. TIMES, Feb. 1, 2012, http://thelede.blogs.nytimes.com/2012/02/01/the-deep-comic-roots-of-self-deportation.

4. Julia Preston, *Republican Immigration Platform Adopts 'Self-Deportation,'* N.Y. TIMES, Aug. 23, 2012, http://thecaucus.blogs.nytimes.com/2012/08/23/republican-immigration-platform-backs-self-deportation.

5. Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013).

6. This article will use the term "undocumented person" or "undocumented migrant" to refer to those who have either entered into the United States without inspection, or have continued to stay in the United States after violating their immigration status. For the same reasons articulated by the AP and other news organizations, the use of the term "illegal immigrant" will not be employed. *See* Paul Colford, *'Illegal Immigrant' No More*, AP BLOG (Apr. 2, 2013), http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/.

https://digitalcommons.pace.edu/plr/vol34/iss2/7

renting apartments, H.B. 56's declaration that all contracts entered into with undocumented people are unenforceable, or Arizona's prohibition on transportation of undocumented people, the goal is to prevent the physical presence and residence of any undocumented person within city or state borders.[7] The term "self-deportation" is not limited to the removal of unwanted migrants currently residing in the state or municipality, but also refers to the creation of a hostile environment for undocumented migrants so as to deter them from migrating into the state or municipality at all.[8]

In June of 2012, the Supreme Court struck a severe blow against self-deportation laws when it ruled that existing federal law pre-empted three out of the four provisions of Arizona's S.B. 1070 and that the fourth provision would survive only if narrowly applied.[9] In deciding the case, the Court never directly addressed Arizona's purpose in passing the law, which was to expel the undocumented. Rather, the Supreme Court sidestepped questions about whether the law was discriminatory, unduly harsh, or violated a substantive constitutional right of a person or a group of people.[10] Despite S.B. 1070's overt discrimination and harsh treatment of a class of people, the Court's opinion only referred to sovereignties and the balance of power between the federal and state governments.

Pre-emption's role in the S.B. 1070 litigation is

7. Illegal Immigration Relief Act Ordinance ("IIRAO"), Alabama Act 2011-535, and SB 1070 §5.

8. The architects of such policy viewed an enforcement heavy environment essential to not only expel unwanted migrants but to also serve as a deterrent for their migration. *See* Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CTR. FOR IMMIGR. STUDIES (Apr. 2006), *available at* http://www.cis.org/Enforcement-IllegalPopulation.

9. *See* Arizona v. United States, 132 S. Ct. 2492, 2510 (2012) ("Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.").

10. *See* Justin Feldman, *The Missing Racial Profiling Argument in the Arizona Case*, COUNTERPUNCH (July 19, 2012), http://www.counterpunch.org/2012/07/19/the-missing-racial-profiling-argument-in-the-arizona-case (The one provision of S.B. 1070 that presumably survived would have been analyzed under the Fourth Amendment, but the Court found the charge untimely.).

unsurprising as it has been used to challenge state based immigration regulation for more than a century.[11] Even though self-deportation legislation is often explicitly discriminatory against a group of people, a focus on structural and federalism values was used as the constitutional footing of the undocumented continues to be unclear and their access to constitutional protections limited. Surrogates such as federalism, administrative competence and, in some cases, the substantive rights of citizens in order to challenge state based immigration laws has in the modern era proved to be more effective than using traditional civil rights bulwarks such as Equal Protection.[12]

The shift from a focus on discrimination and substantive rights to ones focusing on pre-emption and surrogates, raises certain concerns. Professor Geoffrey Heeren warns that the repeated use of procedural surrogates and structural arguments such as pre-emption masks the trend of taking away substantive rights for non-citizens and could even backfire by allowing litigants to strip away immigrant friendly legislation or policy.[13] Even as state legislators in Arizona, Georgia and Alabama write laws designed to drive the undocumented from their respective borders; states such as California, Illinois, and New Mexico have passed laws designed to welcome the undocumented. Faithful adherence to the pre-emption doctrine might jeopardize such efforts as impermissible attempts to interfere with federal immigration policy. More importantly though, an exclusive focus on pre-emption and surrogates strategies creates the impression that the constitutional defect of self-deportation laws is not with the discrimination or the draconian treatment of people inherent in these policies, but rather that they are administrated by the wrong officials. Two of the more objectionable aspects of self-deportation law, classification of a group of vulnerable people,

11. Chy Lung v. Freeman, 92 U.S. 275 (1875).

12. *See* Charles L. Black Jr. , Structure and Relationship in Constitutional Law 39-51 (1969), Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

13. *See* Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 Colum. Hum Rts. L. Rev. 367 (2013).

and harsh treatment of those people designed to drive them out of their homes, remain unaddressed. However, because the undocumented remain legally vulnerable to classification generally,[14] and harsh treatment can implicate a spectrum of traditional state police powers, finding a constitutional defect that addresses the discrimination and draconian treatment is elusive. A critical look at Justice Scalia's dissenting opinion in *Arizona* reveals a potential source of substantive protection against state discrimination of the undocumented that addresses both discrimination and the harsh treatment; the right to travel.

During oral arguments of *Arizona v. United States*, Justice Scalia succinctly stated a defense to Arizona's power to force out undocumented immigrants: "The Constitution recognizes that there is such a thing as state borders, and the states can police their borders."[15] Justice Scalia's dissenting opinion repeatedly relies on the premise that the state of Arizona is a sovereign body.[16] Because one key aspect of sovereignty is the power to control borders and prevent entry to unwanted migrants, Justice Scalia argued that Arizona could exercise such a power to exclude undocumented immigrants. This justification for controlling migration is not novel or without support; the constitutional justification for federal power in regulating immigration is based largely on the sovereignty of the United States.[17] National sovereignty, as the source of the constitutional power to restrict migration into the United States, rests on the premise that each nation should have the ability to define its own membership. Such membership is primarily defined by who is allowed to enter,

14. Motomura, Hiroshi, Immigration Outside the Law (Kindle Locations 2977-2980, 2993) Oxford University Press. Kindle Edition (2014).

15. Transcript of Oral Argument at 36, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

16. Ableman v. Booth, 62 U.S. 506, 516 (1858) ("And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.").

17. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution.").

reside and become a citizen of the United States. Justice Scalia argued that Arizona's sovereignty should lead to a similar result.

Arizona designed S.B. 1070 to protect its borders and expel the undocumented from its territory. Arizona decided that its residents should not include the undocumented and used several of its police powers to enforce this decision. By protecting its borders and choosing its residents, Arizona's actions were that of a mini-nation, or perhaps a "demi-sovereignty."[18] If Arizona and each of the several states are sovereigns, then why shouldn't their sovereignty allow them to decide who is allowed to enter and live within its borders? Despite the common usage by jurists and commentators in referring to states as "sovereigns," when each of the several states formed the union or joined the national government, each state gave up its sovereign right to do exactly what Arizona tried to accomplish with S.B. 1070.[19] Controlling borders and deciding the make-up of one's populace is certainly a sovereign power,[20] and yet, the Constitution denies this power to state governments by enforcing the right to travel.

The individual states, unlike the United States, do not have the ability to determine their membership and thus cannot control their borders in the same manner as the federal government. Arizona cannot prevent Alaskans from migrating into its territories, or the poor and homeless from choosing to reside in the warmth of the Arizona sun. This inability to control or restrict migration of people into a state's territory is rooted in the right to travel and is a fundamental feature of our Constitution. The right to travel, a foundational aspect of both federalism and an instrument against discrimination, is an absolute barrier to self-deportation laws passed by states trying to evict the undocumented or trying to prevent their migration into the state.

18. Peter Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1995).

19. New Hampshire v. Louisiana, 108 U.S. 76, 90 (1883) ("The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of states in the United States.").

20. Wong Wing v. United States, 163 U.S. 228 (1896).

The right to travel has a variety of incarnations and many different constitutional homes over its history, a history that predates the Constitution. Article IV of the Articles of Confederation expressly forbade States from restricting entry into the individual states.[21] After the ratification of the Constitution, the Supreme Court, even as it struggled to pinpoint its textual foundations, regularly struck down state laws that discouraged migration or travel. The Court in various periods anchored this right to Article IV's Privileges and Immunities Clause of the United States Constitution,[22] the Dormant Commerce Clause,[23] the Substantive Due Process Clause of the Fifth and Fourteenth Amendments,[24] as a fundamental right under the Fourteenth Amendment's Equal Protection Clause,[25] and most recently, in the Privileges or Immunities Clause of the Fourteenth Amendment.[26] Despite murky explanations and confusing applications, the right to travel's function as an invaluable tool in preserving the mobile and dynamic nature of the nation has never been in doubt.

Arizona's S.B. 1070 and Alabama's H.B. 56 represent the latest in a long line of attempts by states trying to prevent certain people from living within their borders. In the past, States have attempted to prevent the poor from moving into their territories by criminalizing their transportation or denying welfare benefits.[27] At other times, states have tried to discourage migration by taxing travelers or denying new residents the right to vote or access to free non-emergency care.[28] Whether a state takes direct efforts to deny entry to travelers or tries more indirect measures, such as increasing taxes or denying benefits, to drive out new residents (travelers or migrants), the Court has declared that an effort to exclude or

21. Articles of Confederation Article IV.

22. Paul v. Virginia, 75 U.S. (7 Wall.) 168 (1869). Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

23. Edwards v. California, 314 U.S. 160 (1942).

24. Kent v. Dulles, 357 U.S. 116 (1958).

25. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

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

27. Edwards v. California, 314 U.S. 160 (1942); Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

28. Dunn v. Blumstein, 405 U.S. 330 (1972), Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

expel people, is an unconstitutional abridgment to the right to travel.[29] Even when a state exercises police powers, such as allocating employment benefits, criminalization, or taxation, if such power is used to impact migration, the Court has declared such actions unconstitutional.[30] State self-deportation laws should meet a similar fate.

The current state-based immigration laws are not meant to regulate non-citizens within their states and localities, but rather to drive them out. These state actions are overt attempts to exclude a specific group of people from migrating, traveling, or doing any sort of commercial activity within the respective borders. If Arizona's H.B. 1070, Alabama's H.B. 56, or even the Hazelton ordinances had targeted any group that consisted of United States citizens, such as indigents, the mentally impaired,[31] or convicted child molesters, the laws would have been struck down as an impermissible violation of the right to travel. As the Supreme Court explains, "the purpose of inhibiting migration . . . [of] persons into the State is constitutionally impermissible."[32] And yet, because the particular group of people involved are not citizens of the United States and do not have federal authorization to remain in the country, this limitation on state power has not been seriously considered by federal courts to date. This oversight ignores the anti-discrimination purpose right to travel and its role in ensuring that membership decisions are left to the federal government.

Part I of this Article discusses the limitation of the pre-emption doctrine on state self-deportation laws. Part II discusses a short history of the Supreme Court's application of the right to travel. Part III explains why the lack of federal authorization or immigrant status does not exclude people from the right to travel's protection. Part IV discusses how the right to travel relates to citizenship and how the undocumented may exercise what has been described as a privilege or immunity of citizenship. Finally, Part V examines how the current state-

29. Shapiro, 394 U.S. at

30. *See* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986).

31. Bethesda Lutheran Home & Servs., Inc. v. Leean, 122 F.3d 443 (7th Cir. 1997).

32. Shapiro, 394 U.S. at 629.

based "self-deportation" immigration laws violate the right to travel.

I. The Limitations of Pre-emption

The Arizona Court relied on pre-emption in striking down many of SB 1070's provisions. Pre-emption as a doctrine involves examining whether state law unconstitutionally interferes or conflicts with federal law. In traditional pre-emption analysis, state laws can be pre-empted in either an express manner or in an implied manner.[33] Express pre-emption usually would have congressional language that clearly indicates that state laws are not tolerated. For implied pre-emption, it can exist in one of two ways; conflict pre-emption where state laws conflict directly with federal law or goals, and field pre-emption, where federal law is so comprehensive in an area that no space is left for the state.[34]

The *Arizona* Court employed a variety of different pre-emption analysis on each provision of SB 1070 separately.[35] For certain provisions, such as the Arizona registration provision, the Court found "that the Federal Government has occupied the field of alien registration."[36] With other provisions the Court employed an implied conflict pre-emption analysis. One of the key rulings from Arizona was that State laws that encroached on the use of federal enforcement discretion would be pre-empted.[37] The Court also struck down one of the main strategies that architects of self-deportation laws had tried to use; the mirror-theory.[38] What was largely left untouched by

33. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2 SUTHERLAND STATUTORY
CONSTRUCTION § 36:9 (7th ed. 2009).

34. *Id. Arizona*, 132 S.Ct. at 2501.

35. *Arizona,* 132 S.Ct. at 2501-10. *See also,* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM & MARY BILL RTS. J. 577 (2012).

36. *Arizona*, 132 S.Ct. at 2501.

37. *Id.* at 2506.

38. *Id.* at 2502-03. For a detailed discussion of the history of the "mirror theory", please see Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253-54 (2011). And Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR.

the Arizona decision, and which continues to be a source of conflict, is when states regulate in areas that do not have federal analogues. Federal law does not regulate non-citizen housing, or their economic and social activity in the manner that some self-deportation laws, such as HB 56, or the municipalities of Hazelton, City of Freemont and Farmers Branch attempted to do. Without any federal analogues, these laws cannot be analyzed under an implied conflict analysis and instead must be analyzed using "field" preemption principles. The problem with using field pre-emption analysis comes with how to frame what "field" the state law is trying to regulate.

A. *A Difference in Framing: When do States and Cities Engage in Immigration Policy?*

One of the most difficult aspects of immigration pre-emption law has been deciding when a state law should be considered an "alienage" law or an "immigration" law.[39] State laws that consider alienage has existed and upheld from nearly the beginning of the nation's history.[40] At the same time as Professor Motomura has written, ""Alienage" rules may be surrogates for "immigration" rules. Often, the intended and/or actual effect of an alienage rule is to affect immigration patterns."[41] At what point can a state law that regulates non-citizens, becomes an "immigration law" that should be preempted? Prior to the Arizona court, the answer was confusing, and after Arizona, the answer continues to be confusing, especially for state laws[42] that regulate in an area

L.J. 459, 475 (2008) ("[s]tate governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law.")

39. Motomura, Hiroshi, *Immigration and Alienage Federalism and Proposition* 187, 35 Va. J. Int'l L. 201, 202 (1994). ("As traditionally understood, "immigration law" concerns the admission and expulsion of aliens, and "alienage law" embraces other matters relating to their legal status.")

40. L. Bosniak, *Membership, Equality and the Difference That Alienage Makes*, *69 N.Y.U. L. Rev.* 1047, 1087 (1994)

41. Motomura, 35 Va. J. Intl. L. at 202.

42. For the purposes of this paper, "state laws" refers to not just laws passed by the State legislature or Assembly, but also includes city ordinances and public referendums as they are considered to be wielding power granted

that federal laws do not.

Three separate circuit courts after the Arizona decision had a chance to examine rental restrictions aimed at the undocumented, and one court, the Eleventh Circuit decided on the contracts provision of HB 56 passed by Alabama. How the circuit courts decided the fate of these two provisions plays an important role in understanding the potential limitation of pre-emption.

In 2006 and 2007 Hazelton Pennsylvania passed an ordinance titled, "Illegal Immigration Relief Act Ordinance" and a rental registration ordinance. In 2010, the Third Circuit ruled such ordinances were pre-empted by federal law, however, the Supreme Court remanded the case back to the Third Circuit and subsequently decided the fate of Arizona's SB1070.[43] The Hazelton ordinance essentially made all leases entered into with the undocumented "void." Originally, in the decision prior to remand, the Third Circuit decided that such restrictions were field pre-empted and post remand the Third Circuit found no reason to revisit this decision. The court decided that the "field" at issue was the immigration policy generally. Because Hazelton or the State of Pennsylvania could not make immigration determinations on their own, any laws that attempted to occupy such a field would be found to be pre-empted. The court connected rental restrictions with a form of regulating residency in the United States. The court summarized its position thusly, "[t]he housing provisions of Hazleton's ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing. By barring aliens lacking lawful immigration status from rental housing in Hazleton, the housing provisions go to the core of an alien's residency. States and localities have no power to regulate residency based on immigration status."[44] Similarly, the Fifth Circuit in *Farmers Branch* examined a similar rental restriction and noted, "[t]his is because no alien with an unlawful status will be able to obtain the basic need of

by the State. *See generally,* Olivas, Michael, Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement, 2007 U Chi Legal F. 27 (2007).

43. Lozano v. City of Hazelton, 724 F.3d 297 (3d Cir. 2013).

44. *Id.*at 315.

shelter through a rental contract. Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch." In order to find this result unconstitutional, Judge Reavley in his concurrence went on to explain that "forced migration of illegal aliens conflicts with the careful scheme created by the INA and burdens the national prerogative to decide which aliens may live in this country and which illegal aliens should be removed."[45] The Eleventh Circuit in *Alabama v. United States* used the same logic and reasoning.[46] Under pre-emption analysis the courts needed to make the connection that expulsion from a city or state is in practice an attempt to expel a person from the United States entirely.

The Eighth Circuit unlike the en banc Fifth Circuit or the Third Circuit upheld the city of Freemont's rental restrictions. The Eighth Circuit did not quarrel with the Third Circuit's analysis of the effect of the rental restriction in discouraging migration out of the municipality, but instead disagreed as to whether it occupied the field of immigration regulation. "Laws designed to deter, or even prohibit, unlawfully present aliens from residing within <u>a particular locality</u> are not tantamount to immigration laws establishing who may enter or remain in the country."[47] It is on this basis that the Eighth Circuit upheld the rental restrictions as not field pre-empted and later on using similar justification found it free from conflict pre-emption as well.

The disagreements between the Eighth circuit and the Third and Fifth Circuit can be traced back to one of the Supreme Court's first pre-emption decision in *Chy Lung*.[48] In *Chy Lung*, California set high bond amounts for certain Chinese woman attempting to de-board ships that landed in California.[49] The Court ruled such policies interfered with federal treaty power and the ability to control immigration.[50]

45. *Farmers Branch*, 726 F.3d 524 (concurring opinion by Judge Reavley.).

46. It is also clear to us that the expulsion power Alabama seeks to exercise through [the contract provision] conflicts with Congress's comprehensive statutory framework governing alien removal.

47. *Keller*, 719 F.3d at 941 (8th Cir. 2013) (emphasis in original)

48. Chy Lung v. Freeman, 92 U.S. 275 (1875).

49. *Id.*

50. *Id.*

Because the migrants were not just entering the state of California, but at the same time was entering in the United States, the state policy's interference with federal immigration policy was direct and obvious.[51] And yet, when states in the interior, such as Nebraska or Pennsylvania, impose barriers for the undocumented the effect on immigration becomes more indirect as these migrants have already entered into the United States.

At this point, an Equal Protection case steps in and does the heavy lifting for circuits that struck down the rental restrictions. In *Traux v. Rauch*, the Court struck down an Arizona employment restriction that affected all non-citizens including lawful permanent residents.[52] The Court examined the employment restriction under the equal protection clause of the Fourteenth Amendment, and remarked, "[State authority] does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[53] The language of Traux was focused on Equal Protection concerns. But in deciding the Equal Protection question, it had to decide Arizona's interest in passing the employment restriction. The Court ruled that whatever interest Arizona may have, it cannot include preventing employment of lawful permanent residents. Denying employment to lawful permanent residents would deny them "entrance and abode," because "instead of enjoying . . . their full scope the privileges conferred by the admission, [they] would be segregated in such of the States as chose to offer hospitality."[54] The Court reasoned that forcing immigrants out of Arizona would affect national immigration policy because other states might follow suit.[55] All of the

51. *Id.*

52. Truax v. Raich, 239 U.S. 33 (1915).

53. *Id.* at 41.

54. *Id.* at 42.

55. It is important to note that Traux's comments about state exclusion impacting national immigration, were only used to examine state power or

circuits that struck down the self-deportation laws following *Arizona* relied on this reasoning from *Traux*. The Eighth Circuit's response in Fremont was simple, "[w]e are unwilling to speculate whether other state and local governments would adopt similar measures, whether those measures would survive non-preemption challenges, and the impact of any such trend on federal immigration policies."[56]

While the logic of *Traux* seems sound enough on the surface, there are flaws on its application to pre-emption jurisprudence. The language of how forcing a person out of any *one* state could prevent him or her from living in *any* state was an examination of state interest under Equal Protection. The hypothetical that if one state could exclude may lead to other states also excluding non-citizens demonstrated the lack of state interest in controlling migration, not a direct example of preemption. Applying this reasoning to pre-emption necessitates that the power to exclude non-citizens from a state border conflicts with the power to exclude people from the national border because of how that power can be wielded in the aggregate. It is this leap that some courts, such as the *Freemont* court found too tenuous and remote to make. Second, *Traux* was also focused on a state curtailing a right given to an individual by federal auspices. The lawful permanent resident status of the petitioner was key, for the Court relied on the notion that he was "admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union." The federal authorization set up the conflict with state law as lawful permanent residents were explicitly given authorization to not just enter the United States, but also, "entering and abiding in any State in the Union."[57] A State's attempt to prevent migration of lawful permanent residents would conflict with federal law, precisely because federal law authorized a person to travel and live anywhere in the United States. Regulating the undocumented would not have this worry.

When Justice Scalia's dissent defended state efforts to protect their own borders as sovereign bodies, the clear

state interest and not a description of immigration pre-emption.

56. Keller v. Fremont, 719 F.3d 931, 942 (8th Cir. 2013).

57. *Traux* at 42.

implication was that he viewed such efforts not as "immigration" law, but rather closer to the spectrum of "alienage" law. Absent a state law such as the one in *Chy Lung*, which prevented noncitizens from entering not just California, but the United States, its effects on national immigration policy remains indirect and in some instances speculative. And yet there is no disagreement that such laws affect the migration of people into and out of state borders, in fact, that is their very purpose. Using preemption analysis to strike down state self-deportation laws requires classifying such efforts as affecting national migration policy, but using a right to travel analysis only requires acknowledging what has been universally accepted, that such efforts have a direct impact on migration of people into and out of state borders.

Critiques of preemption used against state regulation has met with a variety of critics, from those who wish to expand state regulation of immigration,[58] to those who worry that preemption may leave noncitizens more vulnerable.[59] Defenders of preemption have not only referred to traditional federal concerns, but also to values such as equality and establishing membership. In 1995, Professor Motomura responded to a proposal by Professor Spiro to allow for more state regulation by laying out an "equal protection" defense based on the decision from *Plyler v. Doe*. Recognizing that normally the federal government has no greater ability to violate the equal protection clause, he did articulate a federal interest that states did not; creating a national identity. Federal classifications, including ones that delineate the undocumented, could be justified under a federal project of forming a national identity, while states should not be allowed to wade into immigration regulation.[60] Invoking Michael Walzer, he feared that state regulation of immigration would lead to a "thousand petty fortresses." By 2014 Professor Motomura gave a more full-throated defense of immigration preemption in his book, *Immigration Outside the Law,* but

58. Spiro, Peter, Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va. J. Int'l L. 121 (1994).

59. *See Heeren, supra* note 13.

60. Motomura, Hiroshi, *Immigration and Alienage, Federalism and Proposition 187,* 35 Va. J. Int'l L., 201, 203 (1995).

equality and national identity remained central.

In *Immigration Outside the* Law, Motomura embraced preemption as a strong basis for disallowing state regulation of immigrants and immigration. However, equality and the national project of deciding membership remained key in his analysis. Despite acknowledging that distinctions between migrants who are in the country with authorization and those without may be constitutionally allowed, the importance of equality, and eventual access to equality remained paramount. According to Motomura preemption in the immigration context is not solely a structural concern dealing with relationships between states and the federal government. Instead, when applied to immigration law, preemption becomes a prophylactic against violations of equality. "More generally, preemption is appropriate if an expanded state or local role substantially increases the risk of undetected or unremedied constitutional violations."[61] In describing the federal power over immigration, Professor Motomura again wrote about the project to create national identity and membership by declaring that it was the federal government's province to "to decide who belongs and who does not."[62]

Whatever one's opinion may be about immigration preemption[63] an overlooked doctrine, the right to travel has already directly addressed and incorporated the two main themes of Professor Motomura's preemption theory. The right to travel protects against discrimination and is one of the purest examples of the limitation of state power to control identity and community membership.

61. Motomura, Hiroshi (2014-06-02). Immigration Outside the Law (Kindle Locations 3037-3038). Oxford University Press. Kindle Edition.

62. Motomura, Hiroshi (2014-06-02). Immigration Outside the Law (Kindle Locations 3071-3073). Oxford University Press. Kindle Edition. "The federal government's lawsuits against Arizona, Alabama, Utah, and South Carolina reflect its concern that these states have threatened the federal government's constitutional role— as it emerged from the Reconstruction Amendments following the American Civil War— to decide who belongs and who does not."

63. There have been several different scholars who view the preemption wielded by the *Arizona* court in different ways, Kerry Abrams in "Plenary Preemption." 99 Virginia Law Review 601 (2013) described the power as one protecting the federal "plenary" power which could similarly be considered as the power to decide membership and sovereignty.

II. History and Evolution of the Right To Travel

Throughout our nation's constitutional history, the right to travel has played a crucial role in defining our federalist structure. It has promoted national unity by preventing states from frustrating federal power and purpose, and at the same time has protected individuals from discrimination and unequal treatment. At the start, the right to travel prevented any direct interference with the free flow of people over state borders such as with direct taxation and creating criminal liability for travel. But during the civil rights era, the right to travel also began to affect not just direct barriers to migration, but indirect means such as discrimination and mistreatment of classes of people in order to drive them out. The right to travel is more than just allowing people, like commerce, to flow from state to state. The right, especially after the Civil War, is a prohibition against states from exercising membership decisions, not just on a national level, which would interfere with national immigration policy, but also membership decisions for each individual state. While the Citizenship clause prevents States from denying membership to those born within a state's borders, the right to travel prevents States from erecting barriers to membership from migrants. Individual states may be sovereignties in many ways, but their key defect, is that they cannot control who can join and who must leave their state.

The right to travel, and specifically the right to interstate travel, enjoys a long and well-recognized history in the United States predating the Constitution. Article IV of the Articles of Confederation describes an early ancestor to the right to travel:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges or immunities of free citizens in the several States; and the people of each State shall have free ingress and regress

to and from any other State.[64]

The Articles of Confederation Article IV's language referring to free ingress and regress did not end up in the text of the ratified Constitution, but, nevertheless, courts continue to recognize the fundamental aspect of the right, and rarely question its existence. Despite this nearly universal recognition, the Supreme Court has been inarticulate and deliberately vague about the right to travel's origins or applications. The Court has described the right to travel as part of the "Privileges or Immunities" clause of Article IV of the Constitution,[65] as concomitant with national citizenship,[66] as part of the Dormant Commerce Clause,[67] as part of a fundamental right protected by Equal Protection Clause,[68] and most recently, as part of the Privileges and Immunities Clause of the Fourteenth Amendment.[69] While a varied and storied history is by no means an unusual characteristic of a constitutional right, the right to travel is an anomaly mainly because, while successive courts have described the right differently, none have expressly overruled or attempted to disqualify a previous understanding of the right to travel. As will soon become apparent, the right enjoys a fractured and diverse nature that appears to be an amalgam of several different constitutional rights and concerns. A closer examination will reveal a powerful and underappreciated protection against discrimination and the tool to keep the national project of membership and identity away from the States.

64. ARTICLES OF CONFEDERATION of 1781, art. IV.

65. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871) (stating that the Privileges or 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 or Immunities Clause provides "the right of free ingress into other states, and egress from them.").

66. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867).

67. Edwards v. California, 314 U.S. 160, 173 (1942).

68. Shapiro v. Thompson, 394 U.S. 618, 654 (1969); Zobel v. Williams, 457 U.S. 55, 65 (1982).

69. Saenz v. Roe, 526 U.S. 489, 503 (1999).

A. *The Passenger Cases—The Beginning of a Winding Road*

One of the Supreme Court's first opportunities to recognize the right to interstate travel came when Massachusetts and New York created different head taxes for passengers on ships seeking port in Boston and New York.[70] Eight Justices wrote eight separate opinions examining two different state statutes, one in New York and one in Boston.[71] Both statutes placed taxes on ship carriers and used the origin of the passengers to determine the rate; passengers from certain states and countries increased the taxes levied.

The New York statute[72] required taxes to be paid if the ship originated in "foreign" ports. Passengers from other states were charged twenty-five cents for every month if the ship was from Rhode Island, New Jersey or Connecticut, while passengers from other states were charged twenty-five cents for each voyage. Foreign passengers were charged a dollar and fifty cents if they were in the cabin, or a dollar if they were in steerage. The Massachusetts statute[73] required all "alien"

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70. Passenger Cases, 48 U.S. at 283.

71. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993), for a more detailed discussion of the case's impact on immigration law.

72. N.Y. Rev. Stat. § 7 (1827)

> 1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar. 2. From the master of each coasting-vessel, for each person on board, twenty-five cents; but no coasting-vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year.

73. Mass. Rev. Stat. § 2-3 (1837)

> Sec. 1st. When any vessel shall arrive at any port or harbour within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers. Sec. 2d. If, on such

passengers to undergo inspection and, if they were "lunatics," "maimed," or if the alien would be deemed to be unable to maintain themselves, a bond of a thousand dollars had to be issued to ensure that the "lunatic or indigent passenger" would not become a charge of the city of Boston for ten years.[74]

This early attempt by localities to control immigration produced eight different opinions including a dissent by Chief Justice Taney. The Justices argued over the power of federal immigration, taxation and the meaning of Article I Section 8. The discussion also touched upon what Justice Scalia worried about on April 25, 2012 when he asked about Arizona's sovereignty. Do the States have complete control over their borders with the limited exception of allowing federal agents to travel into and through the states?

Justice Maclean considered the migration of free people as "commerce" and determined that regulation of such commerce would violate the Commerce Clause.[75] As to the question of how

> examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond. Sec. 3d. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers.

74. Such a bond being a very early ancestor to the affidavits of support being required for immigrant arrivals in the United States currently, though it is difficult to imagine a $1000 bond be payable by most people during that time period.

75. *See* Passenger Cases, 48 U.S. (1 How.) at 405 ("In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers. For the transportation of both the ship-owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State,

to treat foreigners, Justice Maclean wrote "[e]xcept to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress."[76] Justice Maclean goes on to explain, "If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union."[77] Justice Wayne agreed with his colleague on the application of the Commerce Clause and then wrote about the interplay of federal and state powers when it came to foreigners. Justice Wayne wrote:

> Having surrendered to the United States the sovereign police power over commerce, to be exercised by Congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade, independently of every other condition of admittance which the States may attempt to impose upon such persons.[78]

Justices Maclean and Wayne created the framework, called the immigration pre-emption doctrine, for what would later be the basis of the *Arizona v. United States* ruling some 150 years later.

Justice Taney, in his dissent, put forward what would later become the right to travel. He began the opinion with a heated discussion of how the power to compel entry of foreigners into a state's jurisdictional territory must be considered part of the state's police power to expel unwanted persons that are deemed to be a danger. Justice Taney wrote:

like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the State, they become subject to its laws.").

76. *Id.* at 406.

77. *Id.* at 407.

78. *Id.* at 425-26.

> States have a right to remove from among their people, and to prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government.[79]

The language referred to "people" and Justice Taney's concern for the ability to protect the state's own welfare would naturally apply not only to foreigners, but anyone entering a State's borders. However, Justice Taney clarified that the State's interest in controlling its borders stopped short of citizens and his explanation gave rise to the constitutional doctrine of the right to travel.

According to Justice Taney, a state's power to expel is limited to foreigners. "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."[80] The very act of creating a Union required free access through the different parts of that Union. Unlike Justice Maclean, Justice Taney ignored the Commerce Clause, or any text from the Constitution in making his declaration. Rather, Justice Taney pointed out that the right to travel, including the ingress and egress through state territories, is necessary for the federal government to function as required by the Constitution.

B. *The Right to Travel Emerges as both an Intergovernmental Right and as a Personal Right*

While the *Passenger Cases* set the stage, it was Nevada's attempt to tax people leaving its state that brought the right to

79. *Id.* at 467.

80. *Id.* at 492. It should be noted that Taney's vision of a national form of citizenship subsequently played an important role in the infamous Dred Scott Case.

travel to the forefront and allowed it to emerge as an independently recognized fundamental right under the Constitution. Two years after the Civil War, the Supreme Court struck down a tax levied by Nevada on all outbound passengers from the state.[81] The Court dispensed with the two provisions that swayed the *Passenger Cases* Court, deciding that Nevada's tax did not affect interstate commerce nor imposed a "non-universal" duty. Instead, the Court ruled that Nevada's tax threatened the federal government's constitutional role, including the ability to declare war which necessarily also includes being able to raise an army and transport troops over state lines.[82] The reference to federal war powers is unsurprising given how close in time this case was to the Civil War, a point Justice Miller drove home by noting that if Tennessee or other States during the rebellion had imposed similar taxes as those imposed by Nevada, the United States could not have paid, and thus may have imperiled the war effort.

Interference with federal power was reason enough to strike down Nevada's tax, but the Court went on to rule that the tax infringed on an individual civil right as well. For the *Crandall* Court, the right to interstate travel protects not just federal power, but also protects an individual's ability to transact with the federal government, which in turn is necessary to protect against state intrusions on a host of constitutional rights.[83] States that burden travel or prevent movement through their territories interfere not just with the flow of federal power, but prevent people from seeking the protection of the federal government. Given its historical

81. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

82. *Id.* at 44 ("If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise.").

83. *See id,* ("[T]he citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.").

perspective, the *Crandall* Court's focus on the federal government and its powers is not surprising, nevertheless it is important to remember that the decision predated the Fourteenth Amendment, which would itself become a primary limitation on state power.[84]

C. *The Muddled Mess of Right to Travel—An Incident to State Citizenship?*

Despite the references to federal power and the Commerce Clause in the *Crandall* court's language, a distinctly separate line of cases created an entirely different basis for the right to travel using a historical connection to Article IV of the Articles of Confederation. In 1917, Arizona was the site of an infamous labor conflict aptly titled the "Bisbee Deportations." Executives of a coal mining company heard of a planned strike by miners and were rebuffed by their efforts to get federal authorities to quell dissent and a conspiracy was hatched. Henry Wheeler, the Sherriff of Cochise County deputized several men from the town and began rounding up IWW union supporters. The Sheriff and his deputies began to forcibly remove the workers, not only from the town, but also transported them on a freight train to New Mexico and threatened their lives if they were to return.[85] The deportees were 1186 men, with over 400 of them foreign born. This attempt at strike-busting would later involve the Governor of New Mexico and federal authorities. Eventually, the Sheriff and coal company executives were indicted in federal court on four counts, with the charges all variations of the first count:

> [Conspiring] to injure, oppress, threaten, or intimidate 221 named persons, alleged to be citizens of the United States residing in Arizona,

84. The case was decided in March of 1868, while the Fourteenth Amendment was ratified in July of 1868.

85. *Report on the Bisbee Deportations. Made by the President's Mediation Commission to the President of the United States*, Bisbee, Arizona, Nov. 6, 1917, http://www.library.arizona.edu/exhibits/bisbee/primarysources/reports/president/index.php.

> of rights or privileges secured to them by the Constitution or laws of the United States; that is to say, the right and privilege pertaining to citizens of said state peacefully to reside and remain therein and to be immune from unlawful deportation from that state to another.[86]

The indictments were dismissed on a finding that no federal authority existed to prosecute the men for these crimes[87] and the Supreme Court upheld that decision by the District court. The eight Justice majority decision acknowledged that the miners' constitutional rights were violated and went so far as describing the violated right to travel as "fundamental" and one which encompassed the ability to "peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom."[88] However, the fundamental nature of the right was not enough to sustain the indictment as the Court decided that its Article IV origins limited the federal government's enforcement power.

The right to travel as a subset of the privileges and immunities contained in Article IV of the Constitution was not a novel position, even if it was primarily dicta. The *Wheeler* Court relied on a pair of cases decided right after *Crandall* to declare the right to travel as a privilege and immunity of state citizenship and thus should be enforced primarily by the several states.[89] The two cases, *Paul v. Virginia*,[90] and *Ward v. Maryland*[91] dealt with discrimination against out of state commercial agents (one an insurance corporation, and the other traders), the Court compared Article IV of the Articles of Confederation with Article IV of the Constitution and noted that the "free ingress and egress" appeared in the Articles of

86. United States v. Wheeler, 254 U.S. 281, 292 (1920).

87. The federal kidnapping statute did not exist at this time and would not until after the infamous Lindbergh kidnapping.

88. *Wheeler*, 254 U.S. at 293.

89. *Id.* at 295.

90. Paul v. Virginia, 75 U.S. (7 Wall.) 168 (1868).

91. Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

Confederation but was absent from the Constitution.[92] The Court viewed the deliberate redaction of the "free ingress and egress" language as a form of editorial shortcut rather than a deliberate choice by the Constitution's drafters and therefore read the right back into the privileges and immunities for the Constitution.[93] The Court made the extraordinary step of re-inserting the language because it viewed the right to free travel was essential to the privileges and immunities clause, which was not expressly enumerated anywhere in the text of the Constitution.

Ward and *Paul* did not deal with direct obstruction of the right to travel; nobody was prevented from entering Virginia or Maryland, no taxes were imposed on travelers as in *Crandall* and there was no forcible transportation across state lines as with *Wheeler*. The complainant in *Paul* was an out-of state corporation that objected to higher incorporation fees, while in *Ward*, traders objected to a higher tax levied on them compared to resident businesses. The Court recognized the core complaint as discrimination[94] but waxed eloquently on the right to travel as the means to strike down the state laws. These began the Court's recognition that discriminating treatment, as much as direct barriers, can affect the flow of migration.

Categorizing the right to travel as a privilege and immunity of state citizenship protected by Article IV did not sit comfortably for many jurists. By the 1940s, Justices began to object to the placement of the right as an incident to state citizenship. In *Edwards v. California*,[95] California criminalized the transportation of an indigent into the state. A majority of the Supreme Court relied on one of the justifications used by

92. *See Paul*, 75 U.S. at 180 ("gives [citizens of other States] the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."); *See also*, Lemmon v. People, 20 N.Y. 562 (1856) (discussing the relationship with the Articles of Confederation.).

93. The Supreme Court was heavily influenced by the landmark decision by Judge Washington in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (no. 3,230).

94. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 431 (1870).

95. Edwards v. California, 314 U.S. 160 (1942).

the *Passenger Cases* court and ruled that the California statute violated the Dormant Commerce Clause, rather than Article IV. However, several concurring Justices were uncomfortable with this justification as it reduced migration into a commercial activity and instead articulated a different basis to strike down the California law. The Dormant Commerce Clause, which prevents bias in favor of in-state commerce, seemed a strange place to prevent discrimination against the poor.

Two concurring opinions, one by Justice Douglas and one by Justice Black both cited the Privileges or Immunities Clause of the Fourteenth Amendment as the source of the right to travel and declare it a right of "national citizenship." Justice Douglas rejected prior case law describing Article IV as the home to the right to travel by pointing out that the *Crandall* decision could not have meant Article IV, since Nevada taxed its own citizens as well as any other traveler. Justice Douglas wrote that the right to travel "rises to a higher constitutional dignity than that afforded by state citizenship." For Douglas, the right to travel should be an incident to national citizenship found in the Fourteenth Amendment rather than Article IV's state Citizenship Clause. While Justice Douglas opinion was just a concurrence, the Court would later resurrect it some fifty years later.

D. *Fundamental Right under the Equal Protection Clause of the Fourteenth Amendment*

Fear of the poor did not abate after the *Edwards* decision, and states did not give up on their efforts to exclude them. In 1969, Pennsylvania and Connecticut, along with the District of Columbia, decided that they would try to control the migration of the indigent by cutting off welfare benefits to new residents, thereby actively discouraging welfare recipients from migrating.[96] The Supreme Court had to decide whether the right to travel not only would prevent a state from directly barring "ingress" into the state, but would also prevent the state from indirectly discouraging migration and encouraging

96. Shapiro v. Thompson, 394 U.S. 618 (1969).

exodus.

The *Shapiro* decision changed the course of the right to travel jurisprudence in a couple of important ways. First, despite nearly a century of jurisprudence, the Court became reticent about the origin or textual foundation for the constitutional right to travel.[97] Secondly, even as the Court shied from textually anchoring the right to travel, it introduced the Equal Protection Clause as a means to protect against state actions inhibiting the right to travel.

Unlike *Crandall*, *Edwards*, or *Wheeler*, the states in *Shapiro* were not directly inhibiting people from physically entering their states. And unlike *Ward* or *Paul*, the difference in treatment was directed towards new residents, not out-of-state visitors. These differences were significant; Article IV only protected against disparate treatment of out-of-staters,[98] and while taxing travelers could be seen as affecting commerce, refusal to give welfare benefits was not seen as violating the interstate commerce clause, especially when a federal statute encouraged a one-year residency requirement for aid to dependent children.

By refusing to pin down the textual basis for the right to travel, the Court in *Shapiro* could use the Equal Protection Clause to strike down the residency requirements without having to argue over the textual limits of the right to travel. The Court first declared that the residency requirements were creating classifications between "new" and "old" state residents. This description would not be enough on its face, as this classification did not involve any "suspect" classes such as race. However, under Equal Protection jurisprudence, state statutes can be forced to endure strict scrutiny not just because they use suspect classifications, but also if they infringe on a "fundamental" right.[99] The Court ruled that not only were the

97. *See id.* at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."). The Court's reluctance to pin textual source to the right to travel was presaged in United States v. Guest, 383 U.S. 745, 759 (1966) ("Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further.").

98. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).

99. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

states creating classifications based on time of residency, but also that this classification's purpose was to penalize and chill a person from exercising his or her fundamental constitutional right to travel.[100] By describing the right as fundamental, without pinning it to a particular constitutional provision, the Court was able to void the state statutes under Equal Protection without having to deal with some of the limitations that would have been inherent under Article IV (which does not apply to a state's treatment of their own citizens), substantive due process, or the Commerce Clause. Not only did the use of Equal Protection analysis sidestep these limitations, but it fit well into the scheme of preventing discrimination against the poor.

In the years that followed, the Court continued to use this type of analysis whenever faced with residential requirements for certain programs. The Court struck down the denial of free non-emergency medical care for new residents,[101] the denial of voting rights for new residents,[102] the preference for a state to hire veterans who entered the armed forces while a resident of that state,[103] and even the denial of dividend benefits given out by a state to newer residents.[104] While the Court vacillated on how to distinguish valid residency requirements[105] from invalid residency requirements, one of the keys for the Court was whether or not the State classification would impermissibly discourage migration of certain people into the state.[106]

100. Shapiro v. Thompson, 394 U.S. 618, 631 (1969). "If a law has 'no other purpose…than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.'" *Id.* (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

101. Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974).

102. Dunn v. Blumstein, 405 U.S. 330 (1972).

103. Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986).

104. *See* Zobel v. Williams, 457 U.S. 55, 71-81 (1982). (Justice O'Connor, in a concurring opinion, wanted to tie the right to travel back to Article IV of the Privileges or Immunities Clause.).

105. *See* Sosna v. Iowa, 419 U.S. 393 (1975).

106. One of the key points of confusion for the Court was when residency requirements required "strict scrutiny" or just "rational basis." The strict scrutiny cases all dealt with situations where the infringement on the right to migrate were much higher, where the benefits of residency were such that it was more than just affecting the choice to migrate, but had a significant impact, such as the denial of key welfare benefits, the ability to get non-

The years following *Shapiro* produced a flurry of litigation, including deciding how and in what circumstances the right to travel could be conditioned.[107] Nevertheless, both commentators and the Court were uncomfortable with labeling the right to travel as "fundamental" and yet refusing to pin down a constitutional source, and in *Zobel*, Justice O'Connor explicitly tried to tie the right to travel to the Privileges and Immunities Clause of Article IV.[108]

E. *Privileges or Immunities Clause: The Three Aspects of the Right to Interstate Travel*

In 1992, California's decision to change their welfare benefits program gave the Supreme Court a chance to clarify the muddled jurisprudence of the right to interstate travel and lay out some concrete guidance to states on when the right to travel may be implicated. *Saenz v. Roe*[109] appeared at first to be a rehash of *Shapiro*: California required its new residents to have a full year of residency before allowing them full access to California's welfare program. There were two essential differences from the *Shapiro* case. First, California did not deny new residents all benefits; instead California explicitly gave new residents the same benefits they would have gotten from the State of their prior residence. Secondly, the federal government explicitly authorized durational residency requirements for welfare benefits in a separate piece of legislation.

emergency health care versus the ability to get divorces, or in-state college tuition.

107. In 1981 the Court had to decide whether a person convicted of child abandonment could be restricted from leaving the state of Georgia by prosecution as a felon. *See* Jones v. Helms, 452 U.S. 412 (1981). The Court recognized that the right to interstate travel was undisputedly part of the federal Constitution and yet recognized the varying theories and historical confusion as to the exact source of the right. Without resolving the confusion, Justice Stevens explained that, despite the fundamental nature of the right to travel, restrictions to the right to travel have always been recognized in certain circumstances, especially in the context of crimes. A more detailed discussion appears in Section 2, *infra*.

108. Zobel v. Williams, 457 U.S. 55, 71-81 (1982) (O'Connor, J., concurring).

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

The first difference—treating new residents to California in the same manner as they would have been in their original state—was a crucial distinguishing factor from *Shapiro*. While the Court in *Shapiro* and *Maricopa County* forbade classifications that "punished" people for traveling, California's policy did not impose any burdens on new residents, as they would receive the same benefits they had prior to moving. This circumstance sidestepped the language from *Shapiro* and its progeny requiring some sort of "burdening"—even though California treated new residents differently than established residents.

The second difference, federal authorization, also foreclosed another previously relied upon source of the right to travel. The Dormant Commerce Clause, the textual source relied upon in *Edwards*, provides no protection in the face of federal authorization. While states may not burden interstate commerce on their own, any authorization by Congress would allow states to affect interstate commerce without violating the Dormant Commerce Clause.[110]And finally, because the Privileges and Immunities clause of Article IV is limited to protecting only temporary travelers or non-in state residents,[111] the Court was left with a dilemma: either California's classification system was constitutional or the source of the right to interstate travel had yet to be discovered.

Justice Stevens surveyed the long history of the right to travel and identified three separate aspects to the right to interstate travel. First, any actual barrier to traveling into and out of the state would offend the right to travel. Second, temporary "out of state" visitors could not be discriminated against. Finally, in a move that both adopted and distinguished *Shapiro*, Justice Stevens explained that the right to interstate travel includes, "for those travelers who elect to become permanent residents, the right to be treated like other citizens

110. There remains a question as to whether federal authorization would render permissible what is otherwise a violation of the Comity Clause. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

111. Justice O'Connor had consistently argued that there was no problem in relying on Article IV protections for new residents; she considered "new" residents on the same footing as travelers.

of that State."[112] This formulation allowed the Court to avoid framing the issue as "punishing" a choice to migrate into the State. The very aspect of creating a classification for new residents was considered "punishment" enough. The Court maintained its mysterious reluctance to identify the source of the first aspect of the right to travel, cited Article IV as the source of the second aspect, and revisited the oft-criticized Slaughter-House Cases to unearth the Fourteenth Amendment's Privileges or Immunities Clause as the source of the third aspect of the right to travel. The right to be free from discrimination became not just an Equal Protection right, but also a Privilege or Immunity of national citizenship.[113] This pivot away from the Equal Protection Clause allowed the Court to identify a "textual" source for the right to travel instead of relying on its "fundamental" aspect. By anchoring the right to travel, or in this respect, the freedom from discrimination for being a "new resident," to the Fourteenth Amendment's Privileges or Immunities Clause, the Court could ignore federal authorization of durational residency requirements and declare California's changes to the welfare system unconstitutional.

The resurrection of the Fourteenth Amendment's Privileges or Immunities Clause could have been revolutionary,[114] and yet Justice Stevens blunted the impact of such a ruling by seizing upon dicta from the *Slaughter-House* Cases that referred to waterways,[115] and kept most of the Privileges or Immunities Clause dormant.

Despite *Saenz's* encompassing rhetoric on the history of the right to travel, and its outline of the right to interstate travel's three separate aspects, several open questions remain. First, the *Saenz* court explicitly left open the question of the textual support for the right of "ingress and egress;" tantalizingly, Justice Stevens noted that the right "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"[116]

112. Saenz, 526 U.S. at 500.

113. *Id*. at 502.

114. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (Found. Press 1999).

115. Saenz v. Roe, 526 U.S. 489 (199).

116. *Id.* at 501 (quoting United States v. Guest, 383 U.S. 745, 758

Secondly, the Court never overruled the *Shapiro* line of cases, and while in some respect the jurisprudence seemed to settle (*Saenz* was the last pronouncement by the Supreme Court on the right to travel), the right to travel continues to be an ongoing source of litigation and confusion with the lower courts. Finally, despite describing the right to travel as an anti-discrimination tool, the Court did not create a workable means to identify when disparate treatment would rise to the level of "making residents feel unwelcome" such that it would run afoul of the freedom to migrate.

F. *The Shift from a Federalist Right to Travel into a Civil Rights Right to Travel*

Prior to the civil rights era, the right to travel had been decided primarily on a federalism axis, but the right found new life as a tool to protect the indigent and poor when the Court decided *Shapiro*. With *Shapiro*, the Court leveraged the right to travel's status as a universally accepted constitutional right to prevent the discriminatory treatment of the poor but still avoided making economic class a protected "suspect" classification. The Court was eager to invoke the value of equality, but was not prepared to add the poor to the list of suspect classification. In order to thread this needle, the Court deliberately left the origin and textual support for the right to travel vague and indeterminate. The Court had taken what was a primarily a structural right and reshaped it into a tool to protect individuals from discrimination. *Shapiro* completed the transformation of the right to travel from a federalism right into a full-fledged civil rights one. And yet, the transformation was uncomfortable. The 1970s and 1980s showcased the Supreme Court's discomfort with describing the right to interstate travel as a civil rights issue as the Court took up a right to travel case each year from 1970 until 1975.[117] The 1980s were only slightly less fertile for the right to interstate

(1966)).

117. Oregon v. Mitchell, 400 U.S. 112 (1970); Graham v. Richardson, 403 U.S. 365 (1971); Dunn v. Blumstein, 405 U.S. 330 (1972); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974); Sosna v. Iowa, 419 U.S. 393 (1975).

travel, seeing three cases taken up by the Supreme Court.[118] Until the *Saenz* decision, only two cases in the 1990s dealt in part with the right to travel, *Bray v. Alexander* and *Nordlinger v. Hahn*, and in both cases the Court found that the right to travel was not implicated. As the civil rights era faded, so did the use of the right to travel. Finding Equal Protection inadequate on its own, the Court in *Saenz* attempted to identify the textual source of the right to travel's personal right component. As Laurence Tribe explains, while structural rights could remain un-enumerated, rights which belonged to individuals must be located in the text of the Constitution, which is why the *Saenz* Court was willing to reach back and risk resurrecting the Privileges or Immunities Clause of the Fourteenth Amendment which had laid mostly dead since the *Slaughter-House* Cases.[119]

At first glance, *Saenz* appears to repudiate *Shapiro's* equal protection analysis, but the Court never overturned *Shapiro*, and the Equal Protection framework for the right to travel continues to survive. The lower federal courts continue to rely on Equal Protection analysis when deciding right to travel cases. For instance, in *Doe v. Pennsylvania Bd. of Probationers & Parole*,[120] the court explained that under Equal Protection analysis laws that use non-suspect classifications can still be unconstitutional if they impinge on fundamental rights, with the right to interstate travel being one of them.[121] The Massachusetts Supreme Court interpreted *Saenz* as reaffirming the *Shapiro* decision and continues to rely on the Equal Protection Clause when deciding right to travel cases.[122]

118. Jones v. Helms, 452 U.S. 412 (1981); Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986); Zobel v. Williams, 457 U.S. 55, 65 (1982).

119. TRIBE, *supra* note 114.

120. Doe v. Pa. Bd. of Probationers & Parole, 513 F.3d 95 (3d Cir. 2008).

121. Despite the fundamental nature of the right, the Court found that because the petitioners were under probation, the restriction on the right to travel was constitutional. *Id.*

122. Sylvester v. Comm'r of Revenue, 837 N.E.2d 662, 666-67 (Mass. 2005) ("First, the Court reaffirmed the holding of Shapiro v. Thompson, *supra* (and, by extension, later related decisions), that the constitutional right to travel is protected by the Equal Protection Clause of the Fourteenth Amendment, so that a State classification involving a length of residence to qualify for welfare benefits has the effect of imposing a 'penalty' on the right to travel that is unlawful unless the classification is necessary to advance a

This interpretation of *Saenz* is unsurprising, since the Court repeatedly described the right to travel as protecting against discriminating treatment. When Justice Stevens equates the right to travel as "the right to be treated like other citizens of that State" it is not hard to see why courts continue to rely on the Equal Protection Clause in deciding right to travel cases.

The right to travel's long history showcases its many different functions. It helps prevent interstate conflict, both as an instrument in Dormant Commerce Clause jurisprudence and as a form of comity in Article IV's prohibition against discrimination against non-residents. And yet, the right to travel is more than just a structural right; it is a fundamental right that demands Equal Protection. While its various uses and history can be frustrating to commentators and jurists alike, the right to travel plays a crucial role in promoting national unity and providing a significant bulwark for individual freedom.

III. Undocumented Status and the Right to Travel

A. *Why Lack of Federal Authorization Does Not Allow States to Ignore the Right to Travel for Undocumented Migrants*

At first glance, the position that the undocumented can claim a right to travel seems preposterous. How could people who do not enjoy a legal right to enter or live in the United States make a claim as to travel within and between the states? An undocumented migrant's defining characteristic is past evasion of immigration procedures or a violation of the conditions of his or her entry, so how can he or she claim a right to establish residence? But the syllogism is misplaced for it assumes that the greater power—to exclude or deport from the country which belongs to the federal government—can provide states with the so-called lesser power—to exclude or deport from an individual state. The difference between state and federal sovereignty is a crucial factor in understanding how the right to travel extends to those without federal authorization.

compelling governmental interest.").

When the Supreme Court linked the ability to expel unwanted migrants to the ability to exclude unwanted people, it referred to this power as an "inherent and inalienable right of every sovereign and independent nation."[123] The federal government's power to control its borders and the flow of non-citizens within its territories is an expansive one rarely questioned. The federal government may condition entry into the United States for several reasons, from restricting employment,[124] to setting durational limits,[125] and even to forcing certain geographic limitations on entry.[126] This power to restrict movement, travel, and migration are all sovereign powers because they are all related to the ability to choose membership and identity. The United States of America as a sovereign nation should have the ability to choose whom to accept as members of its society, both temporary and permanent. While the most prominent type of membership-citizenship-is a hotly contested status and will be discussed *infra*, other sorts of membership are no less important. Temporary tourists are given a membership into the United States to enjoy the sights and provide both culture and commerce. Students are given membership into the national community of universities and colleges to both learn and contribute scholarship. The federal government inspects applicants for memberships in the various spheres, and decides whether or not a person fits the necessary criteria.

Undocumented migrants are people who either lost legal membership or never applied for such membership from the federal government of the United States in the first place. This lack of legal recognition is the source of the federal government's power to deport non-citizens, including the undocumented. Deportation is the effectuation of the choice by the federal government to deny membership to a person inside the United States. Whenever the federal government wields

123. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("rest upon one foundation, are derived from one source...and are in truth but parts of one and the same power").

124. Tourist visas do not allow employment, while student visas may restrict employment to on-campus positions.

125. Most non-immigrant visas have durational requirements.

126. Border Crossing cards are valid for entry for a geographic area around the border.

this power it must necessarily deny a person a variety of substantive due process rights, such as freedom from restraint, access to family, and ultimately the freedom to choose one's residence. The power of deportation has a profound consequence on what sort of rights an undocumented person may assert against the federal government. The federal government's greater power to exclude and therefore deport would necessarily subsume a claim to the right to travel. This is unsurprising given that, historically, the right to travel is mostly unconcerned with the exercise of federal power. The right to travel, along with the Citizenship Clause of the Fourteenth Amendment,[127] is a powerful reminder that the individual states have no ability to determine their own membership. Without the power to deny individuals state membership, States lack the power to expel the unwanted, even those without membership granted by the federal government-the undocumented migrant.

B. *The Right to Travel versus State Sovereignty—the Power to Choose Membership*

The right to travel jurisprudence began with a focus on movement and commerce. The cases recognized that "ingress" was to be protected from interference and that commerce would suffer if state borders restricted not just goods, but people[128] However, with *Shapiro*, the focus shifted away from just movement to membership and discrimination. Courts no longer were concerned with states placing barriers to actual movement such as in *Wheeler* or *Edwards*, but started to focus on how states were choosing which members residing in the states would get full protection of the law.[129] State discriminatory treatment that affected migration garnered the attention of the Courts. States were not allowed to deny poor

127. The Citizenship Clause forbids a state from denying state citizenship to a U.S. citizen who decides to reside within its territories.

128. *See* Ward v. Maryland*,* 79 U.S. (12 Wall.) 418, 431 (1870).

129. This focus on membership questions echoes Professor Motomura's concerns about the national versus state attempts to decide membership. *See* Section I. The right to travel jurisprudence provides the example on what is an exclusive "national project" the determination of membership that is given to the federal government and withheld from the states.

migrants full membership status, even though lack of money itself was not a protected class. The right to travel evolved into a right of migration between states premised on equal treatment.

When the Supreme Court decided *Shapiro*, it represented a leap in the evolution of the right to travel. Prior to *Shapiro*, Courts were focused on making sure that travel and commerce were fully protected by denying the individual states the ability to restrict movement across their borders. But the law at issue in *Shapiro* was of a wholly different character. California was not preventing travelers or businessmen or even federal officials from entering or doing business within its borders. Rather, California attempted to restrict the number and type of persons who could claim membership as California residents and, by doing so, receive the full benefits of California laws. While the Fourteenth Amendment's Citizenship Clause made it impossible for California to directly deny citizenship in general to its residents, California's disparate treatment of new residents tried to accomplish what a direct barrier could not.

When the Supreme Court struck down the individual states' attempt to discriminate against new migrants who were poor, the right to travel became not just about movement or travel, but a restriction on how states could use their laws to affect their own membership. A State cannot implement its own "immigration" policy, precisely because the states are not sovereigns. While the direct barriers to movement, such as entry taxes and criminalization, would clearly implement a migration policy, the Court beginning in *Shapiro* recognized that disparate treatment within the state could accomplish the same goals as tightened borders.[130] Despite the broad powers each state has to police and regulate its members, it may not deny membership or withhold the benefits of its laws to people who choose to live within its borders. This restriction on state power runs parallel to and in contrast with the Federal Government power to do exactly what the states cannot.

Federal immigration policy allows the federal government

130. Shapiro v. Thompson, 394 U.S. 618 (1969).This is the same reasoning that motivated the self-deportation architects who decided that discriminating against certain people within its borders not only would force some out, but would discourage others from entering at all.

to deny a myriad of benefits to those it deems unfit. The federal government is allowed to enforce its decisions on membership through its plenary power and most directly by exercising its deportation power. State governments have no such recourse. An example of this state disability is borne out by the Citizenship Clause, which forbids states from having any say on who is and who is not a citizen of the United States. The Citizenship Clause not only prevents states from deciding federal membership, but-importantly-the clause also prohibits states from defining state citizenship when the person in question is a natural born citizen. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside*."[131] While the concept of state citizenship played an important role in the Antebellum period, modern states tend to use the term "residents" to define a host of state membership boundaries precisely because the Fourteenth Amendment muddled the meaning of state citizenship.[132]

Federalism plays an important role in preserving the role of state governments without losing a national character. State power is enormously broad and often has the most immediate effect on individuals. And yet, the right to travel significantly undercuts the sovereignty of individual states. Just as Justice Scalia and Justice Taney point out, a state does have significant legitimate interests that are severely hampered when a state is unable to control its borders and prevent migration. When California wanted to limit the poor via the legislation in *Edwards* and in *Shapiro*, the goal was not just prejudice against the poor, but a legitimate concern that an influx of the poor would threaten their current welfare system for its current citizens. Maricopa County's decision to limit free non-emergency care to established residents was a choice designed to protect its program from financial ruin.[133] As pressing and legitimate the concerns the individual states had, the Constitution does not allow the states fix such problems by

131. U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added).

132. Examples include state taxation, in-state tuition, and the obligations of jury duty and voting. The possibility that states can define citizenship to those without federal citizenship will be discussed infra.

133. Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974).

denying residency to people in their particular state.

C. *The Right to Travel Protects Interests Unaffected by a Lack of Federal Authorization*

If states are not allowed to use migration policy as a solution to various problems, how does this relate to state self-deportation laws? There are two main reasons why the lack of federal authorization does not affect the right to travel analysis. Migration barriers erected by individual states are generally repugnant to the comity and relations between the different states, and self-deportation laws are no exception. The prohibition against states deciding migration policy is an important tool to prevent conflicts between the states and to promote national unity.[134] The status of the migrants being protected matters little: the more burdensome or noxious the group of migrants is, the more important it is to allow the free flow of migration. Just as setting up tariffs or barriers to the free flow of goods violates federal unity, so do barriers to the free flow of people-including the undocumented—between the states. Secondly, the right to travel is a right of personhood and not dependent on federal authorization or status. Its fundamental nature arose from its concern for equality under the law, a protection that extends to the undocumented.

1. The Right to Travel and Comity Considerations

The comity aspect of the right to travel is relatively uncontroversial and largely accepted by jurists and commentators alike. Professor Nzelibe argues that the right to

134. This potential conflict between states convinces Erin Delaney that the Dormant Commerce Clause, one of the potential anchors to the right to travel, may be used as a tool to evaluate state self-deportation laws. "In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens" 82 N.Y.U. L.Rev. 1821 (2007). Much of what she describes as concerns under Dormant Commerce Clause, as applied to immigration already exists in right to travel analysis. Ultimately, equating migration directly with commerce may make the direct application of dormant commerce clause jurisprudence problematic. Regardless, much of its application can prove useful in deciding how to detect breaches of the right to travel. *See infra* Part V.

travel's main purpose is "conserving the political and economic union against provincial state interests."[135] Professor Nzelibe explains that several clauses in the Constitution, namely Article IV's Comity Clause and the Commerce Clause, were drafted with the idea of promoting a national Union and reducing interstate conflicts. The right to interstate travel embodied similar values and should more properly be labeled as a "free movement" principle rather than an individually protected right. He describes how the free movement principle, like Article IV and the Commerce Clause, shared similar heritages and policy norms-the promotion of a federal unity.[136] For Professor Nzelibe, the right to travel, Article IV, and the Commerce Clause form a trio of "union-conserving norms."[137] Under the free movement principle, a state's discriminatory practice should be analyzed by deciding if it poses a "threat to the underlying norm of promoting federalism" rather than examining its effects on individuals.[138] The free movement principle is a "surrogate" right, which "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."[139] The union-preserving role of the right to travel is independent of any specific individual's status or ability to assert rights. The determinative question should be whether the state's interference with movement and migration threatens national unity.

135. Jide Nzelibe, *Free Movement: A Federalist Interpretation*, 49 AM. U. L. REV. 433, 435 (1999).

136. Other scholars such as Professor Richard Collins, have made similar arguments. Professor Collins focused less on the political union but rather viewed the Dormant Commerce Clause and the right to travel as creating a federal common market. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988).

137. Nzelibe, *supra* note 135, at 440-41.

138. *Id.* at 449.

139. *Id.* at 452.

2. Self-Deportation Laws as a Threat to Comity Between States

The list of the amici in the S.B. 1070 case before the Supreme Court produced few surprises, with one notable exception. The States of New York, Illinois, Hawaii, Rhode Island, California, Connecticut, Oregon, Massachusetts, Maryland and Vermont all joined an amicus brief that argued that Arizona's attempt to initiate a state-based immigration scheme under S.B. 1070 violated federalism. While notable that these states all argued against their own power to create an immigration scheme, most of their arguments echoed the federal government's concerns around pre-emption. However, in a section titled "Arizona's Single-State Removal Policy has National and International Effects," the state attorneys general described the impact of Arizona's S.B. 1070 on their respective states.[140]

State amici began by describing an effect of S.B. 1070, "[b]ecause Arizona cannot compel the federal government to remove undocumented residents, S.B. 1070's provisions have the primary effect of redirecting undocumented immigrants to other States."[141] Arizona had argued that its undocumented population was burdensome, that it led to increases in crime, and a threat to the fiscal and employment security of the state. Regardless of whether these fears were founded, the goal of driving out undocumented immigrants from the state and diverting them to their neighbors was exactly what the other state amici objected to. But how exactly does Arizona's decision to enact S.B. 1070 affect the other states and would those effects lead to unconstitutional conflicts?

a. *Migration affecting Interstate Commerce*

While this concept may seem repugnant to some, the Court has a long history of equating the migration of people with the

140. Brief of the States of New York, et al. as Amici Curiae Supporting Respondent at 21, Arizona v. United States, 132 S. Ct. 2492 (2012) (No 11-182).

141. *See id.*

flow of commerce, including the migration of non-citizens. Many of the Justices in the *Passenger Cases* rejected the local taxes by New York and Boston, believing that they would directly implicate interstate commerce and are therefore prohibited by the Dormant Commerce Clause.[142] The taxes at issue in the case were prompted by fears of economic burdens and payoffs to other states.[143] The commerce justification was again relied upon by a concurring opinion of the Court when it struck down Nevada's tax in *Crandall*, and later once again by the majority of the Court in *Edwards*, which tried to prohibit the migration of poor people into the state. While this justification fell out of favor later on,[144] it has never been expressly overruled, and as late as 1982, Justice Brennan approvingly noted this justification in the *Zobel* decision.

The fact that migration affects commerce does not necessarily lead to the conclusion that the right to travel is housed in the Dormant Commerce Clause, but it does highlight the havoc that a violation of the right to travel can have on the federal union.[145] When states begin to restrict migration of people, economic instability follows. The notion that the migration of people, whether undocumented or poor, affects commerce is not controversial or even debatable. Human beings, regardless of their status are principle drivers of commerce and the economy. This relationship between migration and commerce is one reason that Professor Delaney proposed an Article I Dormant Commerce Clause Analysis for examining state regulation.[146] The magnitude and direction of the economic effects of undocumented immigrants has been a fiercely debated topic among economists and used by politicians as justification to pass laws welcoming or restricting non-

142. *See* Passenger Cases, 48 U.S. (7 How.) at 283.

143. Friedrich Kapp, a state Commissioner of Emigration in the 1870s wrote, "While New York has to endure nearly all of its evils, the other States reap most of the benefits of immigration." FRIEDRICH KAPP, IMMIGRATION AND THE COMMISSIONERS OF EMIGRATION OF THE STATE OF NEW YORK 157 (The Nation Press 1870).

144. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Saenz v. Roe, 526 U.S. 489 (1999)

145. Even if the right to travel is not housed in the Dormant Commerce Clause, its analytical framework may be useful in studying immigration laws.

146. Delaney, supra note 134.

citizens.[147] The laws at issue in the *Passenger Cases* and *Mayor of New York v. Miln*[148] are prime examples of state-based immigration restrictions designed to affect interstate commerce.[149] Similarly, when New York and California complained to the United States Supreme Court about Arizona's legislation restricting migration of the undocumented, they cited economic concerns.

b. *Non-commercial Ways that Migration of Non-Citizens Affects Comity Between States*

The effects of controlling interstate migration are not limited to commercial repercussions. Arizona, as well as other states with similar laws, such as Georgia and Alabama, justifies the laws based on non-economic concerns. In its brief to the United States Supreme Court, Arizona argued "[t]his flood of unlawful cross-border traffic, and the accompanying influx of illegal drugs, dangerous criminals and highly vulnerable persons, have resulted in massive problems for Arizona's citizens and government, leaving them to bear a seriously disproportionate share of the burden of an already urgent national problem."[150] The Supreme Court's majority opinion, even as it struck down most of S.B. 1070, recognized Arizona's concerns for law enforcement by citing to a (dubious) report that estimated a higher criminal proportionality for the undocumented population in Maricopa County.[151]

Arizona also expressed concern over the degradation of public parks and natural resources caused by border crossers. While the magnitude, cause, and perhaps even the existence of

147. *See* Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, MIGRATION POL'Y INST. (Dec., 2009), http://www.migrationpolicy.org/research/economics-and-policy-illegal-immigration-united-states.

148. New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

149. Passenger Cases, 48 U.S. at 283; *Miln,* 36 U.S. at 102.

150. Brief for the Petitioners at 3, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

151. *See* Arizona v. United States, 132 S. Ct. 2492, 2500 (2012) (citing Steven A. Camarota & Jessica Vaughan, Center for Immigration Studies, Immigration and Crime: Assessing a Conflicted Situation 16 (2009)).

these effects are debatable,[152] the stakes are high enough that if an individual state appears to try and "pass on" those effects to its neighbors, conflicts can arise. Tellingly, Arizona began its brief to the Supreme Court by declaring that uneven federal enforcement in Texas and California had funneled the burden of undocumented immigration to Arizona.

The stated justifications for SB 1070 in dealing with the undocumented have a historical precedent. In *Edwards,* the Court noted "[t]he State asserts that the huge influx of [indigent] migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering."[153] As serious as these concerns may be, they highlight the degree to which the possibility of friction can occur. As the Justices ruled in *Edwards*, "this phenomenon does not admit of diverse treatment by the several States. The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative."[154] The Court goes on to say,

> [a]nd [for limitations on state power] none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world.[155]

The *Edwards* Court quotes Justice Cardozo as saying "[the Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the

152. *See* Hanson, *supra* note 112, at 8.
153. Edwards v. California, 314 U.S. 160, 173 (1942).
154. *See id.* at 176.
155. *Id*. at 173.

long run prosperity and salvation are in union and not division."[156] The right to travel plays a crucial role in creating a national framework and preventing individual states from attempting to fix difficult problems by passing them on to other states.

The passage of S.B. 1070 caused a number of other states, including Georgia, Alabama, Indiana, and Utah, to pass similar laws. The year that Arizona passed S.B. 1070, several newspapers reported that between10 and 20 states were considering similar bills.[157] While this may, at first, appear to be a way for states to unite, especially as many of the laws were written by the same authors, this copycat reaction by the states is an example of retaliatory action. When the *Edwards* Court described "retaliatory" action, it depicted a scenario where other states would react to California's laws by passing similar legislation, only harsher.[158] The concern was that each state would continually attempt to drive out indigents by passing ever more draconian legislation. In passing H.B. 56, a law described as broader in scope and harsher in application than Arizona's S.B. 1070 provision, Alabama took the first step in creating conflict and chaos among its fellow states.

3. Restriction of Migration of Undocumented Implicates Federal Power

The federalism aspect of the right to travel is not limited to "horizontal" federalism, or in other words just comity between the states, but does have an impact on vertical federalism, namely the relationship between the federal and state governments. In *Crandall*, the Supreme Court explained why territorial exclusions by states would and could frustrate

156. *Id.* at 174.

157. *See* John Miller, *Twenty Other States Considering Copying Arizona Immigration Law*, HUFFINGTON POST (June 25, 2010, 7:13 PM), http://www.huffingtonpost.com/2010/06/25/twenty-other-states-consi_n_626095.html; ImmigrationWorks USA, *Immigration Reform in Other States Since Arizona's SB 1070*, HISPANICALLY SPEAKING NEWS (Nov. 1, 2010), http://www.hispanicallyspeakingnews.com/immigration-news/details/immigration-reform-in-other-states-after-arizonas-sb-1070-2605/2703/html.

158. Edwards v. California, 314 U.S. 160. 176 (1942).

national interests and power. The Court described the varying seats of federal power, from the centralized to locations far and wide within the various states, and explained that

> [i]n all these [locations the Federal government] demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.[159]

Restrictions on movement of people dilute and frustrate the Federal government's ability to exercise its power, especially in the realm of immigration and alienage. For example, suppose that an undocumented man lives in a state that does not have an immigration court, such as Iowa. If he has an immigration hearing in Omaha, Nebraska, and Nebraska has strict laws criminalizing any entries by the undocumented, then the Federal government's ability to control immigration would be threatened by state law. The ability to move between state borders not only prevents states from in-fighting, but is also necessary to allow federal power to flow throughout the nation. Because federal power inheres in its agents and the ability to exercise power over people, geographical restrictions on people inevitably obstruct that power.

This type of interference with federal power is not the same as pre-emption. Pre-emption, like the right to travel, is an outgrowth of the federalist structure. The superiority of federal law to state law is an aspect to federalism as much as the principle of limited powers for the Federal government. Pre-emption is primarily concerned with the vertical structure of the government, namely the relationship between a state's power and the Federal government's. As the *Arizona* Court explained, pre-emption occurs when the Federal government has declared exclusive jurisdiction over a field (field pre-emption), or when state laws and federal laws conflict such

159. Crandall v. Nevada, 73 U.S. (6 Wall) at 44.

that it becomes impossible to comply with both.[160] State and local regulation, just like Arizona's S.B. 1070, can run into pre-emption issues when dealing with non-citizens. Pre-emption and the right to travel, even as purely federalist values, are not identical.

While pre-emption focuses on conflicts between state and federal laws, the right to travel's concerns are broader. The right to travel protects federal power in two primary ways. The first is to ensure the ability of federal officers and people under federal authority to move freely across state borders without interference. State immigration laws do not normally interfere with federal officers or their ability to freely travel in to and out of a state. But interference with federal power also occurs when states restrict the ability of people to petition the federal government. Self-deportation laws interfere with the ability of people to entreat the federal government for benefits and protection. When Arizona's borders are hostile to any movement by undocumented people, it is impossible for the undocumented to petition the federal government for help or protection that they would otherwise have the ability to do.[161] For instance, a young undocumented immigrant, who would be otherwise eligible for immigration relief, may be living in Arizona or the neighboring state of New Mexico. If Arizona is allowed to restrict movement internally or through its borders, the applicant may never have a chance to file and attain federal relief without violating Arizona laws restricting the movement of the undocumented. Even in the modern era, which relies heavily on electronic medium, the freedom of movement is often necessary for those who seek the authority and protection of federal power.[162] Any legal restriction on movement that may hamper the ability to petition for federal protection undermine federal power and is suspect.

160. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012).

161. *Crandall's* language does refer to the citizen being able to seek federal power, but as will be argued *infra*, this distinction loses its importance once the courts accept that the undocumented have the right of access to the court system.

162. While DACA applications are received through the mail, applicants are expected to get biometrics done at application support centers.

D. *Right to Travel is Not Just a Structural Concern*

Describing the right to travel solely in terms of federalism misses the right's rich history and the important role that it plays in defending individual liberty. Justice Taney's description defines its purpose as solely structural, and even *Crandall's* invocation of national interest makes note of the "corollary" right possessed by citizens.[163] Article IV, commonly referred to as the "Comity Clause," also provides individual rights, such as those contained in its Privileges and Immunities Clause.[164] Despite Professor Nzelibe's frustration with the post-*Shapiro* line of cases that consistently refer to the right to travel as an individual right, other scholars have recognized that the right to travel plays a dual role, protecting federalism and individual liberty.[165] It accomplishes these dual purposes by preventing states from discriminating against migrants or travelers, directly and indirectly. By prohibiting states from engaging in individual migration policies, the right to travel enhances the federal union; but it also allows people to exercise choice in where to reside or travel within the United States. Because the scope and breadth of individual liberties can oftentimes vary depending on immigration status, it is a fair question to wonder whether non-citizens, especially the undocumented, may invoke the right to travel to protect their own liberty interests.

E. *Equal Protection for the Undocumented*

The right to travel was a powerful tool against

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163. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867) ("But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.").

164. *See* Metzger, *supra* note 110.

165. *Id.*

discriminatory treatment by the individual states long before the creation of the Fourteenth Amendment and its Equal Protection Clause. While the right to travel's protection is not as broad in scope of as the Equal Protection Clause, it prevents states from using invidious classifications to discourage travel or migration. In the *Passenger Cases*, Massachusetts and New York attempted to curtail movement by foreigners and citizens who were from out-of-state. The tool they used to accomplish this was a head-tax that created various different classifications. When California tried to prevent the poor from migrating to the state, it passed a criminal law preventing the transportation of a certain class of people: those who were likely to become indigent. Despite this prior history, it wasn't until *Shapiro*, that the Equal Protection Clause began to take center stage in protecting the right to travel. The right certainly existed prior to the Equal Protection Clause, but one of the key means to preserve the right—prevention of discrimination wasn't fully realized until the *Shapiro* decision. The right to travel is a fundamental constitutional right such that any state classification on its exercise must pass strict scrutiny.

The Supreme Court foreclosed arguments that the Fourteenth Amendment as a whole does not apply to the undocumented shortly after the Amendment's ratification. Beginning with *Yick Wo v. Hopkins*,[166] non-citizens were able to seek protection under the Fourteenth Amendment's Due Process Clause. *Mathews v. Diaz* extended the Fifth Amendment's Due Process protection to include undocumented immigrants. [167] However, the Supreme Court did not decide the scope of the Equal Protection Clause until Texas passed a law that withheld funding to public schools that educated undocumented children.

In *Plyler v. Doe*,[168] the Supreme Court settled several questions. First, the words "person" and "within their jurisdiction" of the Equal Protection Clause covered undocumented immigrants. States may not deny Equal Protection of the law to the undocumented. However, while

166. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
167. Mathews v. Diaz, 426 U.S. 67 (1976).
168. Plyler v. Doe, 457 U.S. 202 (1983).

Equal Protection covered the undocumented, its application remained unclear and ultimately proved to be very narrow.[169]

Even as Equal Protection's scope included the undocumented, important limitations were put into place. First, the Court decided that undocumented status is not a "suspect" class, meaning that strict scrutiny would not apply to classifications based on undocumented status. The Court ruled that undocumented status was not an immutable characteristic and instead was the product of a conscious unlawful act.[170] Second, the Court ruled that public education is not a fundamental constitutional right and therefore discriminatory restriction on access to public education does not have to survive strict scrutiny analysis.[171] The second ruling was as crucial as the first. If public education is a fundamental right under Equal Protection, then even if the classification was not suspect, any restriction would still require examination under strict scrutiny. Ultimately, the Court ruled the law unconstitutional under a lesser form of scrutiny. While *Plyler* importantly opened the door for Equal Protection claims, it did so in a very narrow way.[172] Immigration status was not a suspect classification requiring protection, even as the scope of Equal Protection does include undocumented people. The unanswered question left by *Plyler* is what would happen if a state attempted to discriminate against the undocumented by denying a "fundamental" right previously recognized as protected under the Equal Protection Clause?

The list of Equal Protection fundamental rights is not a long one. The Supreme Court has protected parental rights,[173] the right to have one's vote counted,[174] the First Amendment,[175]

169. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010).

170. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982).

171. *Id.* at 223 ("Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.").

172. *See* Motomura, *supra* note 169, at 1731-32 ("[The Plyler Court] relied so heavily on the involvement of children and education that no court has ever used it to overturn a statute disadvantaging unauthorized migrants outside the context of K-12 public education.").

173. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

174. Bush v. Gore, 531 U.S. 98 (2000)(If a fundamental right under the Equal Protection Clause however is the requirement to have one's vote count,

the right against sterilization (or reproduction),[176] the right to contraception[177] and, most relevant to this discussion, the right to interstate travel.[178] While both Equal Protection and substantive due process both use the term "fundamental" as pertaining to rights, the uses are very different in application. As Justice Stewart writes in response to Justice Harlan's dissenting opinion in *Shapiro*, in deciding a fundamental right under Equal Protection, the Court "does not 'pick out particular human activities, characterize them as "fundamental", and give them added protection.' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands."[179] Unlike substantive due process, which may be used to find un-enumerated rights under the guise of "liberty", an Equal Protection fundamental right must already enjoy explicit constitutional protection.

When courts described the right to travel as an individual right, they often referred to terms such as liberty[180] and freedom of movement. In the context of international and intra-state travel[181] the courts explicitly grounded the right as a liberty interest. Restrictions on the ability to travel into and out of a state's territory, or restrictions on where to choose to live, are intrinsically tied to liberty and another reason why it

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how could a non-citizen be afforded such protection when they can be excluded from suffrage altogether? The right under Bush v. Gore does not require universal suffrage; rather it requires that once a person votes, it must be counted equally to all the other votes. And because non-citizens may be given suffrage and have throughout the nation's history, it stands to reason that if they were allowed to vote, their vote must be counted equally.).

175. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

176. Skinner v. Oklahoma, 316 U.S. 535 (1942).

177. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (Though the Court did not need to decide that the right to contraceptives was a fundamental right as it struck the restriction under rational basis, the Court strongly indicated that it would have found Griswold's prohibition as a fundamental right.).

178. Shapiro v. Thompson, 394 U.S. 618 (1969).

179. *See id.* at 642.

180. It is important to note, that while "liberty" can have broad meanings, the references to the right to travel refer to a narrower definition concerning freedom from physical confinement.

181. Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002); Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990); State v. Burnett, 755 N.E.2d 857 (2001).

https://digitalcommons.pace.edu/plr/vol34/iss2/7

is a fundamental right that covers all people, including the undocumented.

IV. Citizenship and the Right to Travel

A careful reader of the right to travel cases will note that the word "citizen" appears throughout the Supreme Court's decisions. The right to travel's textual foundations include the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment; rights which non-citizens and the undocumented enjoy. However, the Court has also pointed to other textual foundations of the right: the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment, both of which explicitly contain the term "citizens" and not the term "persons." The latter status is one that an undocumented migrant may make a claim to, while the former status is out of reach. Moreover, Justice Taney, one of the first jurists to define the right to travel, explicitly denied this right to non-citizens and described it as a right unique to federal citizens.[182] How can non-citizens, particularly the undocumented, be able to invoke a right that has been described as a "privilege or immunity of citizenship?"

A. *The Citizenship Divide*

Prior to the Court's decision in *Saenz*, the right to travel as an exclusive citizenship right was merely a suggestion gleaned from the repeated use of the word "citizen" and various dicta from dissenting and concurring opinions. When presented with the question directly, the Supreme Court in *Graham v. Richardson*[183] declined to decide the issue and instead relied upon the Equal Protection Clause. The perception of the right to travel changed dramatically after *Saenz* described the textual foundations as partially residing in the Comity Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. The suggestion of citizenship

182. Passenger Cases, 48 U.S. (7 How.) at 283.
183. Graham v. Richardson, 403 U.S. 365 (1971).

exclusivity transformed into an assumption. And yet, the Court never decided that the right to travel's scope was limited to citizens or citizenship; California's welfare scheme did not depend on the citizenship status of any of the incoming migrants. The revival of the Fourteenth Amendment's Privileges or Immunities Clause was a strategic choice, designed to address California's attempt to accomplish indirectly what the states in *Shapiro* could not do directly. Even assuming that *Saenz's* identification of the Privileges or Immunities Clause as a significant source of the right to travel is correct, it doesn't decide the scope of the right to travel's protection. The paucity of jurisprudence around the Privileges or Immunities Clause muddies the issue, and surprisingly enough, the Supreme Court has not expressly withheld a privilege or immunity of citizenship from non-citizens. An examination of constitutional citizenship, the historical origins of the right to travel, and finally the right's expansion under the Fourteenth Amendment's Equal Protection Clause reveals that, regardless of its textual source, the right to travel protects non-citizens in the interior of the United States.

Both Article IV's "Privileges and Immunities" Clause and the Fourteenth Amendment's "Privileges or Immunities Clause" contain the term "citizen", which naturally leads to the assumption that non-citizen migrants, especially the undocumented, are outside of the respective clauses' coverage. Justice O'Connor, in a concurring opinion, noted that Article IV's clause would naturally be read to exclude non-citizens.[184] But before this next logical step can be taken, John Hart Ely's warning about the scope of the Privileges or Immunities Clause should be heeded:

> "I certainly agree that we should defer to clear constitutional language: for one thing it is the best possible evidence of purpose. But when the usual reading is out of accord with what we are quite certain was the purpose, we owe it to the Framers and ourselves at least to take a second

184. *See* Zobel v. Williams, 457 U.S. 55, 74 (1982).

look at the language."[185]

The fact that both clauses contain the term "citizen" does not necessarily limit or define the scope of the clauses' protection.[186]

The claim that the right to travel is an exclusive right for citizens faces several hurdles. First, citizens have few exclusive constitutional protections.[187] One scholar even deemed citizenship irrelevant in constitutional law.[188] Second, the historical underpinnings of the right to travel extended to non-citizens and "inhabitants." The interweaving of "citizenship" and the right to travel was a strategy motivated by racial animus and fear of movement by free black men into slave states. And finally, even if the right to travel began as a privilege or immunity of citizenship, once it was given fundamental status under the Equal Protection Clause it would necessarily extend to non-citizens and the undocumented.

B. *The Thinness of Citizenship Rights*

When Alexander Bickel wrote that citizenship was "not important," he did so with a specific worry in mind. As he explained, "Citizenship is a legal construct, an abstraction, a theory. No matter what safeguards it may be equipped with, it is at best something that was given, and given to some and not to others, and it can be taken away."[189] To him, the grounding of rights and constitutional protection based on the legal status of citizenship was dangerous and far less reliable than understanding that rights were dependent on "personhood." He

185. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 25(1980).

186. An example of how the term "citizen" in the Constitution may extend to non-citizens can be seen in the context of Article III's diversity jurisdiction requirement, which has been interpreted to include residents of a state who are not federal citizens. Similarly, despite references to "state citizenship," citizens of Puerto Rico also enjoy Article IV protection.

187. *See* Linda Bosniak, *Constitutional Citizenship through the Prism of Alienage*, 63 Ohio St. L.J. 1285, 1314 (2002)

188. Alexander M. Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369 (1973).

189. *Id.* at 387.

warned that "it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson . . . ."[190] Indeed, he was particularly concerned that a citizen-based rights theory would lead us to "a search for reciprocity and symmetry and clarity of uncompromised rights and obligations," which in turn would lead to a theory of rights dependent on consent and contract.[191] This warning is particularly prescient when considering the fate of constitutional protection for undocumented migrants in the United States.[192] Constitutional jurisprudence has largely heeded Bickel's concerns and disfavors making constitutional protection hinge on citizenship.

Kurt T. Lash's book *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship*, makes two convincing arguments that seriously questions the role of the right to travel as a "citizenship" right. First and foremost, despite the common reading of *Coryfeld* that had included the right to travel as a right belonging to Article IV, Professor Lash demonstrated that ante-bellum common understanding of *Coryfeld* was much more limited. Despites its expansive dicta, *Coryfeld* and the other antebellum decisions on Article IV confirm an understanding that the "privileges and immunities" of citizenship did not refer to national or even fundamental rights, but rather only rights expressively protected by states to their own citizens.[193] He also defended against the notion that the 14th Amendment's privileges or immunities clause refers to unenumerated rights and instead articulates how the drafters and common understanding of the Privileges or Immunities clause during its passage refers to enumerated federal rights such as the first eight amendments, or the Bill of Rights. He specifically criticizes the *Saenz* court's incorporation of the right to travel into the privileges or immunities clause.[194] Suffice to say, despite the Court's nearly offhand description of

190. *Id.*

191. *Id.*

192. *See* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L. L. 694 (2011).

193. Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of Citizenship*, Cambridge University Press 2014, p. 23-37, 166-167.

194. *Id.* at 263 n.120.

the right to travel as a 'citizenship' right, there is considerable doubt whether such descriptions hold any analytical or even historical weight.

A survey of constitutional rights explicitly reserved for those who have the status of citizenship yields a short list. If one includes unenumerated rights under Article IV or the Privileges or Immunities Clause of the Fourteenth Amendment the list gets considerably larger, but difficulties arise in deciding when an un-enumerated right should be reserved for citizens rather than for people in general. The Constitution requires certain office holders to be United States citizens, such as the President and Members of Congress, but notably does not require members of the Judiciary to be United States citizens. And while the public may consider suffrage itself a uniquely held right of citizens, it was denied to a large percentage of citizens, namely women, until relatively late in the history of the Constitution,[195] and continues to be denied to minors and felons from certain states. Additionally, suffrage was occasionally given to non-citizens, even before the forming of the Republic and as a practice continued sporadically throughout the states.[196] Non-citizens—even undocumented immigrants—may bring suit in state and federal courts, a privilege in common law that was exclusive to citizens.[197] Deciphering what constitutes a "citizenship" right exclusive to

195. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (suffrage is not a privilege or immunity of citizenship). Professor Amar argues that the suffrage right already existed for women prior to the Nineteenth Amendment, but that the amendment merely required its recognition. And yet, it is undeniable that non-landowners could not vote for many years, and that minor citizens and certain felons may also be denied the ability to vote. Notably most challenges to restrictions on voting invoke the Equal Protection Clause, i.e. Bush v. Gore, 531 U.S. 98 (2000).

196. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993). Recently the City of New York is considering reviving this practice, *see* NEW YORK CITY COUNCIL, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=803591&GUID=3652CB45-9436-4D4F-ADE3-E17CE8A8AF28&Options=&Search=.

197. Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975); Montoya v. Gateway Ins. Co., 401 A.2d 1102 (N.J. Super. Ct. App. Div. 1979); Janusis v. Long, 188 N.E. 228 (Mass. 1933); Catalanotto v. Palazzolo, 259 N.Y.S.2d 473 (Sup. Ct. 1965).

citizens is not an easy task.[198] It gets more confusing when trying to differentiate a separate question of when citizens can be treated differently than non-citizens. When are state and federal laws allowed to benefit citizens over non-citizens can muddle the question of what rights citizens have that non-citizens do not.

The Supreme Court has authorized laws that discriminate against non-citizens in terms of employment,[199] land ownership,[200] welfare benefits,[201] and holding public office. But while disparate treatment is authorized, this is not the same as designating underlying benefits as constitutional rights exclusive to citizens. It may be constitutional to deny a non-citizen the ability to receive welfare benefits, but it does not follow that welfare benefits are an exclusive right for citizens. Constitutionally permitted disparate treatment of non-citizens does not in and of itself indicate an underlying exclusive right of citizens.[202] Citizenship status, outside of the "right" to hold certain federal offices, has not been a determinative factor in deciding most, if any, constitutional protections.[203] Despite Justice Warren's insistence that citizenship is a "status, which alone assures the full enjoyment of the precious rights conferred by our Constitution," this has rarely been the case.[204] If the right to travel were a constitutional right exclusive to United States citizens, it would be a rare creature.[205]

198. One such privilege which is not explicitly listed in the Constitution, may include the ability to invoke the protection of the nation in international disputes or when outside the territory of the United States.

199. Sugarman v. Dougall, 413 U.S. 634 (1973).

200. Oyama v. California, 332 U.S. 633 (1948).

201. Mathews v. Diaz, 426 U.S. 67 (1976).

202. This is especially true when considering the scope of the Equal Protection Clause, which covers non-citizens and undocumented migrants alike.

203. The recent controversy over the use of drones to kill U.S. Citizens on both enemy and domestic soil without a trial coupled with Senator McCain and Graham's insistence that the Boston Marathon Bombers be denied Miranda warnings helps illustrate the decreased importance of citizenship and constitutional protection. In the Guantanamo cases, the Government pushed to use citizenship status as a dividing line for habeas coverage, but the Court ultimately rejected this bright line rule.

204. Perez v. Brownell, 356 U.S. 44, 64-65 (1957) (Warren, J., dissenting).

205. Perhaps the best example of an affirmative right enjoyed by United

The small weight given to citizenship status was seen early in the Fourteenth Amendment's Privileges or Immunities jurisprudence when the Court decided *the Slaughter-House* Cases. The *Slaughter-House* Court placed the "Privileges or Immunities" phrase into a narrow box where it has been invoked rarely and, in the words of Professor Tribe, has been an "underutilized constitutional provision if ever there was one." [206] Modern scholars such as Akil Reed Amar and Michael Kent Curtis have echoed previous scholars like Charles Black and Phillip Kurland who have rejected the *Slaughter-House* holding and instead attempted to revitalize citizenship as the anchor for constitutional protection by resurrecting the Privileges or Immunities Clause of the Fourteenth Amendment.[207] Scholars and occasionally jurists have criticized the road not taken and considered the elevation of the Due Process Clause and the evisceration of the Privileges or Immunities Clause as a mistake of constitutional jurisprudence.[208] And yet, this revival of the Privileges or Immunities Clause comes with a price, for the Clause specifically lists "citizens" under its protection, while many of the substantive rights listed under the Bill of Rights list "person" or "people" as the scope of protection.[209] For Amar, the exclusion of non-citizens was not a large concern and he considered them protected adequately by procedural fairness.[210] Other scholars, such as Charles Black, Jr. worried

States citizens exclusively is the right to avoid deportation.

206. TRIBE, *supra* note 114, at 1325.

207. CHARLES LUND BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW, 33-66 (1969); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life after Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?*," 1972 WASH. U.L. REV. 405 (1972).

208. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, 161-62 (2012) (arguing that the incorporation doctrine was put off track by the Slaughter-House Cases); TRIBE, *supra* note 114, at 1317; and *see* Kurland, *supra* note 207, at 406.

209. *See* Phillip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011).

210. Amar argues that the separate usage of "citizen" compared to "person" is a distinction between substantive rights and rights of procedural fairness. *See* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY, 388 (2006).

about excluding non-citizens but argued that a strong pre-emption doctrine could generally protect against state encroachment on protected rights.[211] Until *Saenz* came along, the *Slaughter-House Cases* made the list of citizen privileges or immunities an exceedingly small list. And yet, the impact of *Saenz* was hardly felt outside of residency restrictions.[212]

C. *The Right to Travel's Origins Included Residents and Inhabitants*

The lineage of the right to travel can be traced prior to the Constitution and was explicitly protected by Article IV of the Articles of Confederation. Article IV of the Articles of Confederation referenced the privileges and rights of citizens and yet, it bestowed them upon all of the "free inhabitants" of the various states. Moreover, when referencing the right to ingress and egress, Article IV explicitly gave this right to the "people" and did not restrict it to citizens.[213] The Northwest Ordinance of 1787, the act that created territorial governments held by the United States and was part of the "Organic" law of rights, also had a provision that protected "travel." The Ordinance made the navigable waters and the "carrying places" into "common highways" that were "forever free" to "inhabitants of the said territory", "citizens of the United States", and "those [citizens] of any other States that may be

211. *See* BLACK, *supra* note 207.

212. *See* Lawrence Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present*, 113 HARV. L. REV. 110 (1999).

213. ARTICLES OF CONFEDERATION OF 1781, ART. IV, para. 1. ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges or immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.").

admitted."[214] The Northwest Ordinance's declaration of the scope and protection for travel should not be underestimated. The Ordinance existed prior to the Constitution's own ratification and predated the Bill of Rights. It was instrumental in defining the scope and, perhaps, coverage of the Privileges and Immunities Clause of Article IV of the Constitution and later the Privileges or Immunities Clause of the Fourteenth Amendment.[215] The explicit language of the Articles of Confederation and the Northwest Ordinance was not limited to citizens and extended to "people", and "inhabitants" of the territories of the states at issue. The reference to "inhabitants" instead of "citizens" was not idle or written without contemplation of citizenship as both documents explicitly also used the citizen term in other areas. While historical examples of non-citizens claiming the right to travel may be lacking, there have been few express denials to non-citizens either.[216]

214. Northwest Ordinance of 1787, reprinted in 1 U.S.C., at LV-LVII. ("The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." The separation between "citizens of the United States" and "those of any other States", is a curious one as the phrasing during a period where national citizenship had not been explicitly defined.).

215. *See* Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges or Immunities*, 120 YALE L. J. 1820 (2011).

216. *See* Graham v. Richardson, 403 U.S. 365, 375 (1971), which expressly left open the question of whether non-citizens could claim a right to travel. ("While many of the Court's opinions do speak in terms of the right of 'citizens' to travel, the source of the constitutional right to travel has never been ascribed to any particular constitutional provision."). *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969); United States v. Guest, 383 U.S. 745, 758-59 (1966). The Court has never decided whether the right applies specifically to aliens, and it is unnecessary to reach that question here."); *But see*, Zobel v. Williams, 457 U.S. 55, 64 (1982) (O'Connor, J., concurring) ("The word "Citizens" suggests that the Clause also excludes aliens. *See*, *e. g.*, *id.*, at 177 (dictum); L. Tribe, American Constitutional Law § 6-33, p. 411, n. 18 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions."); Doe v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1374-75 (N.D. Ga. 2001) (denying claim based on undocumented status, but also assuming that if there was a "fundamental" right to travel that an undocumented migrant possessed, it would not prevent restrictions on driver's licenses).

D. *The Second Missouri Compromise and the Question of State Citizenship*

The best example of Alexander Bickel's worries about the impermanence and discretionary nature of citizenship is the fate of free African-American men prior to the Civil War. The *Dred Scott* decision and Justice Taney's attempt to withhold citizenship from African-American men based on their race illustrates the danger of using "citizenship" rather than personhood as an anchor for constitutional protection.[217] The underlying logic of Justice Taney's infamous *Dred Scott* ruling can be found in an early watershed moment of the antebellum period; Missouri's admittance into the Union as a State. The Missouri Compromise, whereby Missouri became a slaveholding state after an agreement was reached on how to handle the Louisiana Territories is well-known American history. What is less-known is one of the first examples of a State's attempt to exclude people from its territories, the Missouri Constitution of 1820, which led to the Second Missouri Compromise.

On February 18, 1820, the United States Senate agreed to allow Missouri into the union after it held a constitutional convention and presented to Congress a state constitution.[218] The presented state constitution, however, contained a clause that required the Missouri legislation to pass laws to "prevent free negroes and mulattoes from coming to, and settling in, this state, under any pretext whatsoever."[219] The attempt to exclude free African-Americans and mulattoes caused an uproar in the divided Senate. One group of senators condemned the provision as unconstitutional and clearly "abhorrent" to the Federal Constitution; others either saw no such conflict, or preferred that the judiciary decide the issue. Eventually, a compromise was reached where Missouri's Constitution was accepted with a

217. Obviously the expansive aspect of birthright citizenship from the Citizenship Clause plays an important role, but it only serves to hide the fact that Citizenship is a legal construct while personhood is not. A legal construct, even if constitutionally defined requires legal mechanism for support. Personhood does not.

218. Missouri Enabling Act, ch. 22, §§1, 8, 3 Stat. 545, 548 (1820).

219. MO. CONST. of 1820, art. III, § 26.

strange caveat attached.[220] Unfortunately, the agreed-to condition and the language used only served to create more confusion and eventually lead to the infamous *Dred Scott* decision.

The Senate debated over the proposed Missouri Constitution centered on a variety of axis, but only two themes played an important role in this discussion. First, detractors of the proposed Constitution worried that it could exclude federal soldiers from entering Missouri to claim land due to them.[221] The Union Army famously had a large number of conscripts who were foreign born and non-citizens.[222] By giving the example of U.S. soldiers as part of the excludable class, the Senators invoked concerns over federal power, as soldiers were given title and rights to land and if Missouri excluded them, then the federal power and promise would be threatened.

The second important theme became the exclusion of free blacks and mulattoes who some considered citizens of the non-slave owning states.[223] Did Article IV of the United States Constitution, which guarantees privileges and immunities to citizens of other states, conflict with Missouri's attempts to exclude free blacks and mulattoes?

The contours of state citizenship were undefined during this period, and the Senate heard arguments that cast

220. Res. of Mar. 2, 1821, 3 Stat. 645. ("[T]he offending MO constitutional clause] shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the States in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States.")

221. 37 ANNALS OF CONG. 47 (1820) ("Even if soldiers of the United States, people of this proscribed class cannot enter Missouri without violating the constitution of the State.") *Id.* at 86. ("Sir, you not only exclude these citizens from their Constitutional 'privileges and immunities,' but also your soldiers of color, to whom you have given patents for land.") Senator Holmes had tried to argue that U.S. soldiers were naturally exempted from the Missouri Constitution's prohibition because the offending article did not use the word "all."

222. ELLA LONN, FOREIGNERS IN THE UNION ARMY AND NAVY (La. State Univ. Press, 1951).

223. *See* Hamburger, *supra* note 209 (for a discussion of how the Second Missouri Compromise shifted the argument of whether free blacks were citizens based on the arguments supporting and denouncing Missouri's proposed Constitution.); 37 ANNALS OF CONG. 86 (1820).

citizenship as a synonym with residence,[224] a membership defined by the several states, and for some a status dependent on a set of rights.[225] No agreement on state citizenship was agreed upon and the proposed Missouri Constitution was eventually accepted with a concession that it would not be used to pass laws that would prevent any citizen of any of the states from privileges and immunities protected by the Constitution.[226] Essentially, the debate over the status of free blacks was punted to another time (and came to a head with *Dred Scott*) and left open whether the right to travel hinged upon state citizenship. While Missouri detractors assumed that at the very least citizens could not be denied the right to travel, they did not concede that only citizens would be protected.[227] Meanwhile, Missouri's supporters viewed citizenship as something inherently unavailable to black people and thus were not able to avail themselves of either the privileges or the immunities of state citizenship, including the right to travel.[228]

E. *State Citizenship and its Continual Importance*

Eventually the Fourteenth Amendment and its Citizenship Clause decreased emphasis on state citizenship and its role in protecting constitutional rights. And yet, Article IV protections remain a vibrant area of constitutional law.[229] While the question of what rights fall under its protections garner plenty of attention, courts have not paid much attention to what constitutes state citizenship for constitutional purposes other than to rely on domicile or residence.[230] This is unsurprising as

224. 37 ANNALS OF CONG. 93 (1820).

225. *Id.* at 87.

226. Res. of Mar. 2, 1821, 3 Stat. 645. ("[The offending MO constitutional clause] shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the States in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States.")

227. 37 ANNALS OF CONG. 48 (1820).

228. One Senator tried to argue that the right of ingress was not included as a privilege and immunity of citizenship. See Remarks by Senator Holmes, 37 ANNALS OF CONG. 85 (1820).

229. *See* McBurney v. Young, 133 S.Ct. 1709 (2013).

230. *See* Pannil v. Roanoke Times Co., 252 F. 910 (W.D. Va. 1918)

the Fourteenth Amendment's Citizenship Clause forbids states from denying citizenship to any United States citizen who decides to reside in a particular state. But it does leave some intriguing questions open, as some states have begun to recognize residency not just for lawful permanent residents, but also for the undocumented.[231] Even though states cannot deny citizenship to federal citizens residing in their territory, there is no textual restriction on states granting citizenship to residents who are not U.S. citizens.[232] When a state grants residency to a United States citizen, it automatically by constitutional mandate grants state citizenship. But what happens when a state grants residency to non-citizens, even the undocumented? The Second Missouri Compromise and the existence of a state citizenship distinct from federal citizenship[233] leaves open the possibility that foreign born state residents could gain the benefit of state citizenship, even if they are denied federal citizenship. Would the granting of certain rights create citizenship as the senators supporting Missouri had argued? Or would a status or membership need to be explicitly granted before certain rights would be recognized?

F. *Aliens Who can Claim Privileges and Immunities of Citizens*

Linda Bosniak in *The Citizen and the Alien: Dilemmas of Contemporary Membership* coined the phrase, "alien citizen," as a radical response to the attacks on non-citizens' ability to

(discussing when a person may lose their state citizenship when they had no intent to travel back there).

231. There are many examples that are relevant, from the granting of in-state tuition to undocumented students to giving driver's licenses to the undocumented and most recently California's decision to allow undocumented resident to practice law; Emily Green, *Calif. Law Allows Undocumented Immigrants To Practice Law,* NPR (Oct. 8, 2013, 3:25 AM) http://www.npr.org/2013/10/08/230320902/calif-law-allows-undocumented-immigrants-to-practice-law.

232. In New York a bill designed to do just that, is titled "New York is Home Bill" see http://www.businessweek.com/articles/2014-06-16/in-new-york-a-bill-to-grant-undocumented-immigrants-state-citizenship

233. *See* Hough v. Societe Electrique Westinghouse De Russie, 231 F. 341, 343 (S.D.N.Y. 1916) ("One may be a citizen of the United States, and yet not be a citizen of any state.").

claim protection under the Constitution. Professor Bosniak argued that a movement towards the Citizenship Clause as a source of rights does not necessarily lead to the exclusion of non-citizens from substantive constitutional protections.

Citizenship, according to Professor Bosniak, is not a unitary or discrete term, but rather a bifurcated one. Citizenship can refer to status, in effect a definition of a certain type of membership, or it may refer to a set of baseline substantive rights.[234] Bosniak's divide, the status of citizenship versus the rights of citizenship, was an outgrowth of some prior scholarly work from the 1970s. She quotes John Hart Ely, who wrote, "there is a set of entitlements, 'the Privileges or Immunities of citizens of the United States,' which states are not to deny to anyone."[235] Ely later clarifies this as meaning that the Privileges or Immunities of United States citizens only defines the rights, rather than defining the people who hold them.[236] Ely and later Bosniak argued that the term "citizen" with respect to the rights guaranteed by the clause could cover aliens as well as "status" citizens. This reading of the Privileges or Immunities Clause finds some support in an influential interpretation of the Privileges and Immunities Clause of Article IV. Justice Washington described the rights under that clause as, "in their nature, fundamental; which belong, of right, to the citizens of all free governments."[237] Aside from the right to travel, Justice Washington also referred to the right of equal taxation, the right to own land, and finally the right to sue in court.[238] These separate rights described as privileges and

234. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 14 (2008).

235. *Id.*

236. *See id.* at 90 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 83 (1980)).

237. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (no. 3,230).

238. Justice Washington's reference to the fundamental nature of the rights and how they may be enjoyed by all citizens of all free governments leaves open the question of whether the United States, or the individual states are required to protect the rights of citizens of other nations. Because Justice Washington was describing how states must honor the fundamental rights of citizens of other states, it may be an easy jump to consider whether citizens of other nations should be included as well. However as Professor Lash has shown, and later the treatment by the *Wheeler* court, the listing of the rights may be a descriptive of rights already protected by states, rather

immunities of citizenship have been extended to non-citizens in various contexts already. While the right to own land has historically been dependent on legislative largess, the ability to sue in court has not so far been depended on a legislative act of consent.

While Ely was willing to interpret the Privileges or Immunities Clause outside of the text, he was still missing a manner in which to include non-citizens under its protection. Kenneth Karst provided a way to bridge the Privileges or Immunities Clause to non-citizens by way of the Equal Protection Clause. In 1977, Professor Karst wrote the foreword for the November Harvard Law Review where he made a bold attempt to find the underpinnings of substantive equal protection.[239] He proposed that Equal Protection meant 'equal citizenship.' He defined equal citizenship as a set of principles, which "presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant."[240] The reason Karst used "citizenship" as a starting point, rather than personhood, revealed itself when he described the role a citizen plays; a "citizen is a participant, a member of a moral community who counts for something in the community's decision making processes."[241] But most importantly, as Professor Bosniak points out, Karst's use of the word "citizen" does not refer to the status of citizenry, but rather to the set of obligations that a nation has to its members.[242] Karst's citizenship referred to a baseline of substantive rights, one which guaranteed certain obligations of government over its members.

Karst provided two main reasons why equal citizenship principles should be housed in the Equal Protection Clause rather than the Privileges or Immunities Clause. First, he

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than a list of rights that states *must* protect. Regardless the expansion to include non-citizens has already begun with several rights on Justice Washington's list.

239. Kenneth L. Karst, *The Supreme Court, 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

240. *Id.* at 6.

241. *See id.* at 8.

242. *Id.* at 5 (Karst himself downplays citizenship as a mere legal status: "Citizenship, in its narrowest sense, is a legal status. . . . So viewed, citizenship is a constitutional trifle . . . ."). *Id.*

believed that the development of jurisprudence under Equal Protection created a solid foundation and provided modern judges with guidance on how to apply those principles. Secondly, he believed that the equal citizenship principle extends to non-status citizens. His argument on its applicability to non-citizens boiled down to the "broader principle of equal citizenship extends its core values to noncitizens, because for most purposes they are members of our society."[243] He goes on to note the strangeness of the term by noting, "[i]f it is paradoxical to suggest that a citizenship principle protects aliens, the paradox is one of rhetoric, not substance."[244] And yet, this transference of equal "citizenship" poses some severe problems.

Lawrence Tribe described the Equal Protection Clause solution forwarded by Professor Karst, but was skeptical that "the Equal Protection Clause extended all the rights of national citizenship to aliens."[245] Historically aliens were treated differently than citizens, even with respect to the Equal Protection Clause, a result which Tribe found rational as "aliens and citizens may simply not be similarly situated."[246] Linda Bosniak was also skeptical of Professor Karst's wholesale use of the Equal Protection Clause. While she agreed with the focal point of rights should be on personhood, she argued that the concept of citizenship also extends to creating a "hard shell" of "national exclusivity and closure." Citizenship doesn't just describe rights, but also membership of a nation, which must inherently be exclusive. In order for citizenship to define membership and create boundaries, there must be some division between citizens and non-citizens for otherwise there is no limiting principle. In other words, ". . . although equal citizenship requires rights for everyone, it also tolerates, and perhaps even demands, the legal exclusion of certain territorially present non-nationals for some purposes . . . ."[247] Karst himself tried to identify the rights denied to non-citizens under citizenship by declaring that insofar the United States is

243. *Id.* at 45.
244. *Id.* at 46.
245. TRIBE, *supra* note 114, at 1375.
246. *Id.*
247. BOSNIAK, *supra* note 234, at 100.

a "political" community, then perhaps political rights may properly be denied to non-citizens. And yet, this formulation is vague and laden with value judgments.[248]

Commentators have used descriptors such as "personhood", "membership" or "political" as a means to decide which rights are properly denied to non-citizens and which ones should be included. And yet these descriptions are difficult to distinguish from value judgments about citizenship in general. For example, Amy Motomura argued that non-citizens should be allowed to sit on juries and the New York Council debated extending voting privileges to non-citizens. These modern arguments mirror the fundamental question of citizenship itself; representation and membership for those affected. As Professor Tirres has shown, there had been a long history of restrictions on land ownership for non-citizens, and yet this was based on a different *political* concept of sovereignty.[249] While many alien land laws are still on the books, Professor Tirres and others have argued that their existence should be considered outdated precisely because the American concept of sovereignty has shifted. What exactly qualifies as a "political" right if suffrage does not, and land ownership may? If a right has already been extended by the Equal Protection Clause, then it would stand to reason that it could be extended to non-citizens using the same mechanism.

G. *The Equal Protection Clause Expanded the Scope of the Right to Travel*

The history and application of the right to travel mirrors Professor Karst's view on "citizenship" rights that can be extended through the Equal Protection Clause. Under Professor Karst's view, a privilege or immunity of citizenship

248. Both Tribe and Karst mention suffrage as an example that could be denied to non-citizens, but as explained earlier suffrage is not a privilege or immunity protected by the 14th Amendment's Privilege or Immunities Clause.

249. Allison B. Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77, 91(2012) ("Land was granted in exchange for allegiance, including the obligation to provide military protection for the kind or queen and by extension, the lord. Property was thus a key determinant of allegiance and loyalty.").

could be granted to a non-citizen by applying the Equal Protection Clause. Or as Tribe described "the Equal Protection Clause, so the argument goes, by prohibiting discrimination in legal rights among all *persons*-citizens and persons alike-would . . . secure the 'privileges or immunities of citizens of the United States' to all persons within the jurisdiction of a particular state."[250] While it may stretch Equal Protection too far to extend *all* privileges or immunities to non-citizens, particular attention should be paid to those privileges or immunities that have already been made subject to Equal Protection analysis as a "fundamental" right. The right to travel is one such privilege or immunity.

When the Court in *Shapiro* decided that the right to travel prevented California and other states from denying welfare benefits, it did so by applying the Equal Protection Clause. And yet, the Court did not try and create a suspect classification for the poor, or those who needed public benefits; instead the Court ruled that residency classifications were unconstitutional because it burdened a "fundamental right—the "right to travel." The Court was reluctant during the *Shapiro* case to explain the textual foundations of the right to travel, and yet nevertheless "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations . . . ."[251] By recognizing the fundamental right, without having to anchor it, the Court was able to find a violation of the Equal Protection Clause without relying on the underlying explicit constitutional authority. This was important, for while the Fourteenth Amendment's provision provided for power of enforcement against the states, other constitutional rights may or may not have been applicable against the states at all. Incorporation of substantive rights were (and still are) controlled by references to "due process," a phrase that had to be separately weighed. *Shapiro's* end-around was used earlier by *United States v. Guest* when the Court ruled that the federal conspiracy statute covered

250. TRIBE, *supra* note 114, at 1325.
251. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

attempts to interfere with the right to travel by private actors because of the right's fundamental nature.[252] The extension of the right to travel through the Equal Protection Clause was key. In doing so, the Court signaled that the right to travel was of a fundamental nature such that it should be enjoyed by all persons and not limited to its original ancestry as a citizenship right.

The framework described by Kenneth Karst can be applied to the jurisprudence of the right to travel.[253] Once a privilege or immunity of citizenship has been extended by use of the Equal Protection Clause a strong presumption should be assumed that it should become applicable to all persons, including non-citizens. Notably[254] Equal Protection does not completely prevent a state from denying the right to travel, or other fundamental rights to a person, but it does mandate that such a denial survive strict scrutiny.

V. Self-Deportation Laws and the Right to Travel

Establishing that states have little ability to restrict migration, because of concerns of comity and equal protection is a starting point. Despite various state legislatures making their intentions of restricting migration clear and prominent, the implementation of the policy requires examination.[255] When does a law that regulates non-citizens become a law that attempts to drive them out of the state or prevent their entry? At what point does a law regulating activity of non-citizens under a state's police power become one that restricts

252. United States v. Guest, 383 U.S. 745, 758 (1966).

253. Justice Brennan in the *DeSoto* and *Zobel* cases explicitly referred to principles of equal citizenship perhaps in a nod to Professor Karst's arguments.

254. While the Court has also recognized suffrage as a fundamental right protected by the Equal Protection Clause, the reasoning here does not force the extension of suffrage to non-citizens, an unintuitive and for many an unacceptable result. Suffrage is of a fundamentally different nature than the right to travel, not only is it not a 'privilege or immunity' of citizenship, but it is also mentioned and handled by section 2 of the Fourteenth Amendment. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

255. *This American Life: Reap What You Sow*, Chicago Public Radio (Jan. 27, 2012), http://www.thisamericanlife.org/radio-archives/episode/456/transcript.

migration and runs afoul of the right to travel?

A. *Deciding when Discrimination Affects Migration*

The question of when and how a state law violates the right to travel has been a puzzle throughout the right's long history.[256] However, the Supreme Court has provided some useful guidance. The right to travel can be infringed upon in three ways: the first is a "direct obstruction" to ingress and egress, this has included criminalization, and direct taxation of people traveling into the state. The second and third method is the use of discrimination against travelers and new residents of a state. Direct obstruction on the ability or forced exit does not require much additional analysis. However the use of discriminating treatment to control travel and migration does. States may not treat travelers differently because they are not residents, and may not discriminate against "new" residents for being new.[257] A right to travel that ignores discrimination would be neutered as states could control migration by disparate treatment. The Supreme Court has provided guidance on to determine when a state controls migration by using discrimination

States cannot create conditions based on disparate treatment that would drive a population out or prevent certain groups from entering. And yet, individuals or groups may decide to move into states or leave states for a host of reasons and states are not forced to take into every possible incentive. Taxation provides an obvious example. States are not required to homogenize their taxation schemes even though many people can base their decisions to live or leave a state based on taxation.[258] Nevertheless the Supreme Court has not shied away from striking down unequal treatment that has the

256. *See* Saenz v. Roe, 526 U.S. 499, 501-504 (1999).

257. Article IV purports to protect travelers while the Fourteenth Amendment's Privileges or Immunities Clause protects residents.

258. Paul L. Caron, Did Taxes Help Drive Dwight Howard to Sign with the Houston Rockets Rather Than the L.A. Lakers?, TAXPROF BLOG (Jul. 6, 2013), http://taxprof.typepad.com/taxprof_blog/2013/07/did-taxes.html; though some limitations on taxation may exist; see David Schmudde, Constitutional Limitations on State Taxation of Nonresident Citizens, 1999 L. REV. MICH. ST. U. DET. C.L. 95, 95-167 (1999).

potential to exclude people.

Prior to *Saenz*, state legislators were often explicit in their desires to affect migration policy. In *Shapiro*, the states admitted that they intended to prevent poor people from migrating into their states for welfare benefits. In *Maricopa*, Arizona explicitly declared their intention to prevent people from moving in to use free medical services. When state legislators made public their intentions to prevent migration, it was easy for the Court to declare such intentions as unconstitutional, even if they would serve a legitimate purpose such as preventing financial ruin of a program.[259] Just as with other Equal Protection claims, a clear animus, or in this situation a clear purpose to drive people out of the state, would violate the right to travel.[260]

When states and legislators are less clear on their intentions, the Court must examine the conditions imposed by state legislators. In striking down the denial of welfare benefits in *Shapiro* and free medical care in *Maricopa*-the Court couched these benefits as "vital" or as a "basic necessity of life."[261] When compared to residency for tuition at colleges, the Court stated that "higher tuition fees to nonresident students cannot be equated with granting of basic subsistence."[262] The Court was attempting to balance the level of harm imposed by the state.[263] It is not surprising that courts in *Maricopa* and *Shapiro* both found that the denial of "basic necessities of life" to be coercive and penalizing people for choosing to migrate. Imposing conditions that are reasonably calculated to force migration should be considered a difficult standard to meet

259. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974).

260. The animus test from Village of Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252 (1977) should apply be applied to the right to travel context.

261. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 258 (1974).

262. *Id.* at 260 *quoting* Starns v. Malkerson, 326 F. Supp. 234, 238 (Minn. 1970)) (the court could be forgiven for some hyperbole for denial of benefits that would result in death may be protected by substantive due process and not require the right to travel).

263. *Zobel* would seem to create a stark contrast, but the majority refused to see the case as one of the right to travel, and the concurring opinion by Justice Brennan recognized that it would have little effect on migration. Only Justice O'Connor's concurrence framed the issue squarely under a right to travel.

under normal circumstances. A higher tax burden, or more onerous licensing requirements are unlikely to meet this hurdle. Even restrictions on where to live, as long as alternatives are plentiful, may not trigger strict scrutiny. Nevertheless a denial of essential benefits, which need not themselves be constitutionally mandated, does trigger scrutiny under a right to travel analysis.

B. *Self-Deportation Laws as Impermissible Burdens on the Right to Travel*

State self-deportation laws run afoul of the right to travel under three circumstances. The first is the purpose and intent of the law was to affect the migration of people into and out the state or municipality. Despite having clear borders, states have no legitimate interest in protecting their borders against people. The second method is for states to directly obstruct the entry of non-citizens into their territory or directly force them out. This can be accomplished with taxes, though most state self-deportation laws avoid the taxation issue and go straight to criminalizing people for their presence. The final method for a self-deportation law to violate the right to travel, would be to deny essential key services or benefits to non-citizens such that they would be dissuaded from entering or forced to leave.[264]

The state legislatures that passed self-deportation laws such as HB 56, SB1070, or the municipalities that passed the ordinances in Farmers Branch and the City of Hazelton were initially not shy about their intentions to force migration out of

264. Professor Delaney in proposing a Dormant Commerce Clause analysis essentially reaches a similar conclusion by noting that, "A Dormant Commerce Clause–type approach would require an expansion of this principle to regulations affecting access to other basic goods—such as housing, education, or health care—the denial of which threatens an immigrant's ability to survive as a new resident. Preventing aliens from accessing these types of goods can be considered tantamount to denying them entrance, thus violating the national interest in a uniform system of immigration." Delaney, at 1845 supra note 134. This is unsurprising given the intertwined nature of the right to travel and the Dormant Commerce clause. However, it should be noted that the "effects" test proposed by Professor Delaney, would not work, as the Court struck down a similar attempt under the right to travel calling it an "actual deterrence" requirement. Saenz, 526 U.S. at 504.

their area. Scott Beason openly declared that HB 56 was designed to "fix" the undocumented problem, and to do so by driving them out of the state. But just as California eventually stopped referring to their attempt to change welfare benefits as a migration tool, the authors of self-deportation laws may also stop publicly declaring their intentions to drive the undocumented out. In which case, relying on legislative intent or purpose to analyze state deportation laws may not prove fruitful.

The "self-deportation" laws operate on several different levels. The laws criminalize the presence of undocumented migrants, usually in the form of requiring documentation to prove lawful status. The laws criminalize activities that are essential to residence; such as employment and the renting of an abode. Finally, the laws also discourage or invalidate interactions that undocumented have with other residents of the state, for instance preventing the transportation or harboring of undocumented migrants and the voiding of contracts entered into with the undocumented.

Laws, such as SB 1070 that criminalize the mere presence of the undocumented are a clear example of a direct migration control. Threatening a person with loss of liberty for the mere act of entering into the territory is the hallmark of state action forbidden by the right to travel. In fact, other than the Missouri Constitution of 1820, no state has attempted to test the right to travel in this manner.

Laws that restrict certain activities, such as employment and rent present a more difficult challenge. Employment restrictions have been difficult to analyze using the pre-emption and equal protection analysis, and prove to be no easier when placed against the right to travel.[265] However, preventing a person from seeking any employment could be interpreted as forcing a person to leave the state. While the denial of employment for specific jobs for non-citizens may not run afoul of the Equal Protection Clause directly,[266] the

265. *Compare* DeCanas v. Bica, 424 U.S. 351 (1976), *with* Traux v. Rauch, 239 U.S. 33, 42 (1915).

266. *Compare* Amback v. Norwick, 441 U.S. 68 (1979) (denying non-citizens employment as public teachers upheld), *with* Application of Griffiths, 413 U.S. 717 (1973) (forbidding the exclusion of non-citizens from being

Supreme Court has found that denying employment on a blanket basis can run afoul of the right to travel.[267] While the denial of specific jobs or specific licensing requirements would not be enough to compel the expulsion of the undocumented, a universal ban on all types of employment is coercive enough to violate the right to travel.[268]

Similarly, ordinances that prevent the undocumented from renting an apartment also run afoul of the right to travel. Forcing the choice to either become homeless or break the law would drive reasonable people to leave the state or municipality. Federal courts have described such choices as forcing people to leave the area. In the *Hazleton* case, the Third Circuit in examining Hazelton's rental restrictions noted, "[I]t is difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it."[269] In the en banc decision by the Fifth Circuit in *Farmers Branch*, the Court similarly described the rental ordinances as creating circumstances such that, "because no alien with an unlawful status will be able to obtain the basic need of shelter through a rental contract. Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch."[270] Compare the decision in *Maricopa County* that forbade Arizona from withholding "a basic necessity of life," with the *Farmers Branch* decision that the rental ordinance "precludes aliens from obtaining an essential human requirement."[271] The perspective that rental contracts are necessary for the basic requirement of shelter may also go a long way to explain why land ownership can be denied to non-

lawyers).

267. Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986) (striking down an employment classification for veterans who served while a resident of New York versus another state).

268. Once again this does not prevent a federal scheme that would prevent employment. An open question would remain as to whether federal authorization could allow states to adopt policies that prevent the employment of the undocumented. For instance a federal mandatory E-Verify program would require additional analysis.

269. Lozano v. City of Hazelton, 620 F.3d 170, 220-21 (3d Cir. 2010) (quoting Bonito Boats v. Thundercraft Boats, 489 US. 141, 160 (1989)).

270. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 541 (5th Cir. 2013) (Reavley, J., concurring).

271. *Id.* at 541.

citizens while rental restrictions cannot apply to the undocumented.[272]

While the renters' and employment provisions have gotten judicial scrutiny in a variety of courts, the provisions that test basic social and economic interactions has only been tested in a lawsuit challenging Alabama's HB 56.[273] HB 56 went a step further than the previous self-deportation laws by voiding contracts entered into by the undocumented and by eliminating governmental services. The Eleventh Circuit Court of Appeals struck down these provisions citing pre-emption, but did so by describing them as "extraordinary and unprecedented would be an understatement, as it imposes a statutory disability typically reserved for those who are so incapable as to render their contracts void or voidable. Essentially, the ability to maintain even a minimal existence is no longer an option for unlawfully present aliens in Alabama."[274] If Alabama could void all contracts entered with undocumented migrants, it would effectively shut down their ability to conduct basic economic activities.

Self-deportation laws also criminalize normal social interactions with the undocumented. While federal law has anti-harboring statutes that prevent people from concealing or transporting undocumented migrants, courts have limited criminal liability for conduct that "substantially facilitates" an undocumented person remaining.[275] State laws that criminalize the transportation or harboring of the undocumented have no such requirement and punish conduct that could include inviting an undocumented migrant for dinner, or carpooling with one to work. These laws reach into normal social interactions and punish any contact with the undocumented. Most courts have struck down these provisions after comparing them to the federal analogues and finding them an "untenable expansion."[276] Just as the contractual provision of HB 56 attempts to cut off economic interactions of the undocumented,

272. This may answer the conundrum posed by Tirres, *supra* note 249.

273. ALA. CODE § 31-13-1 (1975).

274. United States v. Alabama, 691 F.3d 1269, 1293 (11th Cir. 2012).

275. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 576 n.20 (5th Cir. 2013) (Reavley, J., concurring).

276. *Id.* at 531 n.9.

the expansion of transportation or harboring provisions attempt to cut off all social interactions. Under both scenarios, they would render it nearly impossible for the undocumented to function in society and therefore force them out of the municipality or state.

If instead of employing pre-emption, the *Farmers Branch¸ Fremont¸* and *Alabama* courts had instead employed the right to travel, much of the analysis would remain intact. All three courts would have examined the state self-deportation laws and ruled that their purposes and results if enacted would drive the undocumented out of the state or municipality. The difference in employing a right to travel lens would be such a conclusion would be determinative, any additional conjecture of this effect on national immigration policy would be unnecessary.

The decisions in *Plyler* and *Arizona* could have similarly been simplified. Texas's discrimination against undocumented children could have been struck down as an attempt to withhold an essential benefit that unconstitutionally burdened the right to travel, just as the denial of free emergency room services in *Maricopa* or welfare benefits in *Shapiro*. SB 1070's attempt to drive the undocumented from Arizona and create their own state migration policy could have been ruled as a threat to comity between the states, federal power and most importantly a violation of a fundamental right that has been protected since before the Constitution.

Conclusion

Justice Brandeis famously declared, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." [277] Implicit in Brandeis' vision of state sovereignty are two assumptions, that such experimentations do not imperil the rest of the country and that people have the freedom to decide which states they may choose to become a member of.

277. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1982) (dissenting opinion by Justice Brandeis).

Self-deportation laws violate both assumptions of Justice Brandeis' vision for state sovereignty.

Controlling the migration of people is an awesome power, one that implicates both individual freedom and national sovereignty. Nations and sovereignties may employ a variety of means to control migration and membership. The federal government may create incentives for entry on the national level. At the same time, the federal government wields the awesome power of deportation, a power that can separate families, deny people their freedom and liberty and even interfere with basic constitutional and human rights if wielded fairly. States however only have the power to entice entry.[278] They do not have any power to drive or deny entry into their borders.[279]

The right to travel restriction against state control of migration confirms Professor Motomura's vision of a federal project to create membership and identity. Undocumented immigrants are undocumented because the federal government has either chosen to exclude them, but failed to remove them, or the government has not had a chance to decide the matter because of deception or evasion by the migrants themselves. But when the federal government fails to act, states and municipalities do not have room to exercise their judgment. Michael Walzer advocated that a strong national border is necessary to prevent the creation of a "thousand petty fortresses"[280] but it is the right to travel that prevents states and municipalities from building walls and gates to those

278. Zobel 457 U.S. at 67-68 (concurring opinion by Justice Brennan) ("A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry.")

279. The one-sided nature of the right to travel; restricting states from denying entry or forcing exit but allowing them to encourage migration affords it an advantage over pre-emption analysis. While states that encourage protection of the undocumented may suffer under a preemption analysis, not such infirmary would occur under the right to travel framework.

280. The term was coined in, Michael Walzer, SPHERES OF JUSTICE, A DEFENSE OF PLURALISM AND EQUALITY 39 (1983), to describe the dangers of not having a strong national border.

searching for a home, or a place of sanctuary.