THE PROMISE AND PERILS OF "PRIVILEGES OR IMMUNITIES": *Saenz v. Roe*, 119 S. Ct. 1518 (1999).

In *Colgate v. Harvey*,[1] a 1935 case, the Supreme Court invoked the Fourteenth Amendment's Privileges or Immunities Clause[2] for the first time since the Court had rendered the clause a virtual dead letter in the *Slaughter-House Cases*.[3] Critics chided the *Colgate* Court for reading "privileges or immunities" into a case properly involving only the Equal Protection Clause,[4] and accused the majority of "reverting to the fundamental rights theory" that the Court had already "expressly rejected."[5] Supporters hailed the revival of the clause as an appropriate vehicle to extend substantive rights beyond the limits of the sputtering Due Process[6] and Equal Protection Clauses. They envisioned a "gradual process of inclusion" by which the Court would "expand the privileges or immunities clause to the full scope of the 'fundamental rights' theory . . . ."[7] A case note appearing in the Harvard Law Review that year questioned whether the Court had embraced fundamental rights, or

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1. 296 U.S. 404 (1935) (holding that a state law that taxed dividends earned out-of-state but exempted dividends earned in-state violated equal protection, and independently holding that the same law violated the privileges or immunities by infringing the citizen's right to engage in business or to loan money in any state), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940) (upholding a state law that taxed deposits in out-of-state banks at a higher rate than deposits at in-state banks on the grounds that the right to carry on business in another state is not a privilege or immunity of national citizenship).

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

3. 83 U.S. (16 Wall.) 36 (1873) (declaring that the Fourteenth Amendment Privileges or Immunities Clause only protected from state infringement those rights inherent in "the Federal government, its National character, its Constitution, or its laws").

4. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

5. William W. Godward, Note, *Constitutional Law: Privileges or Immunities Clause of the Fourteenth Amendment*, 24 CAL. L. REV. 728, 731 (1936) (noting that critics dismissed as unnecessary dicta the Court's independent finding that the state tax law in *Colgate* offended Privileges or Immunities, in addition to Equal Protection, and that they criticized the "vice of indefiniteness" inherent in fundamental rights theory).

6. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

7. Godward, *supra* note 5, at 731 (noting that supporters welcomed *Colgate* as a rejection of the "inconceivable" notion that the Privileges or Immunities Clause had no independent meaning, and predicting a gradual process of incorporation of the Bill of Rights against the states under the revived clause).

merely relied on a guarantee of non-discrimination.[8] Five years later, in *Madden v. Kentucky*,[9] the Supreme Court overruled *Colgate v. Harvey*. The revival of the Fourteenth Amendment's forgotten clause seemed over before it had scarcely begun.

Six decades after the Court overruled *Colgate*, the revival begins again. In *Saenz v. Roe*,[10] the Court invoked the Fourteenth Amendment Privileges or Immunities Clause to strike down a durational residency requirement in section 11450.03 of California's welfare statute[11] as an impermissible infringement on the right to travel. The Court further held that congressional approval did not resuscitate the constitutionality of section 11450.03.[12]

In American constitutional law, "privileges or immunities" rests at the fulcrum of the conflict between a fundamental rights theory grounded in natural law and the anti-discrimination norm inherent in equal protection.[13] Justice Thomas traces the natural law foundation of "privileges or immunities" in American law as far back as late seventeenth century state declarations during tensions with England.[14]

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8. *See* James Barr Ames, Note, *The "Privileges or Immunities" Clause of the Fourteenth Amendment: Colgate v. Harvey*, 49 HARV. L. REV. 935, 935 (1936) ("An analysis of the entire opinion, however, leaves considerable doubt as to whether the privilege is that of making extra-state investments or that of making them free from discrimination based upon their extra-state character.").

9. 309 U.S. 83 (1940) (upholding a state law that taxed deposits in out-of-state banks at a higher rate than deposits at in-state banks on the grounds that the right to carry on business in another state is not a privilege or immunity of national citizenship).

10. 119 S. Ct. 1518 (1999).

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

12. *See Saenz*, 119 S. Ct. at 1528-29.

13. *Compare* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1473-74 (1992) (asserting that the Privileges or Immunities Clause should be construed as an anti-discrimination provision), *with* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 100 (1986) (arguing that the Framers adopted a fundamental rights view of the Privileges or Immunities Clause), *and* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 63, 63-67 (1989) (arguing that a natural law theory of the Privileges or Immunities Clause is not only historically warranted, but is also the best defense of limited government, separation of powers, and judicial restraint).

14. *See Saenz*, 119 S. Ct. at 1535-38 (Thomas, J., dissenting), *citing The Massachusetts Resolves*, *in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS 56 (E. Morgan ed. 1959) ("Resolved, That there are certain essential Rights . . . founded in the Law of God and Nature, and are the common Rights of Mankind . . . [These] essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by Magna Charta."); *and 1774 Statement of Violation of Rights*, 1 JOURNALS OF THE CONTINENTAL CONGRESS 68 (1904) ("[O]ur ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-

Justice Washington's opinion in *Corfield v. Coryell*,[15] which considered Article IV of the United States Constitution,[16] is the fullest expression of this view.[17] It was Justice Washington's opinion, against the backdrop of the Fourth Article of the Articles of Confederation and Article IV of the United States Constitution, that informed the Reconstruction Congress that passed the Fourteenth Amendment.[18]

Beginning with *Paul v. Virginia*,[19] the Court backed away from the fundamental rights approach, embracing for the first time the narrower anti-discrimination conception of "privileges or immunities."[20] Four years later, in *Slaughter-House*, the Court decisively rejected the rights-based theory and adopted the conception of "privileges or immunities" as an anti-

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born subjects . . . ."). Justice Thomas suggests that these natural law declarations were reassertions of their understanding of the term "privileges and immunities" set out in colonial charters dating back to the 1606 Charter of Virginia. *See Saenz*, 119 S. Ct. at 1536 (Thomas, J., dissenting), *citing* 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3788 (F. Thorpe ed. 1909).

15. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit) ("We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.").

16. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

17. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 529 (2d ed. 1988) ("*Corfield* can be understood as an attempt to import the natural rights doctrine into the Constitution by way of the privileges and immunities clause of article IV."). *Corfield* certainly is not the only Supreme Court opinion to embrace a natural rights theory of privileges and immunities, however. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 580 (1857) (Curtis, J., dissenting) (asserting that citizens of each state enjoy fundamental rights of national citizenship); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 117-18 (1873) (Bradley, J., dissenting) (arguing that the right to choose one's calling is among those rights which are "in their nature, fundamental; which belong, of right, to the citizens of all free governments.") *citing Corfield*, 6 F. Cas. at 551; McCready v. Virginia, 94 U.S. (4 Otto) 391, 396 (1876) (holding that the right to farm oysters is not a fundamental right of "citizens of all free governments.").

18. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Howard); CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement by Senator Trumble); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992) (noting a Congressman's "obligatory quotation from Corfield").

19. 75 U.S. (8 Wall) 168, 180 (1868) (concluding that, although the Privileges or Immunities Clause protects the right of free ingress and egress and the right to acquire and enjoy property, "[i]t was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States . . . [I]t secures to them in other States the equal protection of their laws . . . and giv[es] them equality of privilege with citizens of those States.").

20. *See* TRIBE, *supra* note 17, at 544 ("The anti-discrimination principle has been understood as the core of the privileges and immunities clause at least since *Paul v. Virginia* . . . .").

discrimination provision.[21] Since that monumental decision—despite the brief flirtation in *Colgate*—the Court has refused to accept either that Article IV's Privileges and Immunities Clause or that the Fourteenth Amendment's Privileges or Immunities Clause encompasses unenumerated fundamental rights.[22] Fundamental rights theory persists, nonetheless, under the alter egos of due process and—in a delicious irony—equal protection,[23] as if the procedural nature of those guarantees rendered them less expansive and, thus, less menacing.

Like *Colgate*, *Saenz* revives the debate about the meaning of the Privileges or Immunities Clause, and with it speculation about the implications of the decision for the future. At first blush, the prospects of *Saenz* seem anathema to conservatives. Even under the narrowest reading, which reads *Saenz* as merely applying existing precedent, the Court struck down a statute that was the product of a properly functioning political dialogue between Congress and the States. Indeed, *Saenz* thwarts a somewhat rare Congressional effort to devolve federal power back to the States. If read broadly, a majority of the Court, including the Court's most liberal members, appears to have revived the forgotten clause, breathing new life into the Court's unbounded discovery of unenumerated rights. In fact, the practical effect of *Saenz* could be to suggest that welfare benefits are a fundamental right. Worst of all, the Court's

21. *See* 83 U.S. (16 Wall.) at 77-78; *see also* TRIBE, *supra* note 17, at 530 (noting that "the Court rejected the natural rights theory of the privileges and immunities clause entirely" in the *Slaughter-House Cases*).

22. *See* Madden v. Kentucky, 309 U.S. 83, 90-91 (1940) (noting the Court's position that the Fourteenth Amendment Privileges or Immunities Clause protects citizens against state abridgment of rights of national citizenship, as distinct from fundamental or natural rights); Toomer v. Whitsell, 334 U.S. 385, 395-96 (1948) (omitting any discussion of fundamental rights, characterizing Article IV's Privileges and Immunities Clause as a guarantee of substantial equality, and holding that a state statute which requires non-residents to pay higher fees than residents for a license to harvest shrimp violates the Privileges and Immunities Clause because the state failed to reasonably justify the discrimination); *see also* TRIBE, *supra* note 17, at 533 (noting the shift from *Corfield*'s method on categorizing fundamental rights to *Toomer*'s focus on justifications for discriminatory classifications).

23. *See* TRIBE, *supra* note 17, at 533 (observing that "[i]n spite of the shift in focus [from categorizing fundamental rights to justifying discriminatory classifications], the fundamental rights approach has not been purged from privileges and immunities clause analysis") (internal citations omitted); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1247 (1998) (arguing that the Framers' fundamental rights view of the Privileges or Immunities Clause "turns out to resemble the doctrine that would blossom into the fundamental rights strand of equal protection analysis in the 1960s.").

reliable conservative trio is conspicuously equivocal. Even in dissent, Chief Justice Rehnquist and Justice Thomas tacitly approve a fundamental rights approach to "privileges or immunities." Finally, and perhaps most remarkably, Justice Scalia joined the majority opinion . . . in silence.

Justice Scalia's decision to join the majority provides some indication that the *Saenz* decision should not be as disheartening to conservatives as it may initially appear. Indeed, *Saenz* need not be read so narrowly as to be anomalous, or read so broadly as to reinvigorate an unwieldy theory of fundamental rights. Rather, one can understand *Saenz* to afford a textually and historically constrained reading of the Privileges or Immunities Clause which lays the groundwork for advancing the Rehnquist Court's jurisprudential vision. A revived Privileges or Immunities Clause, rooted in the historical origins of the text, arguably renders the dormant Commerce Clause fiction superfluous, counsels heightened judicial protection for economic rights, and sets the Court on a path toward a uniform, intermediate level of protection for *all* rights. More importantly, this approach avoids the judicial quagmire of unenumerated fundamental rights. Thus, Justice Scalia's vote in *Saenz* is wholly consistent with the Rehnquist Court's larger judicial effort—evident in its Takings Clause,[24] Commerce Clause,[25] and Fourteenth Amendment jurisprudence—to reshape federalism, reorder the body of judicially protected rights, and moor American constitutional law to its textual and historical roots.

I. FACTS AND PROCEDURAL HISTORY

In 1992, California received a federal waiver from the Secretary of Health and Human Services, Donna Shalala, to implement a novel provision of California's welfare statute.[26] Section 11450.03 of the California Welfare and Institutions Code limited a new resident, for the first year of residence, to

24. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

25. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

26. *See* Saenz v. Roe, 119 S. Ct. 1518, 1521-22 (1999). California's welfare benefits are among the highest in the nation. *See id.* at 1523.

the level of benefits that she would have received in her prior state of residence.[27]

After receiving benefits lower than those given to year-long California residents, three California residents challenged the constitutionality of section 11450.03 in *Green v. Anderson*.[28] Relying on *Shapiro v. Thompson*[29] and *Zobel v. Williams*,[30] the District Court for the Eastern District of California enjoined implementation of the durational residency requirement on the grounds it violated the Equal Protection Clause.[31] District Judge Levi reasoned that, given the higher cost of living in California, the statute penalized the decision of new residents to migrate to the state.[32] The District Court concluded that California had failed to justify the discriminatory classification. It would be flatly impermissible for California to enact a statute to deter the influx of low income citizens. Moreover, California had failed to explain why new residents—as opposed to old residents—should bear the burden of reducing the welfare budget, if the state's purpose was to save money.[33] The Court of Appeals summarily affirmed.[34]

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27. *See* CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999). The relevant provisions of section 11450.03 read:

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

28. 811 F. Supp. 516 (E.D. Cal. 1993).

29. 394 U.S. 618 (1969) (striking down a one-year residency requirement for obtaining welfare benefits on the grounds that it violates the Equal Protection Clause by unjustifiably infringing the fundamental right to interstate travel).

30. 457 U.S. 55 (1982) (striking down a state dividend distribution program, which favored established residents over new residents, as a violation of equal protection).

31. *See Green*, 811 F. Supp. at 523.

32. *See id.* at 521.

33. *See id.* at 521-22.

34. *See* Green v. Anderson, 26 F.3d 95, 96 (9th Cir. 1994) ("We affirm for the reasons stated in the district court's order.").

The Supreme Court granted certiorari,[35] but dismissed without reaching the merits. Prior to the Supreme Court's decision in the case, the Ninth Circuit invalidated Secretary Shalala's waiver in a separate proceeding, rendering the case before the Court no longer ripe for adjudication.[36] California indicated that the statute could not be implemented without further action by the Secretary of Health and Human Services.[37]

Subsequent to the Supreme Court's dismissal of *Anderson v. Green*, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[38] which authorized any state to calculate welfare benefits for citizens residing in the state less than 12 months based on the benefit levels of the beneficiary's state of prior residence.[39] Under PRWORA, California no longer needed a waiver to implement section 11450.03. Soon afterward, the Director of California's Department of Social Services,[40] announced that section 11450.03 would be enforced as of April 1, 1997.[41]

Shortly thereafter, two California residents brought an action in the Eastern District of California challenging once again the constitutionality of section 11450.03 and PRWORA.[42] District Judge Levi concluded that PRWORA did not affect his prior legal analysis in *Green v. Anderson*, and again enjoined the implementation of the statute as a violation of the Equal Protection Clause.[43] The Court of Appeals once again affirmed.[44]

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35. *See* Anderson v. Green, 513 U.S. 922 (1994).

36. *See* Anderson v. Green, 513 U.S. 557, 559 (1995) (per curiam), *citing* Beno v. Shalala, 30 F.3d 1057, 1073-76 (9th Cir. 1994).

37. *See id.* at 559-60.

38. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.)

39. *See* § 103(a), 110 Stat. at 2124 (codified at 42 U.S.C. § 604 (c) (1994 & Supp. II)).

40. After the case was argued before the Supreme Court, Rita Saenz replaced Eloise Anderson as Director of California's Department of Social Services. *See* Saenz v. Roe, 119 S. Ct. 1518, 1524 n.10 (1999).

41. *See id.* at 1522.

42. *See id.* at 1523. After stipulation by the parties, the District Court certified a class of plaintiffs comprised of all present and future welfare applicants who had applied or would apply for welfare benefits on or after April 1, 1997, and who had been or would be denied full benefits because they have not resided in California for a year prior to their application. *See id.* at 1523 n.7.

43. *See* Roe v. Anderson, 966 F. Supp. 977, 984-85 (E.D. Cal. 1997).

44. *See* Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998). The court agreed that the issue was discrimination against residents of the same state, based on length of residence, and not a comparison between residents of different states. It concluded that

The Supreme Court affirmed, with Justice Stevens writing for a seven-Justice majority.[45] At the outset, Justice Stevens noted that "[t]he word 'travel' is not found in the text of the Constitution. Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence."[46] Justice Stevens broke the "right to travel" into three different components: (1) the right freely to enter and to leave a state; (2) the right of non-residents to be treated equally when visiting a state; and (3) the right of new residents to be treated the same as existing residents of a state.[47]

In disaggregating the right to travel, the *Saenz* Court implicitly recognized, but commingled, the two visions of "privileges or immunities." The Court's parsing of the right to travel defined the privilege both as a fundamental right—the right to physical ingress and regress among the states—and as a principle of non-discrimination—the right to equal treatment as a visitor or new resident in a state.[48]

The Court treated the first component of the right to travel—the right to enter and leave a state—as a fundamental right.[49] According to the Court, this right is not expressly enumerated in the Constitution,[50] although it is firmly embedded in constitutional jurisprudence.[51] Scarcely a sentence later, however, the majority implicitly linked the first component to Article IV's Privileges and Immunities Clause. The Court

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the plaintiffs had demonstrated a reasonable likelihood of suffering irreparable harm in violation of the Equal Protection Clause, and thus upheld the order enjoining implementation of the statute.

45. *See Saenz*, 119 S. Ct. at 1524. Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined the majority opinion. *See id.* at 1521.

46. *Id.* at 1524 (internal quotation marks omitted), *citing* United States v. Guest, 383 U.S. 745, 757 (1966).

47. *See Saenz*, 119 S. Ct. at 1525.

48. Six years before *Saenz*, Justice Scalia recognized these two components of the right to travel in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that barriers to intrastate movement to obtain an abortion do not implicate the right to interstate travel, unless intentionally applied in a fashion that discriminates against citizens of other states). Looking only to precedent as his legal foundation, Justice Scalia asserted that "the right of interstate travel . . . protects interstate travelers against two sets of burdens: the erection of actual barriers to interstate movement and being treated differently from intrastate travelers." *Id.* at 276-77 (internal quotation marks omitted), *citing* Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) *and* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).

49. *See Saenz*, 119 S. Ct. at 1525.

50. *See Saenz*, 119 S. Ct. at 1524-25.

51. *See* Edwards v. California, 314 U.S. 160 (1941) (invoking the right to interstate travel in striking down on dormant Commerce Clause grounds a state law which made it a crime to bring an indigent non-resident into the state).

recognized in a footnote that Article IV had been "formed exactly upon the principles" of the Fourth Article of the Articles of Confederation,[52] which guaranteed "[t]he right of free ingress and regress to and from neighboring States."[53] Thus, the majority treated the first component of the right to travel as implicit in the constitutional text, interpreted against the backdrop of the Articles of Confederation.

The second component of the right to travel commingled the two visions of "privileges or immunities." On the one hand, the Court identified a procedural guarantee of "equality of privilege" for citizens visiting another state.[54] This right, the Court said, was secured by Article IV's Privileges and Immunities Clause.[55] The Court noted that the procedural protection was not absolute, referring to *Toomer*'s "substantial reason" test for discriminatory classifications.[56] On the other hand, the Court—again by footnote—cited *Corfield* for the proposition that "the right of a citizen of one state *to pass through, or to reside in* any other state" was among the "'*fundamental*' rights protected by the privileges and immunities clause."[57] In so doing, the Court both invoked *Corfield*'s fundamental rights language and refuted its construction of the right to travel to another state to visit as somehow less fundamental than the right to migrate. At oral argument in *Saenz*, Justice Scalia himself expressed uneasiness with such a distinction between the visitor and the new resident.[58]

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52. U.S. ART. OF CONF., art. IV ("[T]he 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 . . . .").

53. *Id.* at 1525 n.13 (internal quotation marks omitted), *citing* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (M. Farrand ed., 1966).

54. *See Saenz*, 119 S. Ct. at 1525-26, *citing Paul*, 75 U.S. (8 Wall.) at 180.

55. *See Saenz*, 119 S. Ct. at 1525.

56. *See Saenz*, 119 S. Ct. at 1526, *citing* Toomer v. Whitsell, 334 U.S. 385, 396 (1948) ("Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.").

57. *See Saenz*, 119 S. Ct. at 1526 n.14 (emphasis added).

58. *See* Transcript of Oral Argument, Saenz v. Roe, 119 S. Ct. 1518 (1999) (No. 98-97), *available in* 1999 WL 22762, at *52 (Jan. 13, 1999) ("I don't know how and why . . . you

At issue in *Saenz*, according to Justice Stevens, was the third component of the right to travel—"the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[59] This protection, the Court wrote, was "plainly identified" in the Citizenship Clause[60] and the Privileges or Immunities Clause of the Fourteenth Amendment.[61] Although the Court acknowledged the "fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*,"[62] the Court concluded that—whatever the scope of the Clause—"it has always been common ground that this Clause protects the third component of the right to travel."[63] Thus, the Court decided only that, at a minimum, "privileges or immunities" embodies a principle of non-discrimination.

In the end, the third component of the right to travel is largely superfluous. Indeed, the third component merely reiterates what the Court had indirectly recognized in defining the second component of the right to travel: the principle of non-discrimination applies to the right to migrate as well as the right to travel. In essence, then, the Court made explicit that the right to migrate was located in, and secured by, the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses, not Article IV or Justice Washington's opinion in *Corfield*.[64]

Curiously, the Court then launched into what appears to be an Equal Protection analysis, which treats new residents as a suspect class. This is far afield of the fundamental right to travel. After conceding that the case "involve[d] discrimination against citizens who have *completed* their interstate travel,"[65]

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say the right to migrate is a fundamental right and somehow less fundamental than the right to travel.").

59. *Saenz*, 119 S. Ct. at 1526.

60. U.S. CONST. amend. XIV, § 1 ("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.").

61. *See Saenz*, 119 S. Ct. at 1526.

62. *Id.* at 1526-27, *citing* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80, 112-13 (1873).

63. *Saenz*, 119 S. Ct. at 1526.

64. *See id.*

65. *Saenz*, 119 S. Ct. at 1527 (emphasis added).

the Court argued that the citizen's right to be treated *equally* in her new state of residence was at stake.[66] The majority held that strict scrutiny was required to judge the constitutionality of a state law that discriminates against its citizens based on length of residence.[67] Justice Stevens wrote: "Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty."[68] The durational residency requirement failed under strict scrutiny because length of residence and the identity of the prior state of residence have *no relevance* to the need for benefits, and bear *no relationship* to any legitimate state interest.[69]

Lastly, the majority turned its attention to the issue of congressional approval. The Court held that Congress's passage of PRWORA did not redeem the constitutionality of California's durational residency requirement. "Congress," Justice Stevens wrote, "has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation."[70] The Court recognized that section 5 of the Fourteenth Amendment gives Congress broad enforcement power, but denied that such power encompassed the power "to restrict, abrogate, or dilute these guarantees."[71] Instead, the Court reserved for itself the sole power to approve discriminatory classifications that touch the tripartite right to travel.

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66. *See id.*

67. *See id.*

68. *Id.* The Court went on to argue that recognizing new residents' claims to full welfare benefits would not encourage citizens of other states to establish residency just long enough to grab the benefits and run. According to the Court, welfare benefits are different from "readily portable benefit[s], such as a divorce or a college education . . . ." *Id.* (citations omitted).

69. *See id.* at 1528. The Court's language suggests that § 11450.03 would have failed even *Toomer's* more flexible "substantial reason" test. *See supra* note 68 and accompanying text; *see also infra* note 132 and accompanying text.

70. *Saenz*, 119 S. Ct. at 1529. The Court also rejected the Solicitor General's argument, as amicus, that PRWORA offers states a choice-of-law provision subject to intermediate scrutiny. *See id.*

71. *Id., citing* Katzenbach v. Morgan, 384 U.S. 641, 651, n.10 (1966).

Chief Justice Rehnquist and Justice Thomas wrote separately in dissent and joined each other's opinion. Chief Justice Rehnquist opposed the Court's decision to "breathe[] new life into the previously dormant" clause.[72] Although noting that "[m]uch of the Court's opinion is unremarkable and sound,"[73] Chief Justice Rehnquist argued that the Court's definition of the third component conflated the right to travel with the right to equal state citizenship by bona fide residency.[74] Accordingly, "right to travel analysis refers to little more than a particular application of equal protection analysis."[75]

Under equal protection rational basis review, the Chief Justice would have upheld the statute as a reasonable "good faith residency requirement."[76] The majority had argued that the need for welfare benefits is unrelated to the length of residence, and that welfare benefits—distinguishable from other "readily portable benefit[s], such as a divorce or a college education"—pose less danger that citizens of other states will grab the benefits and run.[77] Chief Justice Rehnquist was not persuaded.[78] In response, he first noted that the Court has upheld durational residency requirements for college education,[79] divorce,[80] and political party registration,[81] despite the apparent lack of any relationship to length of residence.[82] Second, the majority's distinction between portable and non-portable public benefits is illusory.[83] In fact, the state has a

72. *Saenz*, 119 S. Ct. at 1530 (Rehnquist, C.J., dissenting).

73. *Id.*

74. *See id.* at 1532.

75. *Id.* at 1532 n.2, *quoting* Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982).

76. *Id.* at 1530.

77. *Saenz*, 119 S. Ct. at 1530. Justice Stevens, writing for the majority, had accepted as undisputed that the respondents were bona fide residents, concluding that "[w]e thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned." *Id.* at 1527.

78. *Id.* at 1534 (Rehnquist, C.J., dissenting).

79. *See* Vlandis v. Kline, 412 U.S. 441, 445 (1973) (affirming a state law that imposed higher tuition rates for nonresidents as compared to residents at state universities).

80. *See* Sosna v. Iowa, 419 U.S. 393, 408-09 (1975) (holding that a state may permissibly impose a one-year residency requirement for obtaining a divorce).

81. *See* Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973) (upholding political party registration restrictions that are analogous to a durational residency requirement for the right to vote in primary elections).

82. *See Saenz*, 119 S. Ct. at 1534.

83. *See id.* ("[T]his 'you can't take it with you' distinction is more apparent than real, and offers little guidance to lower courts who must apply this rationale in the future. Welfare payments are a form of insurance, giving impoverished individuals and their

greater need to require proof of bona fide residence for welfare benefits than for divorce or college eligibility because welfare expenditures have "a far greater impact on a State's operating budget . . . ."[84]

Justice Thomas viewed *Saenz* as a straightforward equal protection case. Although he declared his willingness to revisit the meaning of the Privileges or Immunities Clause, Justice Thomas argued that *Saenz* was not an appropriate case to do so. He cautioned: "Before invoking the Clause . . . we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant" and to "consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence."[85]

Justice Thomas traced the Framers' understanding of "privileges or immunities" from early seventeenth century colonial charters to Article IV of the Articles of Confederation,[86] which formed the basis for Article IV of the Constitution. The definitive interpretation of Article IV's Privileges and Immunities Clause in *Corfield* "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment."[87] Thus, for Justice Thomas, one must look to the Fourth Article of Confederation, Article IV's Privileges and Immunities Clause, and *Corfield* to ascertain the historical meaning and legislative intent which informs the content of the Fourteenth Amendment Privileges or Immunities Clause.

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families the means to meet the demands of daily life while they receive the necessary training, education, and time to look for a job. The cash itself will no doubt be spent in California, but the benefits from receiving this income and having the opportunity to become employed or employable will stick with the welfare recipient if they stay in California or go back to their true domicile. Similarly, tuition subsidies are 'consumed' in-state but the recipient takes the benefits of a college education with him wherever he goes. A welfare subsidy is thus as much an investment in human capital as is a tuition subsidy, and their attendant benefits are just as 'portable.'").

84. *Id.*

85. *See id.* at 1538 (Thomas, J., dissenting).

86. *See id.* at 1535-36. Justice Thomas noted that the phrase "privileges and immunities" appears to stem from the 1606 Charter of Virginia, with similar guarantees included in other colonial charters. Justice Thomas argued that members of the Second Continental Congress, which drafted the Articles of Confederation, understood the terms "privileges" and "immunities" to mean those natural law rights and liberties enjoyed by all persons. The United States Constitution incorporated the Fourth Article of Confederation into Article IV, which provides a similar guarantee of "privileges and immunities." *See id.*

87. *Id.* at 1537. Justice Thomas noted that *Corfield* reflected his own historical understanding of the Privileges or Immunities Clause. *See id.*

According to Justice Thomas, the Court's failure to ascertain the original meaning of the Clause led to the Court's "dubious" conclusion that welfare benefits were a Privilege or Immunity of national citizenship.[88]

Based on his historical analysis, Thomas concluded that the Fourteenth Amendment's Privileges or Immunities Clause does not guarantee equal access to all public benefits established by positive law, but rather "encompassed only fundamental rights that belong to all citizens of the United States."[89] Regarding a government's distribution of public benefits not touching a fundamental right, citizens would be protected—if at all—by the Equal Protection Clause. In closing, Justice Thomas warned of the danger that, unmoored from its historical meaning, the Privileges or Immunities Clause would become "yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court."[90]

II. ANALYSIS

Justice Scalia's decision to join the majority provides some indication that the *Saenz* decision should not be as disheartening to conservatives as it may initially appear. Although fraught with risks, the Court's discrepant language affords an opportunity to lay the groundwork for advancing the Rehnquist Court's larger judicial effort to reshape federalism, reorder individual rights, and moor constitutional law to its textual and historical roots. In the end, *Saenz* may prove fertile ground for advancing the Rehnquist Court's jurisprudential vision.

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88. *See id.* at 1538.

89. *Id.*, *citing* Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit).

90. *Saenz*, 119 S. Ct. at 1538 (internal quotation marks omitted), *quoting* Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

A. *The Jurisprudential Vision of the Rehnquist Court*[91]

The jurisprudential vision of the Rehnquist Court has been defined by a bold effort to fundamentally alter the balance between federal power, state power, and individual liberty. In the realm of government power, the Rehnquist Court has worked to revive federalism by shifting power from the federal government to the States.[92] Several aspects of the Court's jurisprudence illustrate this vision. Last term, for example, the Court further expanded the doctrine of sovereign immunity to limit Congress's power to authorize damages actions against the States for violations of federal law.[93] Likewise, the Rehnquist Court has drawn a bright line to bar Congress from enlisting a State's executive branch official to implement federal law,[94] and directly requiring a State's legislature to legislate.[95] Lastly, the Court has attempted to establish limits on the exponential growth of Congress's Commerce Clause power. In *United States v. Lopez*,[96] Chief Justice Rehnquist, joined by Justice Scalia, revived the distinction between

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91. Justice Scalia's jurisprudential vision has been characterized as "an apolitical ideology sympathetic to classical Manchester Liberalism . . . emphasiz[ing] limited government, faith in the marketplace, commitment to legalism, materialism, property rights, and enforcement of majoritarian morality as essential to the creation of free society." DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 33 (1996). As such, Justice Scalia's constitutional vision fits comfortably with that of the Rehnquist Court, and indeed has been influential in defining that vision. For a summary of other analyses of Justice Scalia's jurisprudence, see *id.* at xvii-xx.

92. *See* Marcia Coyle, *Is Rehnquist Tinkering with Revolution? Justices Seem Determined to Re-Disperse the National Power of Congress to the States*, NAT'L L.J., Aug. 6, 1999, at B7 (noting that the Court's decisions in the federalism cases which dominated the 1998-1999 term "signify the Rehnquist Court has not at all slowed its move to revive the authority of state governments and to remind us of our constitutional framework of dual sovereignty.").

93. *See* Alden v. Maine, 119 S. Ct. 2240 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate a State's sovereign immunity from suit in federal courts pursuant to Congress's Article I powers).

94. Printz v. United States, 521 U.S. 898 (1997) (striking down a provision in the Brady Handgun Act requiring local law enforcement officials to conduct background checks on the grounds that Congress may not commandeer a state's executive branch).

95. New York v. United States, 505 U.S. 144 (1992) (striking down a federal statute requiring states either to pass environmental regulations according to congressional instructions, or to accept ownership of radioactive waste, on the grounds that Congress may not compel states to enact or administer a federal regulatory program).

96. 514 U.S. 549 (1995) (striking down a federal law penalizing handgun possession in school zones as beyond the scope of Congress's Commerce Clause power).

commercial and non-commercial activity in order to impose a boundary on the seemingly unconstrained power of Congress to regulate intrastate activities.[97] The conservative members of the Court have also repeatedly attacked the dormant Commerce Clause as an over-broad and illegitimate constraint on state power.[98] Justice Scalia has been among the most ardent critics of the dormant Commerce Clause fiction.[99] In each of these areas, the Rehnquist Court has assumed the role of keeper and architect of structural federalism.

In the realm of individual liberty, the Rehnquist Court's jurisprudence indicates a fundamental re-thinking of the *Carolene Products*[100] era balance between economic and civil rights. The Court, most notably Justice Scalia in his scholarship, has denounced the traditional dichotomy between economic rights and civil rights,[101] emphasizing instead the intimate relationship between the former and the latter.[102]

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97. *See id.* at 567 (1995) (refusing to "convert congressional authority under the Commerce Clause to a general police power").

98. For a sample of Justice Scalia's criticisms of the dormant Commerce Clause doctrine, see, for example, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 595 (1997) (Scalia, J., dissenting); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895-98 (1988) (Scalia, J., concurring); and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., dissenting).

99. *See* Sara Sachse, *United We Stand – But For How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 ST. LOUIS U. L.J. 695, 720 (1999).

100. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938). In his famous fourth footnote, Justice Stone wrote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153 n.4 (internal citations omitted).

101. *See* Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 31, 31-32 (J.A. Dorn ed. 1987) (arguing that the dichotomy between property and civil rights "is a pernicious notion . . . lead[ing] to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights . . . .").

102. *See* David A. Schultz , *Scalia, Property, and Dolan v. Tigard: The Emergence of a Post-Carolene Products Jurisprudence*, 29 AKRON L. REV. 1, 8-9 (1995) ("Protecting our

Justice Scalia's views reflect the Rehnquist Court's effort to gradually heighten judicial protection for economic rights and retreat from strict scrutiny protection for civil rights.[103] In *Dolan v. City of Tigard*,[104] for example, Chief Justice Rehnquist, joined by Justice Scalia, declared that there was no reason why the Takings Clause should be a "poor relation" to the First[105] and Fourth[106] Amendments. Taken together, the Rehnquist Court's property cases indicate a revival of constitutional property rights,[107] a rejection of the disparate levels of judicial scrutiny for economic and civil rights, and a move toward a uniform, intermediate level of judicial scrutiny to protect *all* rights.[108]

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society against excessive economic regulation and defending property interests appears to be a more sure way for Scalia to support civil liberties than it would be for the Court to single out political freedoms of speech, press, and assembly alone. Constitutional protections do not seem to be enough to protect political liberties. Some institutions, such as property rights, are needed to sustain these liberties."). For a similar view of the false dichotomy between economic and civil rights and the "fundamental interdependence" between personal and property rights, see Justice Stewart's opinion for the Court in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972).

103. *See* Dennis v. Higgins, 498 U.S. 439, 445-46 (1991) (rejecting the distinction between personal and property rights as impossible to apply); Zinermon v. Burch, 494 U.S. 113 (1990) ("We, however, do not find support in precedent for a categorical distinction between a deprivation of liberty and one of property."). Both cases cite Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one . . . ."). *See also* SCHULTZ & SMITH, *supra* note 91, at 208 (noting that Scalia's opinions support "the gradual elevation of judicial scrutiny from rational basis to an intermediate level analysis in examination of property and land use regulation" and "the retreat from heightened scrutiny in examining more traditional Bill of Rights complaints").

104. 512 U.S. 374, 392 (1994).

105. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

106. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

107. *See* Daniel A. Crane, *A Poor Relation? Regulatory Takings After Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199, 238 (1996) ("Recent cases . . . indicate a partial revival of constitutional property rights.").

108. *See* Schultz, *supra* note 102, at 32 (concluding that "[a]fter Dolan, the Court appears to be moving toward using some type of intermediate level of analysis for all types of rights based claims . . . with Scalia leading the way"); *see also* SCHULTZ & SMITH, *supra* note 91, at xxii.

B. *The Overly-Broad Reading: Rebirth of Fundamental Rights Theory*

The greatest peril in *Saenz* is that it will be read broadly to revive fundamental rights analysis, thus opening a Pandora's box of judicial activism. Indeed, in the context of the Court's modern right-to-migrate jurisprudence, *Saenz* may indicate just such a move. Prior to *Saenz*, the Court's right-to-migrate jurisprudence may be described as haphazard at best.[109] In *Shapiro*, for instance, the Court broke from traditional "suspect class" equal protection analysis in its right-to-migrate decisions and relied on the relatively new "fundamental rights" strand of equal protection.[110] In subsequent cases, however, the Court "has subtly moved away from *Shapiro's* troubling fundamental rights analysis."[111] Beginning with then-Justice Rehnquist's majority opinion in *Sosna v. Iowa*[112] and followed by Chief Justice Burger's opinion for the Court in *Zobel v. Williams*,[113] the Court appeared to shift its right-to-migrate analysis toward a suspect class approach.[114] Thus, by reviving the Privileges or Immunities Clause and invoking *Corfield's* fundamental rights language, Justice Stevens's opinion in *Saenz*—although sounding at times like suspect class analysis—may indicate a tendency to re-invigorate fundamental rights, under the doctrinal head of "privileges or immunities."[115]

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109. *See* Todd Zubler, *The Right To Migrate and Welfare Reform: Time for Shapiro v. Thompson To Take A Hike*, 31 VAL. U. L. REV. 893, 893 (1997).

110. *See id.* at 899.

111. *Id.* at 904. One commentator noted that

> there was probably no member of the current court completely at ease with the analytic method that produced *Shapiro v. Thompson*. That decision represented a kind of high-water mark of the Warren Court's open-ended approach to constitutional analysis—so much so that Chief Justice Earl Warren himself dissented from Justice William J. Brennan's majority opinion, which candidly conceded that the right to travel was not anchored to any particular place in the Constitution.

Linda Greenhouse, *Justices Revive Constitution's Privileges Or Immunities Clause Ruling That Voided Two-Tiered Welfare; Top Court On New Constitutional Path*, PITTSBURGH POST-GAZETTE, May 30, 1999, at A15.

112. 419 U.S. 393, 441 (1975).

113. 457 U.S. 55 (1982).

114. *See* Zubler, *supra* note 109, at 904-05.

115. A number of Supreme Court Justices have suggested such an approach in various degrees, believing it consistent with *Slaughter-House*. *See Zobel*, 457 U.S. at 69 (Brennan, J., concurring); Oregon v. Mitchell, 400 U.S. 112, 285-87 (1970) (Stewart, J., concurring); Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); *id.* at 183 (Jackson, J., concurring); *See generally* Zubler, *supra* note 109; William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMM. 73 (1994).

The inherent ambiguity of the Privileges or Immunities Clause, when read to confer fundamental rights, creates the risk that the Privileges or Immunities Clause "will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court."[116] Conservatives need hardly be reminded of the more notorious examples of this form of jurisprudence.[117] For many conservatives, such a risk is scarcely mitigated by the natural law theory of "privileges or immunities," however principled, of the sort proposed by Justice Thomas.[118] Such a theory is sufficiently vague and open-ended to provide "a license for unlimited government and a roving judiciary."[119]

C. *The Unduly Narrow Reading: The First Shot in a Revolution That Will Never Happen*

Given the risks inherent in a broad reading of *Saenz*, a much narrower interpretation of the Court's decision may be deeply appealing. It is in fact possible to read *Saenz* in narrower, less threatening, and wholly unremarkable ways. First, Justice Scalia may simply have felt bound by the *Slaughter-House* precedent. The Court did not purport to overrule *Slaughter-House*.[120] The right to travel (although expansively defined) arguably falls within *Slaughter-House*'s narrow category of national privileges and immunities, later identified in *Twining v. New Jersey*.[121] Nor did the Court explicitly rely on a

116. Saenz v. Roe, 119 S. Ct. 1518, 1538 (1999) (Thomas, J., dissenting) (internal quotation marks omitted), *quoting* Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

117. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down a maximum hours law for bakery employees on the grounds that substantive due process protected a "right to contract"). The Lochner era commonly refers to the Supreme Court's substantive due process jurisprudence from 1897-1937, which struck down several state laws as violations of unenumerated economic rights. Justice Douglas's reliance on "penumbras, formed by emanations" from constitutional guarantees in discovering a fundamental right to privacy in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), evokes similar fears in conservatives.

118. *See* Thomas, *supra* note 14. Although he did not make a fundamental rights argument himself, Chief Justice Rehnquist *did* join Justice Thomas's dissenting opinion, which advocated a historically-constrained fundamental rights theory of Privileges or Immunities. *Saenz*, 119 S. Ct. at 1535-38.

119. *See* Thomas, *supra* note 13, at 63.

120. *See* Zubler, *supra* note 109, at 917-18.

121. 211 U.S. 78, 97 (1908) (listing the privileges or immunities which had been judicially recognized since *Slaughter-House*, and including the right to pass freely from state to state).

fundamental rights theory in deciding *Saenz*; the Court's definition of "privileges or immunities" only necessarily encompassed a principle of non-discrimination.[122] Justice Scalia no doubt welcomed the rare moment of textualist methodology to moor the right to migrate to a textual source. Finally, and more broadly, Justice Scalia's vote in *Saenz* may have foreshadowed a judicial effort to eliminate the disparate levels of protection given to new residents vis-à-vis non-residents.[123] Or, Justice Scalia may just be after a cheaper Louisiana hunting license.[124]

Although significantly less dangerous to those concerned about the prospect of judicial activism, these narrow interpretations are not compelling, especially to conservatives who tempered their reaction to *Saenz* based in part on Justice Scalia's vote. If, like *Colgate*, *Saenz* proves an isolated case, the decision will simply represent an ill-advised judicial intrusion into a well-functioning process of political compromise between Congress and the States. Indeed, the *Saenz* Court struck down a state statute, passed with the authorization of the federal legislature, that structures an area of inherently complex social and economic policy. The sole virtue of such a narrow reading will be that the risks inherent in the opinion never materialize.

D. *The Opportune Reading: Textual and Historical Roots, Blossoming Jurisprudential Vision*

Saenz need not be read so narrowly or so broadly. Rather, *Saenz* should be understood to afford a broad yet textually and historically constrained reading of the Privileges or Immunities

122. *See Saenz*, 119 S. Ct. at 1526 ("Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the Slaughter-House Cases, it has always been common ground that this Clause protects the third component of the right to travel.") (internal citation omitted).

123. *See* Marcia Coyle, *Two High Court Decisions Brighten Prospects for Diverse Citizen Rights*, NAT'L L.J., May 31, 1999, at A7 (col. 7) (speculating that the Court may eventually streamline its uneven right-to-travel jurisprudence); *see generally* Transcript of Oral Argument, Saenz v. Roe, 119 S. Ct. 1518 (1999) (No. 98-97), *available in* 1999 WL 22762, at *34-52 (Jan. 13, 1999) (indicating, at oral argument, Justice Scalia's unease with the disparate levels of protection given to non-resident visitors as opposed to new residents).

124. *See* Transcript of Oral Argument, Saenz v. Roe, 119 S. Ct. 1518 (1999) (No. 98-97), *available in* 1999 WL 22762, at *36 (Jan. 13, 1999) ("I would like to be able to get Louisiana hunting licenses at—at Louisiana resident rates.").

Clause. This reading advances the Rehnquist Court's jurisprudential vision without launching a new era of fundamental rights jurisprudence. By incorporating *Saenz*'s historical analysis into the Court's treatment of the Privileges or Immunities Clause as essentially an anti-discrimination provision, the conservative Justices can argue that the Fourteenth Amendment Privileges or Immunities Clause renders the dormant Commerce Clause fiction bankrupt and dictates greater parity in judicial protection of economic and civil rights. In the future, then, the Court's conservative members can use the majority's reasoning in *Saenz* to re-shape federalism, reorder the body of judicially protected rights, and moor American constitutional law to its textual and historical roots. Thus interpreted, Justice Scalia's vote in *Saenz*, initially a source of much consternation, is not only wholly consistent with the Rehnquist Court's larger judicial effort,[125] but breaks fertile ground for articulating that vision in the future.

1. *Re-shaping federalism by re-casting the Commerce Clause power*

A number of scholars have recognized the similarity between Article IV's Privileges and Immunities Clause and the dormant Commerce Clause doctrine.[126] Both originate in the Fourth Article of the Articles of Confederation;[127] both serve to combat isolationism[128] and guard the national unity;[129] and both

125. Justice Scalia's jurisprudence may be driven more by a desire for philosophical consistency than for conservative outcomes. Thus, Justice Scalia has "parted company with the conservative bloc and joined the liberals in affirming specific Bill of Rights protections .... Unlike Rehnquist, O'Connor, and Kennedy, who seem content simply to advance their policy preferences through the advocacy of conservative case outcomes, Justice Scalia seeks to accomplish broader ends by rethinking the political philosophy and values that have defined American constitutional jurisprudence since the New Deal." DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 206-07 (1996).

126. *See* TRIBE, *supra* note 17, at 536 (noting the similar origins of both clauses in the Fourth Article of the Articles of Confederation, the historically close relationship between the two clauses, and the theory that the Privileges and Immunities Clause was designed to safeguard the privileges of trade and commerce); *see generally* Julian N. Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L.J. 425 (1982) (noting that both clauses regulate state and local discrimination against citizens of other states, and arguing that a proper reading of the Privileges and Immunities Clause should replace the dormant Commerce Clause doctrine).

127. *See* TRIBE, *supra* note 17, at 536.

128. *See* Eule, *supra* note 126, at 446-47 (noting that, like the dormant Commerce Clause, "[i]n its original form, contained in the fourth article of the Articles of Confederation, the privileges and immunities clause specifically treated the problem of

regulate primarily commercial activity.[130] Thus, although Justice Thomas has advocated[131] replacing the dormant Commerce Clause jurisprudence by reviving the Import/Export Clause in Article I, section 10,[132] the more commonly suggested clause to supplant the dormant Commerce Clause fiction is Article IV's Privileges and Immunities Clause.[133]

A revived Fourteenth Amendment Privileges or Immunities Clause arguably renders the dormant Commerce Clause fiction obsolete. Writing after *Colgate*, James Barr Ames predicted that "any expansive development of the forgotten clause . . . would be along lines analogous to those of the commerce clause . . . ."[134] The function of the Court's modern dormant Commerce Clause jurisprudence is to regulate commercial discrimination against out-of-state actors.[135] The Privileges or Immunities Clause is well-suited to such a role. *Saenz* roots the Privileges or Immunities Clause textually and historically in the Fourth Article of the Articles of Confederation, which expressly prohibited discrimination against citizens of other states in

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commercial isolationism."). *But cf.* TRIBE, *supra* note 17, at 403 n.3 (noting that the dormant Commerce Clause, but not Article IV's Privileges and Immunities Clause, protects corporations from discriminatory classifications).

129. *See* Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (arguing that the Court's role in "guarding against rank discrimination" derives from Article IV's Privileges and Immunities clause, not the Commerce Clause); Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147, 150 (1993) ("A core function of the [commerce] clause is to provide a bulwark against invidious treatment of outsiders, and to serve a structural role in the creation of national solidarity.").

130. *See* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV Section 2: Precursor of Section One of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (noting the rights fundamental to national unity, elaborated in Article IV privileges and immunities jurisprudence, are predominately economic or commercial in nature).

131. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 595 (1997) (Thomas, J., dissenting).

132. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on any Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").

133. *See* Eule, *supra* note 126, at 448 ("There is nothing startling, therefore, in concluding that the equality-oriented *privileges and immunities clause* of the Constitution, *and not the commerce clause*, was historically designed to define the scope of state legislative power in commercial matters . . . .") (emphasis added).

134. Ames, *supra* note 8, at 941.

135. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-55 (1977).

commercial activity.[136] Moreover, the modern Privileges *and* Immunities Clause, which the Court has treated like an anti-discrimination provision, is broader than the dormant Commerce Clause: it regulates discrimination against out-of-state citizens in *all* activities, commercial and non-commercial. Finally, the Fourteenth Amendment's Privileges or Immunities Clause is broader still, because it regulates a state's discrimination against *its own* citizens.[137] Thus, the Fourteenth Amendment's Privileges or Immunities Clause, Article IV's Privileges and Immunities Clause, and the Equal Protection Clause serve the broader function of regulating government discrimination in all human activity, thus obviating the need for the dormant Commerce Clause fiction, based on negative judicial inference, to address discrimination in the narrower subset of commercial activities.[138]

A Privileges or Immunities Clause that embodied a principle of non-discrimination under a flexible "substantial reason" test would better balance the competing needs for national unity and state experimentation.[139] Justice Stevens, writing for the Court in *Camps Newfound,* declared: "We have consistently . . . held that the Commerce Clause . . . precludes a state from

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136. *See supra* note 32.

137. This fact suggests another way in which the Privileges or Immunities Clause may re-shape federalism. Through its enforcement power in § 5 of the Fourteenth Amendment, Congress arguably could regulate purely intrastate activity in order to achieve national unity, thus obviating the need for Congress to justify its action as an exercise of the Commerce Clause power by conjuring up some farcical argument that non-commercial, intrastate activities, when aggregated, substantially affect interstate commerce. Such an approach could make the distinction between commercial and non-commercial activity (revived by the Rehnquist Court in *Lopez*) viable as a check on federal Commerce Clause power. At the same time, Congress's new power under § 5 of the Fourteenth Amendment would be inherently limited to enforcing the guarantees of the amendment.

138. Moreover, if the Court accepts the view in *Paul v. Virginia,* 75 U.S. (8 Wall) 168, 177 (1869) that corporations are *not* citizens entitled to the same privileges and immunities as natural persons, the Privileges or Immunities Clause would prove *even less* of a constraint on state power to regulate economic activity than the dormant Commerce Clause fiction.

139. *See* Toomer v. Whitsell, 334 U.S. 385, 396 (1948) ("Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is *no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.* But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.") (emphasis added); *see also* TRIBE, *supra* note 17, at 533 (noting that, in the Court's move from *Corfield* to *Toomer*'s "substantial reason" test, "[a] flexible approach that seeks to allow discrimination but only where necessary was substituted for the rigidity inherent in a test that cast down any discrimination once found to diminish a fundamental right . . . .").

mandating that its residents be given a preferred right of access, over out of state consumers, to natural resources located within its borders or to the products derived therefrom."[140] Yet, the Court has allowed states just such flexibility under Article IV's Privileges and Immunities Clause.[141] Thus, a move from the dormant Commerce Clause fiction to a revived "privileges or immunities" doctrine would expand the power and flexibility of the states.

Finally, *Saenz* leaves the Court well-positioned to address threats to national unity which arise from such enhanced state power. Unlike its Commerce Clause jurisprudence, the Court in *Saenz* declined to recognize a role for Congress in defining the "privileges or immunities" of national citizenship under section 5 of the Fourteenth Amendment.[142] Rather, the Court assumed for itself the mantle as keeper and architect of the federal structure, sole expositor of the "one nation" vision. Such an approach shifts power from Congress to the Court as guardian of the federal structure—perhaps an activist role, but one nonetheless already adopted by the Court in the 1998-1999 term.[143]

By employing the Court's historical analysis and reasoning in *Saenz*, the Rehnquist Court can thus dislodge the dormant Commerce Clause with a revived Fourteenth Amendment Privileges or Immunities Clause. In the process, the conservative Justices can further the Rehnquist Court's jurisprudential vision for twenty-first century American federalism.

2. *Re-ordering economic and civil rights*

The Court's reasoning in *Saenz* also offers a unique opportunity to advance the Rehnquist Court's vision of constitutional rights. Justice Stevens's historical analysis in *Saenz* firmly roots the Fourteenth Amendment Privileges or Immunities Clause in a tradition of economic and property

140. *Camps Newfound/Owatonna*, 520 U.S. at 576 (internal quotation marks omitted), *citing* New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982).

141. *See, e.g.*, Baldwin v. Fish & Game Comm'n of Mont. 436 U.S. 371, 390-91 (1978) (upholding state law requiring nonresidents to pay more than residents for a hunting license); Vlandis v. Kline, 412 U.S. 441, 445 (1973) (upholding higher tuition rate for nonresidents at state university).

142. *See* Saenz v. Roe, 119 S. Ct. 1518, 1529 (1999).

143. *See* Coyle, *Is Rehnquist Tinkering with Revolution?*, *supra* note 92, at B7.

rights. Article IV of the Articles of Confederation, in addition to protecting the right to "free ingress and regress to and from any other state," also protected the right to "all the privileges of trade and commerce" and limited state restrictions on the removal of property.[144] Its constitutional heir, Article IV's Privileges and Immunities Clause,[145] was said by Justice Washington in *Corfield* to protect "the right to acquire and possess property" and "[t]he right of a citizen of one state to pass through, or to reside in any other state, *for purposes of trade, agriculture, professional pursuits, or otherwise.*"[146] The *Saenz* majority quoted the former portion, but curiously omitted the latter portion, of Justice Washington's declaration.[147] The Court's modern privileges and immunities jurisprudence, although it rejects *Corfield's* interpretation (another fact curiously omitted by the Court), continues to recognize predominately economic rights.[148] Thus, as a matter of both originalism and textualism, the historical analysis in *Saenz* arguably supports greater judicial protection of economic rights.

At the same time, the Court's revival of the Privileges or Immunities Clause and its use of a methodological textualism invite a reconsideration of the Court's strict scrutiny protection of civil rights in its equal protection and due process fundamental rights jurisprudence. Professor Tribe, for example, has noted that "the list of fundamental privileges and immunities" is *not* "co-extensive with the . . . fundamental interests recognized by equal protection doctrine."[149] The

144. *See* U.S. ART. OF CONF., art. IV ("[T]he 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....").

145. *See* Greenhouse, *supra* note 111, at A15 ("There is no dispute that, as a matter of history, the privileges the amendment's drafters sought to protect included the right to earn a living, enter into contracts and acquire and maintain property free of government interference—all aspects of the natural law philosophy that inspired the signers of the Declaration of Independence.").

146. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit) (emphasis added).

147. *See Saenz*, 119 S. Ct. at 1526 n.14.

148. *See* Smith, *supra* note 130, at 809 (noting that the rights recognized in Article IV Privileges and Immunities jurisprudence as fundamental to national unity are predominately economic or commercial in nature).

149. *See* TRIBE, *supra* note 17, at 535.

members of the Rehnquist Court can argue forcefully that a principled adherence to the text of the Constitution, understood in light of the Fourth Article of the Articles of Confederation, exposes the excesses of the Court's strict scrutiny protection of civil rights.

Lastly, the Rehnquist Court can use *Saenz* as a vehicle for moving the Court toward a uniform, intermediate level of judicial scrutiny for *all* rights. Elevating judicial protection of economic rights to a par with civil rights forces the Court to either protect all rights using strict scrutiny, or retreat to a more flexible standard of review which protects civil rights but avoids a return to the Lochner era's strict scrutiny protection of economic rights. The conservative Justices can argue, consistent with the Court's anti-discrimination treatment of the clause in *Saenz*, that the Court's "privileges or immunities" jurisprudence should employ something akin to *Toomer*'s "substantial reason" test, which is more flexible and less strict than strict scrutiny under equal protection.[150] Such an approach would start the Court down the path to a uniform standard of intermediate review for legislation which touches *all* rights, both economic and civil. If successful, the conservative majority will have led the Court toward a rejection of the *Carolene Products* era's disparate treatment of economic and civil rights, and will have set the Court on the path toward a uniform, intermediate level of protection for *all* individual rights.

III. CONCLUSION

The Supreme Court's Fourteenth Amendment jurisprudence, however pragmatic, is simply not a principled and faithful reading of the constitutional text. Like *Colgate* before it, *Saenz* revives the debate between those eager for such a principled jurisprudence, and those willing to leave well enough alone. One could dismiss *Saenz* as the first shot in a revolution that will never happen or embrace it as the genesis of a natural law theory of "privileges or immunities." Yet, *Saenz* need not be read so narrowly as to be anomalous, nor so broadly as to revive an unenumerated fundamental rights conception of "privileges or immunities." *Saenz* may afford a reading of the

150. *See supra* note 139 and accompanying text.

Privileges or Immunities Clause which advances the Rehnquist Court's constitutional vision without inaugurating a new era of fundamental rights "privileges or immunities" jurisprudence.

By rooting the Privileges or Immunities Clause in its text and history, *Saenz* arguably renders the dormant Commerce Clause fiction superfluous, counsels heightened judicial protection for economic rights, and sets the Court on a path toward a uniform, intermediate level of protection for *all* rights, while avoiding the judicial quagmire of unenumerated fundamental rights. Justice Scalia's vote is thus wholly consistent with the Rehnquist Court's larger judicial effort—evident in its Takings Clause, Commerce Clause, and Fourteenth Amendment jurisprudence—to reshape federalism, reorder the body of judicially protected rights, and moor American constitutional law to its textual and historical roots.

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