Wrong Turns: A Critique of the Supreme Court'S Right to Travel Cases

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COMMENTS

WRONG TURNS: A CRITIQUE OF THE SUPREME COURT’S RIGHT TO TRAVEL CASES

Ye Shall have one manner of law,
   as well for the stranger,
   as for one of your own country\(^1\)

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I. Introduction

Ignoring the Biblical admonition not to mistreat strangers, American states have frequently tried to enact legislation favoring long-term residents over non-residents and recent arrivals.\(^2\) Beginning with the Warren Court, however, the Supreme Court has held many durational residency requirements unconstitutional violations of the right to travel.\(^3\) Long recognized by courts, the right to travel is one of the few unenumerated constitutional rights which enjoys widespread rhetorical acceptance.\(^4\)

\(^1\) Leviticus 24:22 (King James).
\(^3\) See infra note 40 and accompanying text.
\(^4\) In this respect it is useful to contrast the right to travel with other more controversial unenumerated “rights” such as the right to abortion and the right to die.
In fact, no Supreme Court justice in American history has voiced opposition to the general concept of a right to travel. Nevertheless, the right to travel remains somewhat of an enigma—an ill-defined right emanating loosely from various penumbras within the Constitution.

This Comment begins by tracing the right to travel from its origins in the nineteenth century to its zenith in the Warren and early Burger Courts. It then looks at the current constitutional status of the right to travel. This Comment suggests that, although the Court continues to make occasional references to such a right, the Rehnquist Court is in the midst of significantly scaling back the scope of the right to travel. The Court has succeeded in narrowing the right to travel largely by neglect and thus has failed to articulate a well-defined conception of the right. This Comment argues that this neglect is detrimental to our constitutional system. Finally, this Comment explores possible doctrinal underpinnings for the right to travel and concludes that a scaled-back version of the right to travel is a welcome development, one that is consistent with both democratic and communitarian principles underlying our polity. However, the right to travel should be scaled back explicitly rather than surreptitiously.

II. A Brief History of the Right to Travel

Although barely mentioned in most constitutional law textbooks,

5. There have, of course, been several differences of opinion over the proper scope of the right to travel. See, e.g., Shapiro, 394 U.S. at 629-32 (deciding 6 to 3 that the right to travel bars a state from imposing a one-year durational residency requirement for eligibility to welfare).

6. See United States v. Guest, 383 U.S. 745, 758 (1965) (stating that the right to travel was conceived in the Articles of Confederation and was necessary to bolster the stronger Union the Constitution created); see also, Twining v. New Jersey, 211 U.S. 78, 97 (1908) (recognizing that the right to travel is a right of national citizenship which arises out of the character of national government); Williams v. Fears, 179 U.S. 270, 274 (1900) (noting that the right to move from one place to another is an attribute of personal liberty secured by the Fourteenth Amendment and other provisions of the Constitution).

7. Some constitutional law textbooks mention the right to travel when discussing the Court's equal protection jurisprudence, but afford little or no attention to the historical development of the right. See, e.g., 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: VOLUME TWO CIVIL RIGHTS AND CIVIL LIBERTIES 1456-66 (1991); GEOFFREY R. STONE, ET. AL., CONSTITUTIONAL LAW 807 (1991) (devoting only one paragraph to discussion of the right to travel as a “Fundamental Interest”). Moreover, other books on civil rights and civil liberties ignore the right to travel almost entirely. See, e.g., HENRY J. ABRAHAM, FREEDOM AND THE COURT (1994) (containing no discussion on the right to travel). The little attention given to the right to travel is understandable in light of the lack of public controversy surrounding the right, and the relative infrequency with which the Court invokes the right. Precisely because of this obscurity, however, the right to travel serves as an ideal subject for scholarly debate. Free from
the right to travel has been recognized by American courts for more than 150 years. The first judicial allusion to the right to travel occurred in the 1823 case Corfield v. Coryell. Corfield involved a New Jersey statute prohibiting out-of-state residents from digging clams and oysters in that state. The Pennsylvania court upheld the statute but noted that it was "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, [and] professional pursuits." The right to travel was not confirmed by the Supreme Court until Crandall v. Nevada, which was decided fifty years later. In Crandall, the Court struck down a Nevada tax levied on railroad and stage companies for each passenger transported through that state. Recognizing that similar statutes had the potential to "totally prevent or seriously burden" citizens moving from one state to another, the Court concluded that the statute impermissibly burdened the right to travel.

Since its decision in Crandall, the Court has repeatedly reconfirmed the existence of the right to travel. For example, in 1900, Chief Justice Fuller observed that "[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . ." Forty years later, in Edwards v. California, Justice Douglas wrote that all citizens possess a "right to move freely from [s]tate to [s]tate." Despite this historical tradition, the Court has struggled to identify a doctrinal justification for the right or provide clear guidance as to what the right protects. For example, in Crandall, the Court endorsed a rather narrow

pre-existing notions of right and wrong, discussion about the right to travel can focus on the merits of the right itself and then serve as a model for the study of other rights.

8. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
9. Id. at 547-48.
10. Id. at 552.
11. 73 U.S. 35 (1867). Almost twenty years before Crandall, Justice Taney expressed approval of the right to travel in a dissenting opinion in Smith v. Turner, 48 U.S. 283, 292 (1849) (Taney, J., dissenting) (stating that "[w]e 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") [hereinafter the "Passenger Cases"]. However, a majority of the Court resolved the Passenger Cases on other grounds and, therefore, failed to address the existence of a right to travel. See generally Smith, 48 U.S. 283.
12. Crandall, 73 U.S. at 49.
13. Id. at 43-44.
conception of the right—one that was limited to travel for economic and governmental purposes. Nevertheless, the Court failed to offer any textual basis for the right. Rather, the Court justified the right on the more general notion that as "one people, with one common country . . . [all] members of the same community must have the right to pass and repass throughout every part without interruption." In other instances, however, the Court attempted to derive the right from various clauses in the Constitution and used the right to find unconstitutional statutes only tangentially affecting the ability of citizens to move from one state to another.

The expansion of the right's scope reached its zenith during the Warren and Burger Courts. For example, in United States v. Guest, the Court held that the right to travel protected against private as well as governmental interference with travel. In fact, Justice Stewart described the right to travel as "fundamental to the concept of our Federal Union" and "secured against interference from any source whatever, whether governmental or private." Then, in the landmark case of Shapiro v. Thompson, the Court ruled that Connecticut's one-year residency requirement for welfare recipients was unconstitutional because of its chilling effect on the right to travel. However, rather than declaring the statute a direct violation

16. Crandall v. Nevada, 73 U.S. 35, 44 (1867). The Court wrote that each citizen "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." Id. Likewise, the Court noted that it would not tolerate statutes that "totally prevent or seriously burden" the right to travel. Id. at 46. It would appear, therefore, that only restrictions that physically prevent and not merely touch upon travel related to business or government, would run afoul of the Crandall Court's conception of the right.

17. See Crandall, 73 U.S. at 49.
18. Id. at 48-49.
19. See, e.g., Edwards, 314 U.S. at 178 (Douglas, J., concurring) (concluding that the right to travel stems from the Privileges and Immunities Clause of the Fourteenth Amendment); Williams v. Fears, 179 U.S. 270, 274 (1900) (Fuller, C.J.) (stating that "the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and other provisions of the Constitution"); Paul, 75 U.S. at 168 (deriving right from the Commerce Clause).

20. See supra notes 16-19 and accompanying text; see also infra notes 21-37 and accompanying text.
21. 383 U.S. 745 (1965) (involving private conspiracy to discourage blacks from entering the state).
22. Id. at 759.
23. Id. at 757.
24. Id. at 760 n.17.
26. Id. at 631 ("If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.") (quoting United States v. Jackson, 390 U.S. 570, 581
of the right to travel, the Court applied an equal protection analysis, subjecting the statute to strict scrutiny review27 on the grounds that the right to travel was a "fundamental right."28 Justice Stewart's concurring opinion echoed these sentiments, proclaiming the right to be a "virtually unconditional personal right, guaranteed by the Constitution to all of us."29 Finally, in Dunn v. Blumstein,30 the Court continued its assault on durational residency requirements—this time striking down a one-year residency requirement for voting as a direct infringement on a "fundamental personal right, the right to travel"31 even though there had been no showing of actual interference or deterrence.32

The expansion of the right to travel into a virtually unfettered right, safeguarding travel against even incidental and imaginary restraints, was not lost on all members of the Court.33 In Guest, Justice Harlan noted that none of the constitutional sources proffered for the right to travel could justify its extension to interference by private individuals.34 Likewise, Chief Justice Warren balked at the notion that state residency requirements were per se unconstitutional "merely because [they] burden[] the right to travel."35 Faced with this criticism, the Court held to its sweeping formulation of a "virtually unconditional personal right"36 but did not offer a justification for expanding the scope of the right.37 In fact, rather than explain its actions, the Court simply abandoned the attempt to find a textual basis for the right.38 As Justice Brennan candidly admitted several years later, "the frequent attempts to assign the right to travel some textual source in

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27. When the Court applies strict scrutiny review, it will uphold legislation only if it is necessary to accomplish a compelling governmental interest. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).
28. Id. at 630-31.
29. Id. at 643 (Stewart, J., concurring).
31. Id. at 338. "It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence." Id. at 399-40.
32. Id.
34. Id. at 767.
36. Id. at 643 (Stewart, J., concurring).
37. Id.
38. Id.
the Constitution . . . have proved both inconclusive and unnecessary."

Having jettisoned any textual limitation on the right without formulating its own definition, the Court found itself in a bind. On the one hand, the logic of Guest, Shapiro, and Dunn suggested that a whole range of additional statutes imposing residency requirements were unconstitutional. Yet, given the sheer magnitude of the statutes involved, the Court appeared reluctant to engage in a wholesale assault on state law.

The result was a quixotic period of indecision as the Burger Court labored in vain to make sense of the right to travel. Without text or rationale for guidance, the Court reached seemingly inexplicable results. For example, the Court sustained Iowa's one-year residency requirement for citizens petitioning for divorce, but struck down Arizona's similar one-year residency requirement for access to free non-emergency medical coverage. The Court also began to scrutinize so-called welcome stranger tax schemes benefitting long-term residents over new arrivals under the rubric of the right to travel. In Zobel v. Williams, the Court struck down Alaska's income

40. At one point in the mid-1970s, it appeared that hundreds of statutes ranging from zoning laws to state bar residency requirements might be invalidated. See, e.g., Thomas Steel, The Right to Travel and Exclusionary Zoning, 26 HAST. L. J. 849 (1975) (arguing that zoning laws violate the right to travel); Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 HARV. L. REV. 1461, 1462 (1979) (suggesting that residency requirements for state bar exams discriminate against nonresidents); Note, Durational Residency Requirements for Candidates for State and Local Office Violate Equal Protection, 22 KAN. L. REV. 113 (1973) [hereinafter Durational Residency Requirements] (suggesting that residency requirements for publicly elected officials are unconstitutional).
41. Id.
distribution plan as an infringement on the right to travel. The Justices, however, failed to agree over the reasoning. Writing for the Court, Chief Justice Burger employed a “minimum rationality” test but still found the statute unconstitutional on the grounds that none of the state’s proffered purposes were legitimate. As for the right to travel, Burger relegated it to a footnote in which he observed that “[i]n reality, [the] right to travel analysis refers to little more than a particular application of equal protection analysis.” In contrast, concurrences by Justices Brennan and O’Connor treated the right to travel as a fundamental right which required strict scrutiny and thus was distinct from traditional equal protection analysis. Finally, in his dissent, Justice Rehnquist disavowed the applicability of the right to travel because there had been no showing that the plan impeded people from entering the state.

By the close of the Burger Court, therefore, both the Court’s doctrinal approach to the right to travel and the resulting case law were muddled. Two hundred years of constitutional adjudication made clear that a right to travel existed, but beyond that little was known. The Court failed to define the parameters of the right, identify a compelling rationale for the right, or resolve the case law in a coherent and consistent fashion. As one commentator concluded, the Court’s analysis of the right to travel “forms a fragmented, complex, and confusing mass of interlocking, overlapping theories in dire need of some ordering principle or overarching explanation.”

46. For individual Justice’s reasonings, see id. at 58; id. at 66 (Brennan, J., concurring); id. at 74 (O’Connor, J., concurring); id. at 83 (Rehnquist, J., dissenting).
47. When the Court applies minimum rationality review, it will uphold legislation only if it bears a rational relationship to a legitimate governmental interest. See NOWAK, supra note 27.
49. Id. at 60 n.6.
50. Id. at 66 (Brennan, J., concurring) (stating that Alaska’s dividend-distribution law “clearly, though indirectly” burdens the right to travel); Id. at 74 (O’Connor, J., concurring) (alleging that right to travel derives from the Privileges and Immunities clause).
51. Id. at 83 (Rehnquist, J., dissenting) (arguing that the distribution plan “impedes no person’s right to travel to and settle in Alaska; if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska”).
52. See supra part II; see also supra notes 42, 43, 44 & 46 and accompanying text.
53. See supra part II; see also supra notes 42, 43, 44 & 46 and accompanying text.
54. See supra part II; see also supra notes 42, 43, 44 & 46 and accompanying text.
55. Bryan H. Wildenthal, State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV, 41 STAN. L. REV. 1557, 1557 (1989) (suggesting that the Court should derive the right to travel from the Privileges and Immunities clause).
III. The Rehnquist Court and the Right to Travel’s Vanishing Act

With the arrival of several new justices and a new Chief Justice, one might have expected the Rehnquist Court to make some headway toward resolving the confusion surrounding the right to travel. Unfortunately, rather than resolving the continuing questions about the right to travel, the Court has ignored the problem, paying lip service to the right’s existence while curtailing its application without explanation. Perhaps the most telling evidence of the Court’s failure to address these continuing questions is the scarcity with which the Court has made reference to the right to travel. Since the inception of the Rehnquist Court in 1986, the Court has mentioned the right in only nine opinions. Moreover, even in these cases the right to travel has often been relegated to the footnotes or a dissent, as if it were an afterthought.

The Court’s most extensive recent analysis of the right to travel occurred in Bray v. Alexandria Women’s Health Clinic. In Bray, the Court was asked to decide whether pro-life activists had violated the petitioner’s right to interstate travel by blocking access to abortion clinics. In rejecting this claim, the Court declared that the “federal guarantee 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.”

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56. See infra note 58.
57. See infra text accompanying notes 58 & 59.
58. See Northwest Airlines v. County of Kent, 114 S. Ct. 855, 858 (1994) (holding that airport user fees assessed against commercial airlines did not discriminate against interstate travel); Albright v. Oliver, 114 S. Ct. 807, 813 n.7 (1994) (refusing to consider the issue of interstate travel because petitioner did not raise the issue in his petition for certiorari); Bray v. Alexandria Women’s Health Clinic, 113 A. S. Ct. 753, 762 (1993) (concluding that anti-abortionists’ obstruction of access to abortion clinic did not restrict women’s right to travel); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2842 n.5 (1992) (noting that although state regulation of travel is permissible, a state may not categorically exclude non-residents from its borders); Nordlinger v. Hahn, 112 S. Ct. 2326, 2332 (1992) (rejecting taxpayer’s right to travel and right to vote claims); Burson v. Freeman, 112 S. Ct. 1846, 1863 (1992) (Stevens, J. dissenting) (noting a conflict between the right to travel and the right to vote); Dennis v. Higgins, 498 U.S. 439, 446 (1991) (comparing the right to travel with the right to enjoy property without unlawful deprivation).
59. See, e.g., Northwest Airlines, 114 S. Ct. at 861 (citing congressional committee report which alludes to right to travel); Albright, 114 S. Ct. at 815-17 (Ginsburg, J., concurring) (discussing briefly right to travel of criminal defendants); Burson, 112 S.Ct. at 1863 (Stevens, J., dissenting).
60. 113 A. S. Ct. 753 (1993).
61. Id. at 763.
62. Id. (quoting Zobel, 457 U.S. at 60).
Noting that the only "actual barriers to movement" were "in the immediate vicinity of the abortion clinics," the Court concluded that the right had not been violated. It then went on to say that intrastate restrictions did not implicate the right of interstate travel even when applied intentionally against travelers from out-of-state, unless applied discriminatorily against them. Justice Stevens vigorously dissented, arguing that the "right to travel includes the right to unobstructed interstate travel to obtain an abortion and other medical services." Several observations can be gleaned from Bray. First, the Court was interested in construing the right to travel narrowly so that every minor physical restraint on movement would not give rise to a constitutional challenge based on the right to travel. Second, the Court conceived of the right to travel as pertaining solely to interstate travel, while intrastate travel is devoid of constitutional protection. Finally, although clearly favoring a narrower conception of the right, the majority was not willing to completely abolish the right.

Additional evidence for the Court's hostility to the right to travel is apparent in its decision in Nordlinger v. Hahn, upholding the constitutionality of Proposition 13. Approved by the California electorate in 1978, Proposition 13 places a one percent ceiling on the state's property tax rate and caps annual increases in assessment valuations at two percent of the property's 1975-76 market value so long as the property is not sold. Property transferred after 1976, however, is subject to a step-up in assessment value equal to the fair market value of the property. The effect of Proposition 13,

63. Id.
64. Id.
66. Id. at 763 (noting that the federal guarantee of interstate travel does not transform state law torts into federal offenses when they are committed against interstate travelers).
67. Id.
68. Id.
70. Id. at 2335-36.
71. Id. at 2329. Proposition 13 was approved by 64.8% of the California electorate in November of 1978. Steven T. Lawrence, Solving the Proposition 13 Puzzle: From Amador to Nordlinger - Judicial Challenges and Alternatives, 24 PAC. L. J. 1769, 1773 (1993). For a comprehensive history and analysis of constitutional challenges to Proposition 13, see generally id.
73. Proposition 13 provides for two notable exceptions to this step-up in assessment value. First, transfers from parents to children are completely exempted
therefore, has been to penalize new owners of property by significantly inflating the assessment value of their property while protecting long-term residents against increases.\(^74\)

Proposition 13 does not create any direct impediments to travel, but it does impose indirect burdens analogous to those created by the Alaskan distribution scheme in \textit{Zobel}.\(^75\) Recall that in \textit{Zobel} the Court struck down the income distribution plan as a violation of the right to travel because of its potential for indirectly discouraging citizens from moving out of the state.\(^76\) As Justice Brennan explained:

\begin{quote}
For if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority . . . then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.\(^77\)
\end{quote}

According to Brennan, therefore, a statute that discourages citizens from leaving a state by benefitting long-term residents is an unconstitutional restraint on travel.\(^78\)

In \textit{Nordlinger}, the Court bypassed the petitioner's argument that Proposition 13 violated her "constitutional right to travel"\(^79\) on the grounds that she lacked standing to raise the claim.\(^80\) In the words of the Court:

\begin{quote}
[T]he complaint does not allege that petitioner herself has been impeded from traveling or from settling in California because . . . prior to purchasing her home, petitioner lived in an apartment in \textit{Los Angeles}. This Court's prudential standing principles impose a "general prohibition on a litigant's raising another person's legal rights." Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf, nor has she shown any special relationship with those whose rights she seeks to assert, such that we might overlook this prudential limitation.\(^81\)
\end{quote}

\begin{flushleft}
from the increase. \textit{Id.} Second, persons aged 55 and over can transfer the 1976 base value of their original home to another house of equal or less value, thereby lessening the step-up in assessment value. \textit{Id.}\(^74\) \textit{Id.} at 2329.\(^74\) 457 U.S. 55 (1982).\(^75\) \textit{Id.} at 66 (Brennan, J., concurring).\(^76\) \textit{Id.} at 68.\(^77\) \textit{Id.}\(^78\) \textit{Id.}\(^79\) Nordlinger v. Hahn, 112 S. Ct. 2326, 2332 (1992).\(^80\) \textit{Id.}\(^81\) \textit{Id.} (citations omitted).
\end{flushleft}
Thus, the Court applied a rational basis analysis and concluded that the state had a "legitimate interest in local neighborhood preservation, continuity, and stability."  

The Court's denial of standing signaled a heightened standard inconsistent with prior right to travel cases such as Dunn, where the Court had expressly rejected the notion that actual evidence of deterrence must be shown when asserting a violation of the right to travel. Nevertheless, even under this heightened standard, the Nordlinger Court could have granted standing. The Court premised its conclusion to deny standing on the fact that the right to travel affords no protection to intrastate travel. This assertion is itself controversial, but conceding this point, the Court should have considered not just whether Proposition 13 had prevented the petitioner from entering the state but also if it deterred her from leaving the

82. The rational basis test is the same as minimum rationality review. See NOWAK, supra note 27.
83. Nordlinger, 112 S. Ct. at 2333.
85. Nordlinger v. Hahn, 112 S. Ct. 2326, 2332 (1992). The Court failed to provide an explanation for distinguishing interstate and intrastate travel. One reason why the Court may have resolved the case without a more complete analysis of the right to travel is that it had struck down a similar West Virginia property tax assessment scheme in 1989 without reaching the right to travel issue. See Allegheny Pittsburgh Coal Co. v. County Comm'n of Wester County, 488 U.S. 336 (1989) (holding county tax assessment scheme to be unconstitutional).

The Court's decision in Allegheny surprised many observers and received some criticism. See DAVID M. O'BRIEN, SUPREME COURT WATCH 254-55 (1993) (noting that Allegheny constituted only the second time in the past half century that the Court has extended the equal protection clause to protect economic rights); Robert Jerome Glennon, Taxation and Equal Protection, 58 GEO. WASH. L. REV. 261, 262-63 (1990) (stating that the implications of Allegheny are "ominous" and that the decision should be "discarded quickly").

In Nordlinger the Court distinguished Allegheny on the grounds that the West Virginia scheme had been initiated by a county and was inconsistent with the West Virginia Constitution. Nordlinger, 112 S.Ct. at 2330-94. Thus, the Court reasoned that it violated the U.S. Constitution's guarantee of equal protection. Nordlinger, 112 S. Ct. at 2335. For commentary suggesting that Allegheny and Nordlinger are logically indistinguishable, see Samuel A. Mandarino, This Town Ain't Big Enough For the Both of Us, 1993 WIS. L. REV. 1195; Michael D. Rawlins, Taxation, Equal Protection, and Inquiry into the Purpose of a Law: Nordlinger v. Hahn and Allegheny Pittsburgh Coal Co. v. County Comm'n, 1993 B.Y.U. L. REV. 1001-1018. In his concurrence in Nordlinger, Justice Thomas wrote that Allegheny should be expressly overruled. 112 S. Ct. at 2336 (Thomas, J., concurring).
state—just as Justice Brennan argued that Alaska’s plan had done in Zobel. 86

Consider the plight of a California resident aged fifty-five who has lived in the same house for twenty years. 87 If she moves within California, she can transfer the low pre-1976 assessment value in her current house to a new residence, thereby minimizing the amount she pays in property taxes. 88 On the other hand, if she decides to move to Nevada, she loses all the value of her “accrued seniority” 90—manifest here not in higher income dividends but rather lower property taxes. 90 Thus, analyzed under the Zobel framework, Proposition 13 impermissibly penalizes the exercise of the constitutional right to travel. 91

Rather than undertaking this type of analysis, the Nordlinger Court used standing as a slight of hand to ignore the right to travel. 92 Writing in dissent, Justice Stevens recognized the similarities between Nordlinger and Zobel and argued that “it [was] irrational to treat similarly situated persons differently on the basis of the date they joined the class of property owners.” 93 For support, Justice Stevens quoted a particularly apt portion of the Court’s decision in Zobel:

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence — or even limiting

86. 457 U.S. at 68. The Court noted that if each state were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one state would thereby forfeit his accrued seniority only to have to begin building such seniority again in his new state of residence, then mobility so essential to the economic progress of our nation would not long survive. Id.

87. The Court’s opinion in Nordlinger does not specify the age of the petitioner. The hypothetical here assumes that the petitioner is aged 55 and therefore can take advantage of the special exemption for older residents. However, the hypothetical applies equally well to a younger resident. In fact, the burden on younger residents may be greater because they may be compelled not to change residences until they reach age 55 so that they do not lose the low assessment values of their homes.

88. Nordlinger, 112 S. Ct. at 2329 (distinguishing an acquisition system of taxation from the more commonplace “current value” taxation).

89. Id.

90. Id.

91. Id. “Proposition 13 has been labeled by some as a ‘welcome stranger’ system—the newcomer to an established community is ‘welcome’ in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home.” Id.

92. Nordlinger v. Hahn, 112 S. Ct. 2326, 2329 (1992). The Court analyzed the right to travel from the perspective of one moving to California and failed to consider how the State of California penalizes its own citizens, for example impeding their right to travel through Proposition 13. See also, Wildenthal, supra note 55 and accompanying text.

93. Nordlinger, 112 S. Ct. at 2347 (Stevens, J., dissenting).
access of finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.  

Thus, Stevens concluded that Proposition 13 was unconstitutional. Justice Stevens' analysis, while at least cognizant of the historical tension between the Court's decision and prior right to travel cases, remains somewhat baffling. In particular, his dissenting opinion in Nordlinger purported to apply a rational basis test, rather than the strict scrutiny analysis urged by the petitioners and usually afforded to statutes infringing upon fundamental rights. This confusion over the standard of review is also evident in Justice Stevens' opinion in Hodgson v. Minnesota.

In Hodgson, where he again suggested that the right to travel did not require strict scrutiny, Justice Stevens stated: In cases involving... the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders... But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.

On the other hand, in Burson v. Freeman, Justice Stevens cited with approval the Court's decision in Dunn to use strict scrutiny when confronted with a statute burdening the right to travel. Taken together, Stevens' opinions in Nordlinger, Hodgson, and Burson make clear that he views the right to travel as an important right; but his inability to place the right to travel in the Court's conception of a tiered equal protection analysis is indicative of the general confusion surrounding the right to travel.

94. Id. at 2347-48 (quoting Zobel, 457 U.S. at 64) (emphasis added by Stevens).
95. Id. at 2348.
96. See id. at 2332 ("The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest.").
97. Id.
100. 112 S. Ct. 1846 (1992).
102. In this regard, the Court's right to travel jurisprudence is emblematic of a much larger problem, namely the confusion surrounding the Court's doctrinal approach in the area of equal protection analysis and the Court's ad hoc adoption of a two-tiered, three-tiered, or sliding-scale approach.
In addition, none of the justices have offered a convincing explanation for why the right to travel should be confined to interstate travel as opposed to both interstate and intrastate travel. In Bray, the Court cited three cases to support its contention that the right pertains solely to interstate travel.\textsuperscript{103} These decisions affirm the existence of a right to interstate travel, but none rule out the existence of a corresponding right to intrastate travel.\textsuperscript{104} Other cases have characterized the right to travel more generally as a "right of locomotion"\textsuperscript{105} and a "virtually unconditional personal right."\textsuperscript{106} These cases indicate that the right extends to all forms of travel.\textsuperscript{107} Common sense would also suggest that if a state is barred from prohibiting travel into its borders it should also be prevented from restricting travel within its borders.\textsuperscript{108} In the words of the Second Circuit Court of Appeals, "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."\textsuperscript{109}

The Court's analysis in Bray and Nordlinger, thus, provides only a rudimentary and unsatisfactory analysis of the right to travel.\textsuperscript{110} To be sure, the Court has signaled its preference for a narrow conception of the right to travel, but veiled hints are no substitute for clear, well-reasoned analysis. As the nation's arbiter, it is the Court's constitutionally assigned role to define the proper contours of the right to travel.\textsuperscript{111} Thus, even if the right to travel should be scaled back or perhaps repudiated, the Court's surreptitious dismantling of the right to travel is imprudent. A constitutional democracy such as ours is premised on the notion that certain rights will be reserved to

\textsuperscript{103} Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 763 (1993). The three cases cited by the Court were Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982), Toomer v. Witsell, 334 U.S. 385, 395 (1948), and Paul v. Virginia, 75 U.S. 168, 180 (1868). \textit{Id.}

\textsuperscript{104} Bray, 113 S. Ct. at 763.

\textsuperscript{105} Williams v. Fears, 179 U.S. 270, 274 (1900).


\textsuperscript{107} See \textit{id.} (stating that the right to travel is a broadly assertable, virtually unconditional, personal right); see also \textit{supra} notes 16, 31, 32 and accompanying text.

\textsuperscript{108} See Paul Ades, \textit{The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel}, 77 \textsc{Cal. L. Rev.} 595, 609-13 (1989).


\textsuperscript{110} See \textit{supra} notes 65-85 and accompanying text.

\textsuperscript{111} This role dates back to the inception of our nation. To quote Chief Justice Marshall, it "is the very essence of judicial duty" to resolve in a coherent fashion the conflicts between the Constitution and laws. Marbury v. Madison, 5 U.S. 137, 163 (1803).
the people and outside the arena of legislative decision-making unless preempted by a more compelling governement interest. When the Court fails to define these rights in a coherent and principled fashion, both the people's ability to enjoy their rights and the community's efforts to enact legislation through the democratic process are cast under a pall of uncertainty. As the Court itself has recognized, "[l]iberty finds no refuge in a jurisprudence of doubt."  

Although the right to travel has not engendered much public controversy, the costs of leaving the right poorly defined are great. As an unenumerated right, the right to travel is unconstrained by text and thus conducive to expansive interpretations that could interfere with the legitimate decision-making of legislative bodies. Second, if the Court persists in leaving the right to travel ill-defined, it provides a precedent for the creation of other similarly nebulous rights and thus cheapens the existence of rights that truly are fundamental. Uncertainty about fundamental rights also invites spurious litigation. In fact, the muddled history of right to travel has already proved difficult for lower federal courts to interpret and led to a wide array of largely facetious challenges based on the right to travel. With the federal courts already overloaded, our system can

112. For example, freedom of speech, the right to life, the right to privacy, the right to marry, inter alia, are rights generally reserved for the people; however, these rights have been infringed upon in cases of national security and other such compelling government interests. See, e.g., Boos v. Barry, 485 U.S. 312, 334 (1988) (holding that legislation which prohibited persons from congregating within 500 feet of any embassy was not unconstitutional if the conduct threatened the embassy's "security or peace").  


114. See infra notes 115, 117-19 and accompanying text.  

115. It is not far-fetched to imagine courts arriving at bizarre interpretations of the right to travel. In fact, in a recent case, one judge wrote a dissenting opinion suggesting that the use of drug dealer profiles by police infringed on a defendant's constitutional right to travel. United States v. Hawthorne, 982 F.2d 1186, 1192 (8th Cir. 1992) (Arnold, J., dissenting).  

116. See infra note 118 and accompanying text.  

117. Lower courts have struggled to make sense of the Supreme Court's right to travel cases. As the Third Circuit Court of Appeals recently noted, "[t]he Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry." Schumacher v. Nix, 965 F.2d 1262, 1267 (3rd Cir. 1992).  

118. For a few of the more outlandish uses of the right to travel see: Hill v. City of Harvey, 1993 U.S. App. LEXIS 17965, at *2 (7th Cir. July 16, 1993) (stating that the plaintiff raises "vague, unsupported assertions about the constitutional right to travel"); Hallstrom v. City of Garden City, 991 F.2d 1473, 1476 (9th Cir. 1993) (illustrating plaintiff's argument that Idaho law requiring her to carry a license violates right to travel); Vix v. Brown, 1991 U.S. App. LEXIS 30571, at *1 (9th Cir. Dec. 19, 1991)
little afford this additional litigation. Consequently, it is imperative that the Court address this issue squarely and provide some sort of doctrinal basis for the right, thereby fulfilling its constitutional responsibility of delineating the lines of permissible legislative decision making.

IV. Toward a Workable Definition of the Right to Travel

A. Fundamental Rights and Equal Protection Analysis

Before constructing a new definition of the right to travel, it is important to recognize the source of much of the Court’s recent confusion—namely its insistence on analyzing the right to travel in terms of the Equal Protection Clause. Prior to the Warren Court era, the Court viewed the right to travel as an independent right giving rise to its own cause of action. Thus, in Crandall, when reviewing the constitutionality of a state tax on passengers entering and leaving the state, the Court focused first on the existence of the constitutional right to travel and then asked whether the statute impermissibly burdened the right. Beginning in Shapiro, the Court altered its approach by bringing the right to travel under the rubric of its equal protection analysis, on the grounds that the right to travel was a fundamental right and, therefore, protected by strict scrutiny review under the Equal Protection Clause.

This shift in the Court’s conceptual approach to the right to travel made little sense. If a statute infringes either directly or indirectly on the exercise of a constitutional right, the Court does not need to

119. Judge Posner has commented that “[a]s the Federal Courts become more and more overloaded, the costs imposed on ethical and responsible litigants when judicial resources are diverted to the processing of frivolous claims and defenses mount higher and higher.” Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1203 (7th Cir. 1987).

120. The Equal Protection Clause provides: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §1.

121. Crandall v. Nevada, 73 U.S. 35, 44 (1867) (noting that an individual’s right to travel is independent of any state’s right to control that individual).

122. Id. at 39-46.


124. Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1075 (1979) (explaining that the right of interstate migration did not offend or even implicate equal protection).
rely on the Equal Protection Clause to declare the law unconstitutional.\textsuperscript{125} As Justice Harlan wrote in dissent in \textit{Shapiro}:

[W]hen . . . a classification is based on exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause . . . this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.\textsuperscript{126}

However, in \textit{Shapiro}, the Court never undertook the traditional analysis, preferring instead to assume \textit{arguendo} that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest."\textsuperscript{127}

Several problems emerged from the extension of equal protection analysis to the right to travel. First, the \textit{Shapiro} Court lost sight of the central question—whether the statute created an unconstitutional restraint on travel.\textsuperscript{128} The Court devoted most of its opinion to explaining why various legislative purposes were impermissible, while giving only a brief explanation as to the nature of the burden placed on travel.\textsuperscript{129} Second, since the Court simply assumed that there had been a violation of what it deemed the "fundamental right to travel,"\textsuperscript{130} it never was forced to define the right itself.\textsuperscript{131} Finally, by tethering the right to travel to the Equal Protection Clause, the Court introduced into the right to travel debate much of the confusion surrounding equal protection jurisprudence over standards of review.\textsuperscript{132} In \textit{Shapiro}, the Court adopted a strict scrutiny review\textsuperscript{133} but in subsequent years at times applied an intermediate standard\textsuperscript{134} or rational basis test.\textsuperscript{135} In fact, in \textit{Zobel}, Chief Justice

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{125} \textit{Shapiro}, 394 U.S. at 659 (Harlan, J., dissenting).
\item \textsuperscript{126} \textit{Id}.
\item \textsuperscript{127} \textit{Id.} at 638.
\item \textsuperscript{128} \textit{Id.} at 618.
\item \textsuperscript{129} \textit{Id.} at 638-42.
\item \textsuperscript{130} \textit{Shapiro} v. Thompson, 394 U.S. 618, 638 (1969).
\item \textsuperscript{131} \textit{Id.} at 630-31.
\item \textsuperscript{132} \textit{Id.} at 634-38 (rejecting the rational basis test in favor of a compelling state interest test).
\item \textsuperscript{133} \textit{Id.} at 638. The Court maintained that as the right to travel was a "fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." \textit{Id}.
\item \textsuperscript{134} When applying the intermediate standard of review, the Court will only uphold legislation if it bears a substantial relationship to an important governmental interest. \textit{See} NOWAK, \textit{supra} note 27.
\item \textsuperscript{135} \textit{See} Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1984); \textit{Zobel} v. Williams, 457 U.S. 55, 60 (1981).
\end{enumerate}
\end{footnotesize}
Burger described the "right to travel analysis . . . [as] little more than a particular application of equal protection analysis." horn

These problems point to a larger conceptual problem in the Court's equal protection jurisprudence—namely the inclusion of fundamental rights in general, under the Equal Protection Clause. horn\ The Court extended its equal protection analysis to so-called "fundamental" rights in the 1960s. While on paper this approach may appear logical, in practice the enterprise of reviewing fundamental rights under the Equal Protection Clause is an invitation to create new rights and is of little help in resolving the preliminary issue as to whether the right has in fact been infringed. Equal protection review for fundamental rights is therefore a superfluous step that obfuscates the more important tasks behind the illusion of a scientific and multi-tiered approach. In recent years, the Court has largely stopped identifying new fundamental rights, but unfortunately has yet to repudiate the heightened scrutiny equal protection approach for the right to travel.

137. See Thomas R. McCoy, Recent Equal Protection Decisions—Fundamental Right to Travel or “Newcomers” as a Suspect Class, 28 VAND. L. REV. 987, 988 (1975). Fundamental rights are analyzed under a substantive due process approach. Id. “[S]ubstantive due process is concerned with whether a particular state interference with some individual interest is adequately justified.” Id.
138. Id.
139. Id. at 991.
141. See Perry, supra note 124, at 1077-80 (discussing the quasi-constitutional right to franchise).
142. Id. at 1081-82.
B. Possible Justifications for a Broad Right to Travel

Rather than digressing into equal protection analysis, therefore, the Court in *Shapiro* should have focused on the primary question—whether a one-year residency requirement for welfare acts as a restraint on travel.\(^{144}\) The Court only addressed this question fleetingly, hypothesizing that "[a]n indigent who desires to migrate... will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute."\(^{145}\) Yet, even the Court realized that this was at best a makeweight argument by concluding that the statute merely touched on rather than infringed or penalized the right to travel.\(^{146}\) As one commentator observed:

*The welfare residence requirements attacked in *Shapiro*... did not present even an indirect burden or penalty... Prior to their moves to the defendant states, the plaintiffs had absolutely no claim in those states for welfare benefits. Immediately after moving to the defendant states their situation with respect to those states was unchanged—that is, they still had no eligibility for welfare benefits.*\(^{147}\)

*Shapiro* is not an isolated example of the Court stretching to find an admittedly incidental and tangential restraint on travel to override the legislature. For example, in *Attorney General of New York v. Soto-Lopez*,\(^{148}\) the Court held unconstitutional a New York statute which gave a small advantage on civil service exams to veterans who had been state residents at the time of their entrance to the military.\(^{149}\) Displaying a great deal of imagination, the Court characterized the scheme as a restraint on travel.\(^{150}\)

To arrive at this type of result, one of two approaches must be adopted. Option one is to construe the right to travel so broadly that any impact on travel, no matter how remote, will result in the statute being declared unconstitutional. Perhaps this is what Justice Stewart

\(^{144}\) *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1968). The Court merely stated in conclusory fashion that the purpose of deterring the migration of immigrants cannot serve as a justification for the one-year waiting period since it is constitutionally impermissible. *Id.*

\(^{145}\) *Id.* at 629.

\(^{146}\) *Id.* at 638.

\(^{147}\) *McCoy*, *supra* note 137, at 997.


\(^{149}\) *Id.* at 909.

\(^{150}\) See *id.* at 903 (noting that a state law, through the use of classifications, implicates the right to travel when it deters or penalizes that right).
meant by a "virtually unconditional personal right."\footnote{151} However, in light of the \emph{Lochner v. New York}\footnote{152} era, the Court should at least provide a persuasive explanation for broadly construing an unenumerated right such as the right to travel to trump the results reached by the democratic process. So far, the Court’s best argument is that a broad conception of the right to travel is implicit within “the nature of our Federal Union” and an outgrowth of “personal liberty.”\footnote{155}

While there is undoubtedly merit to the notion that some form of right to travel is implicit within the concept of a federal union, it is important to realize that this rationale falls far short of justifying the extremely broad right necessary to invalidate the statutes in \emph{Soto-Lopez} and \emph{Zobel}. Indeed, the nation functioned reasonably well for almost 200 years prior to the Court’s aggrandized interpretation of the right to travel in the 1960s. It seems insincere, therefore, to describe such a right as vital to our democracy.

Nor is such a broad right to travel supported by conventional methods of constitutional interpretation. In terms of original intent, there is no evidence that the Framers regarded the right to travel as a fundamental right.\footnote{154} In fact, if anything, originalist evidence points to jettisoning the right altogether. For example, when drafting the Constitution, the Framers did not include any provision guaranteeing the right to travel, even though the Articles of Confederation had expressly provided that “people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . . as the inhabitants thereof . . . .”\footnote{155}

This omission coupled with the inclusion of the Interstate Commerce Clause granting Congress power to regulate interstate travel strongly suggests that the Framers did not view the right to travel as vital to the new nation. In fact, to the extent that the Interstate Commerce

152. 198 U.S. 45 (1905). In \emph{Lochner}, plaintiff was convicted of violating New York labor law when he worked more than sixty hours in one week in a bakery. \emph{Id.} The Court addressed the issue of whether restricting plaintiff’s work hours was a valid exercise of the state’s police power to protect the public health, safety, morals, or general welfare. \emph{Id.} The Court held that the law violated plaintiff’s constitutional right to contract and that his work hours were not substantially dangerous. \emph{Id.} Thus, the Court broadly construed the right to contract so as to preempt the police power of the state. \emph{Id.}
153. \emph{Id.} at 629.
154. See, e.g., supra text accompanying notes 7-8 (dating the first judicial allusion to the right to travel as 1823).
155. ARTICLES OF CONFEDERATION, art. IV.
Clause permits Congress to regulate travel, the Constitution actually disavows the notion that the right is an unfettered personal right.156

Repeated attempts to derive a broad conception of the right to travel from the text of the Constitution have proved equally futile. As just mentioned, it seems unwise to base a fundamental right on the Commerce Clause when the clause itself permits Congress to restrict travel.157 Slightly more promising is the Privileges and Immunities Clause. Simply stated, the argument is that the Framers excluded mention of the right to travel because they regarded travel as protected by the Privileges and Immunities Clause.158 This reasoning cannot withstand careful scrutiny. To begin with, the Privileges and Immunities Clause traditionally has afforded no constitutional protection to residents against the laws of their own state.159 Therefore, a right to travel derived from the Privileges and Immunities Clause could not be used to invalidate the type of durational residency requirements struck down in Shapiro or Zobel.160 Second, even if the Framers did intend to incorporate the right to travel provisions from the Articles of Confederation into the Privileges and Immunities Clause, the nineteenth century right to travel was of rather narrow scope. For example, the Articles of Confederation explicitly excluded "paupers, vagabonds, and fugitives" from enjoying the right to travel.161 At most, therefore, the Privileges and Immunities Clause gives rise to a much more modest formulation of the right to travel.

If a broad right to travel is going to be adopted, the justification must rest on either moral or prudential grounds. Even on these terms, however, the argument falls short. Theoretically, a broad right to travel might promote economic efficiency and social harmony by

156. See Bray v. Alexandria Women's Health Clinic, 113A S. Ct. 753, 763 n.7 (1993) (stating that the right to interstate travel "does not derive from the negative commerce clause, or else it could be eliminated by Congress").

157. Nevertheless, at least on two occasions, justices have hinted that the right to travel can be derived from the commerce clause. United States v. Guest, 383 U.S. 745, 757 (1966); Bray, 113A S. Ct. at 794-95 (Stevens, J., dissenting) (citing commerce clause cases for determining the scope of the right to travel).


159. See Zobel, 457 U.S. at 84 n.3 (Rehnquist, J., dissenting).


161. ARTICLES OF CONFEDERATION, art. IV. This exclusion makes Justice Douglas' reliance on the Privileges and Immunities Clause in Edwards to strike down a restraint on the travel of indigents into the State of California seem particularly misplaced. Edwards, 314 U.S. at 160, 178-180. It is also of interest to note that Justice O'Connor quotes extensively from the Articles of Confederation in her concurring opinion in Zobel but conveniently omits mention of this exclusion. Zobel, 457 U.S. at 79.
removing hindrances for traveling from one state to another. If one looks at Shapiro and its progeny, however, it is not at all apparent that society is appreciably better off now that the various residency requirements and tax schemes have been removed from the statute books. Furthermore, if a state enacted legislation threatening the free flow of goods, it is reasonable to believe that Congress would exercise its extensive powers under the Interstate Commerce Clause and expunge the law. As for moral grounds, individuals may have a natural right to move from one place to another unimpeded. However, this right does not translate into an entitlement to welfare or housing every time one decides to move from state to state.

It should also be noted that a broad right to travel has substantial costs. American states typically experiment with different legal schemes, thereby serving as laboratories for social and political reform which, if successful, can be emulated by other states or the federal government. Consider, for example, a statewide health care program for AIDS patients. Permitting State X to adopt a one-year durational residency requirement for receipt of benefits might deter some residents of State Y from entering State X if they stand to lose their health coverage. Without the residency requirement, however, State X might become a magnet for AIDS patients, thus forcing the state to offer less comprehensive health care coverage. Likewise, barring residency requirements creates a free-rider problem because if residents from State Y can easily obtain benefits in State X, State Y has less incentive to adopt its own plan. In other words, useful policy experimentation may be one casualty of a broad right to travel.

Adoption of a sweeping right to travel may also threaten the ability of states to promote a sense of community. In Nordlinger, the Court correctly stated that California had a "legitimate interest in local neighborhood preservation, continuity, and stability" and that Proposition 13 reasonably furthered this objective. Similarly, residency requirements for political candidates seeking state offices may insure better representation of constituents' interests. A

162. See infra note 163 and accompanying text.
163. Currently, a considerable amount of policy experimentation at the state level is occurring in the area of health care. Both Hawaii and Oregon, for instance, have enacted innovative health care plans which could serve as national models. See HAW. REV. STAT. § 39A-51 (1994); OR. REV. STAT. § 127 (1994).
broad right to travel, however, would invalidate all such statutes differentiating between long-term residents and new arrivals.\textsuperscript{166} In fact, some academics have envisioned using the right to travel to invalidate zoning laws.\textsuperscript{167} In an age where crime and violence increasingly threaten our communities, removing the few legal props promoting community stability seems particularly pernicious.

The implicit anti-communitarianism associated with an expansive reading of the right to travel is also inconsistent with American tradition and heritage. One of the landmark developments in this nation’s westward expansion was the Homestead Act\textsuperscript{168} which offered free land to settlers willing to farm the land for a period of ten years. The Homestead Act would not survive the Warren and Burger Court analysis. If Alaska’s attempt to provide a financial incentive for maintaining residence in Alaska is a violation of the right to travel,\textsuperscript{169} the Homestead Act would fare no better.\textsuperscript{170} Likewise, under a broad definition of the right to travel, residency requirements for state political candidates would be unconstitutional. Yet, the Constitution itself imposes analogous citizenry requirements for members of Congress, Senators, and the President.\textsuperscript{171} Given that this broad conception of the right to travel is so wholly inconsistent with American heritage and common sense, it is time to formulate a new understanding of the right.

C. Newcomers as a Suspect Class

An alternate basis for reaching the result in \textit{Shapiro} is to identify newcomers as a suspect class analogous to race or alienage.\textsuperscript{172} Although the Court did not publicly espouse such an approach, in effect this is what the Warren and Burger Courts accomplished. What the Court objected to in \textit{Shapiro} was not that welfare recipients were being turned away at the Connecticut border, but rather that “the

\begin{itemize}
\item \textsuperscript{166} Although the Court has stopped short of prohibiting residency requirements for political candidates, logically a broad right to travel should bar all types of residency requirements. \textit{See Durational Residency Requirements, supra} note 40 at 117.
\item \textsuperscript{167} \textit{See} Steel, \textit{supra} note 40; Ades, \textit{supra} note 108.
\item \textsuperscript{168} Act of May 29, 1830, ch. 208, 4 Stat. 420 (repealed 1891). Congress adopted the first general preemption law in 1836 for the purpose of allowing squatters to acquire title to public lands. \textit{See} id.
\item \textsuperscript{169} Zobel, 457 U.S. at 65.
\item \textsuperscript{170} If anything, the Homestead Act seems to be a much more straightforward burden on travel because forfeiting one’s house and land is significantly more burdensome than a relatively modest yearly dividend.
\item \textsuperscript{171} \textit{See} U.S. CONSt. art. I, §2 (requiring seven years of citizenship for representatives); art. I, §3 (requiring nine years of citizenship for senators); art. II, §1 (requiring fourteen years of residency as well as requiring natural born citizenship for presidency).
\item \textsuperscript{172} McCoy, \textit{supra} note 197, at 1016-17.
\end{itemize}
effect of the waiting-period requirement [was] to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in the jurisdiction." Likewise, in Zobel, Chief Justice Burger was concerned that the "dividend statute creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona-fide residents, based on how long they have been in the state." 

At least conceptually, the creation of a new suspect class creates less problems than trying to protect fundamental rights under the Equal Protection Clause. Some scholars have attempted to use process theory to argue that newcomers are in fact a "discrete and insular" minority worthy of strict scrutiny protection. In the words of one law professor, newcomers are "viewed as sufficiently different by oldtimers in the political majority of any governmental unit that the class is easily stereotyped as ignorant, unreliable, or in some other way inadequate and unworthy of full participation in the society." Consequently, it is argued that newcomers will fare poorly in the majoritarian process and therefore deserve judicial protection.

Nevertheless, as the Court undoubtedly recognized, identifying newcomers as a suspect class is not a desirable option. The analogy between traditional suspect classes based on race or alienage and newcomers is a false one. To begin with, the framers of the Equal Protection Clause harbored no intent to eradicate discrimination against newcomers as a class. Secondly, newcomer status, unlike race, alienage, or gender is not an immutable characteristic. Becoming a newcomer requires a conscious decision to move from one state to another. Also, once having settled in a new location, a newcomer does not retain that status in perpetuity. This is especially true in a mobile society such as ours where it is common to move from state to state. This feature of American society also minimizes the likelihood that newcomers will be disadvantaged by the democratic process because voters are unlikely to enact statutes that in the future

175. See McCoy, supra note 137, at 1019.
176. Id.
177. Id. at 1018-19.
178. Although for originalists this point might end the inquiry, equal protection analysis has been used for other classes, such as gender, not contemplated by the Framers. See generally Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Nevertheless, even if the originalist argument is not dispositive, it does suggest proceeding with caution lest the protection offered to suspect classes be diluted by overuse.
could apply to them if they chose to move to another state. Even more importantly, while newcomers may face some obstacles, the discrimination and hardships endured by blacks and other racial minorities are historically of a significantly greater magnitude.

Finally, it should be noted that identifying newcomers as a suspect class would still require the Court to enforce an independent right to travel. Otherwise, if only the suspect class mode of analysis were used, actual restraints on movement from one state to another would be constitutional so long as newcomers were not treated differently than long-term residents. In other words, treating newcomers as a suspect class would not bar the most egregious restraints on travel.

D. Other Options: Moderation and Abolition

Having ruled out the adoption of a broad right to travel or creation of a new suspect class, several options remain available. One possibility is the endorsement of an intermediate right to travel under which the Court could police unreasonable restraints while upholding restraints it considers less objectionable. This more moderate and flexible approach can be accomplished either by a direct analysis of the burden placed on the right to travel or under the framework of a sliding-scale equal protection analysis. The obvious danger of these approaches is that they have inherent tendencies to degenerate into ad hoc, case-by-case decision making. In this regard, the drift of the Burger Court, to uphold some residency requirements but strike down others without rhyme or reason, is instructive. Nor is there much reason to believe that the current Court could fashion a more coherent analysis without additional guideposts.

Another option would be to abolish the right to travel entirely. This solution undoubtedly would put an end to the confusion over the right to travel and in the process curb facetious litigation, but it would do so only at a heavy cost. While the options mentioned above are troubling, so too is the notion that a right which the Court has repeatedly affirmed for more than 150 years could simply disappear. If the right to travel were abolished, the Court would signal that other rights now thought to be fundamental can be swept away at the whim of five occupants of our nation’s least dangerous branch.


180. There is a substantial difference between overturning precedent that has been reaffirmed repeatedly throughout history without a single justice dissenting and reversing precedent that has either proved controversial, unworkable, or simply unnecessary. There may be instances when such a reversal would be warranted, but

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mon sense suggests that the Court should shy away from such a drastic step.

E. Looking for Clues in Lucas v. South Carolina Costal Council 81

A more prudent course would be to endorse a very narrow definition of the right to travel. A model for such an approach can be found in Lucas v. South Carolina Coastal Council 82 which construed the Takings Clause. In Lucas, Justice Scalia stated that government regulations in the form of zoning or environmental laws could constitute a taking only in cases where “the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle. . . .” 83 Scalia’s opinion in Lucas provided a much needed clarification of when government regulation amounts to a physical taking of property that necessitates compensating the property owner. 84 By limiting regulatory takings to cases where the owner had been deprived of all economically beneficial uses, Scalia resolved the issue in a pragmatic manner that limited the potential disruption of state and local governments, while at the same time, remaining faithful to the Fifth Amendment’s prohibition against the taking of private property without just compensation. 85

A similar analysis balancing pragmatism and history is appropriate for the right to travel. Due to its long rhetorical tradition, the right to travel should not be tossed aside. On the other hand, left unconstrained, the right has the capacity to expand and, in the process, threaten legitimate exercises of democratic power. A Lucas-like decision affirming the right but providing clear guidelines on the narrow contours of the right is, therefore, in order.

As with the Takings Clause, restraints on travel can come in two forms—direct governmental restraints on movement and governmental regulation that affects travel indirectly by making one location more attractive than another. Under a Lucas-type approach, direct and enduring restraints on travel would be analogous to permanent physical occupations of land and thus presumptively unconstitutional. The California statute struck down in Edwards, which barred indigents

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81. Lucas, 112 S. Ct. at 2901-02.
82. Id. According to the Takings Clause, private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V.
83. Id. at 2895 (emphasis added).
84. The Court first addressed this issue in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that the government may to some extent diminish property values without compensation).
85. Lucas, 112 S. Ct. at 2901-02.
from the state, is a good example of such a law. The statute prevented American citizens from moving from one location to another. Furthermore, this prohibition on physical restraints on travel should apply equally to interstate and intrastate travel. Finally, the right to travel should also bar legislation which although operating indirectly, has the effect of blocking, rather than simply hindering or touching on travel. Such a statute is the equivalent of a zoning regulation that deprives all the economically viable uses of a parcel of land. In contrast, state residency requirements and welcome stranger tax schemes pose, at most, incidental restrictions on travel and thus should be valid products of majoritarian rule.

Under this narrow formulation of the right, instances of legislation that run afoul of the right to travel will undoubtedly be rare. This, however, is actually a virtue. The courts were never intended to replace the legislatures as the makers of public policy, only to act as a last resort against the imposition of tyranny. Limiting judicial intervention to extreme cases of interference with travel is, thus, entirely reasonable. Moreover, this understanding of the right to travel is consistent with historical practice. Prior to the Warren Court, the right to travel was not conceived of as a bar to merely incidental and remote burdens on movement, rather, it pertained solely to statutes that actually blocked travel. This more straightforward formulation of the right also has the advantage of providing a clear signal to potential litigants that the courts will not entertain spurious assertions based on the right to travel. Finally, a narrower right to travel would allow legislative bodies greater leeway in rewarding the past contributions of its older residents, thereby promoting greater attachment to the community and continued participation in public affairs.

V. Conclusion

The history of the right to travel in the twentieth century is filled with wrong turns and missed exits. Instead of focusing on the right to travel itself, the Court digressed into the quagmires of equal protection analysis and has never fully recovered. In recent years, the

188. See Williams v. Fears, 179 U.S. 270, 274 (1900).
189. As with the Takings Clause, there would still be line drawing problems for the Court to face. However, short of abandoning the right to travel altogether, this approach provides more guidance to the Court than other approaches. In doing so it minimizes the likelihood that judges will interpret the right expansively. Thus, litigants will have little incentive to raise new challenges based on the right to travel.
Rehnquist Court has been hinting at a narrower formulation of the right to travel, yet has failed to articulate a new definition of the right. The movement toward a narrower conception is a welcome development but one that should be done explicitly. Consequently, the Court should break the silence and, taking its cue from Lucas, provide a detailed explanation that will dissipate the lingering cloud of uncertainty surrounding the right to travel.

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