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The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike

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Articles

THE RIGHT TO MIGRATE AND WELFARE REFORM: TIME FOR *SHAPIRO V. THOMPSON* TO TAKE A HIKE

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I. INTRODUCTION

This Article presents two basic arguments regarding the legacy of the Supreme Court's 1969 decision, *Shapiro v. Thompson*.[1] The first argument is that modern "right to travel" jurisprudence is a doctrinal mess in need of both clarification and fundamental correction. In particular, *Shapiro* bears the blame for sending this area of jurisprudence down such a confusing and wrong path.

The second argument is that *stare decisis* presents no obstacle to overruling *Shapiro* because *Shapiro* and its progeny have proven themselves to be arbitrary in application and, more importantly, have shown themselves to be factually out-of-sync with the new policy regime in which Congress is rapidly devolving power to the states. More specifically, *Shapiro*'s holding has created a "race to the bottom" among state welfare policies, as state legislators have used the only means available to them—cutting Aid to Families with Dependent Children (AFDC) benefits—to prevent their states from becoming "welfare magnets." Furthermore, now that Congress and the President have replaced the AFDC entitlement with Temporary Assistance for Needy Families (TANF) block grants to the states,[2] *Shapiro* could soon turn this race to the bottom into an absolute free fall.[3]

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1. 394 U.S. 618 (1969).

2. On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). See *infra* Part IV for a discussion of this new law.

3. This article should not be read as an argument against the welfare reform itself. If anything, the dire predictions that many have made regarding the new law cast too dark a light on the intentions and abilities of state and local actors. As one commentator has put it:

> Could federal welfare changes lead to more poverty? Yes, but only if every other institution in America—state government, local government, philanthropic and charitable organizations, community and religious groups, businesses—fails utterly, and if neither

This re-examination of *Shapiro* is particularly relevant today because the Supreme Court may soon face the issue of *Shapiro*'s scope and continued relevance as states devise novel welfare schemes that push the right to travel doctrine to its limits. In 1995, for example, the Court heard oral arguments in *Anderson v. Green*,[4] a case that presented the question of whether states may limit new residents' AFDC benefits for one year to the amount those residents received in their previous states. Although the Court ultimately avoided the question because the case turned out to be nonjusticiable, the Court may soon be forced to address it when challenges arise to the recent federal welfare reform legislation, which specifically authorizes states to impose the same type of limit on newcomers' welfare benefits.[5]

Parts II and III of this Article analyze the confusing history of the right to travel doctrine and argue that the Citizenship Clause[6] of the Fourteenth Amendment is the proper foundation for the constitutional right to migrate. Part IV uses basic law and economics principles to analyze how *Shapiro*'s holding theoretically could and empirically does create a race to the bottom in state welfare policies. Part IV also argues that this race will only worsen as Congress devolves power to the states and that these changed circumstances justify overruling *Shapiro*. Finally, Part V attempts to construct a textually-faithful and judicially-manageable framework to implement the right to migrate.

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middle-class citizens nor some poor individuals themselves change any aspects of behavior.

Marvin Olasky, *Welfare Reform Scaremongers*, WASH. TIMES, Aug. 22, 1996, at A14. What this article tries to advance is the idea that even the best-intentioned state legislators may face systematic pressure to lower welfare benefits because of interjurisdictional externalities. This article therefore suggests that the new federal law should be enforced fully, including the provision that mitigates this pressure but that may be unconstitutional under *Shapiro*.

4. 513 U.S. 557 (1995). See *infra* notes 72-79 and accompanying text for a more detailed discussion of the *Anderson* case.

5. *See* 42 U.S.C.A. § 604(c) (Supp. 1997). The new welfare reform legislation contains two sets of statutory provisions: one interim set effective until July 1, 1997 and one permanent set effective thereafter. All references in this article will be to the permanent statutory provisions.

6. "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." U.S. CONST. amend. XIV, § 1.

II. MODERN RIGHT TO TRAVEL JURISPRUDENCE

A. The Initial Wrong Turn: Shapiro v. Thompson

Shapiro v. Thompson marked the start of a new era in right to travel cases.[7] The Supreme Court had, of course, established the right to travel in a number of decisions over the previous century.[8] The Court, however, had never before decided how that constitutional right interacted with the modern welfare state,[9] in which the government can interfere with rights not only by positive, direct actions like criminal sanctions, but also by negative, indirect actions such as the withholding of government benefits.[10] Unfortunately, the Court's poorly reasoned and absolutist decision was more an exercise in judicial policymaking than textual interpretation, and it was rather poor policymaking at that, as is discussed below in Part IV.

Shapiro consolidated three appeals challenging one-year waiting periods that Connecticut, Pennsylvania, and the District of Columbia imposed for new residents to get AFDC benefits. Until the recent federal welfare reform legislation, AFDC was the primary welfare entitlement in the United States and was a joint federal-state program.[11] In 1935, Congress prohibited federal AFDC funds for any state plan that imposed a residency waiting period of more than one year.[12] Despite the willingness of Congress to tolerate waiting periods, the Supreme Court in a 6-3 decision struck down the state plans as

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7. *See, e.g.*, Clark A. Peterson, Comment, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305, 314 (1993) ("By striking down an indirect burden on the right to travel, [*Shapiro* gave the right] new importance and a potentially broader scope, because welfare was not the only governmental benefit subject to waiting periods.").

8. See *infra* Part II for a discussion of pre-*Shapiro* right to travel cases.

9. Professor Cass Sunstein prefers the term "regulatory state." *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U. L. REV. 593, 594 n.5 (1990). This article uses the term "welfare state" to emphasize 1) that *Shapiro* deals explicitly with welfare benefits, not a regulatory matter like licensing, and 2) that welfare is more foreign to pre-New Deal constitutional doctrine (and the common law baseline on which the doctrine was based) than is regulation, with which the pre-New Deal world was at least somewhat familiar.

10. See *infra* Part V for a more detailed discussion of the unconstitutional conditions doctrine in connection with alternatives to current right to travel doctrine.

11. See *infra* Part IV for a discussion of the history and structure of AFDC.

12. 42 U.S.C. § 602(b) (1996). Before the Social Security Act (which included AFDC) was passed in 1935, 20 states had aid to dependent children programs that imposed waiting periods in the state for two or more years. Shapiro v. Thompson, 394 U.S. 618, 639 (1969). In total, the Social Security Act required the repeal of 41 state statutes imposing one form of residency requirement or another. *Id.* at 640.

classifications impinging upon the fundamental right to interstate[13] travel in violation of the Equal Protection Clause of the U.S. Constitution.[14]

Writing for the Court, Justice Brennan disclaimed any need to base the right to travel on a specific textual provision of the Constitution.[15] Noting that various provisions of the Constitution had in past cases been invoked to justify the right to travel, the Court said past precedent was sufficient to categorize the right to interstate travel as "fundamental" and thus within the scope of the Equal Protection Clause.[16] The Court further found that the waiting-period statutes did not promote any compelling state interests and therefore failed strict scrutiny.[17]

Interestingly, the Court made no distinction between the right to interstate travel and the right to interstate migration. The two rights, of course, are not identical. If the European Union, for example, grants Americans the right to travel freely among its member nations, it does not follow that Americans also have the right to migrate and establish permanent residences anywhere in Europe. Similarly, what was at issue in *Shapiro* was not the right to travel to Pennsylvania or Connecticut, but the right to migrate to those states and establish residences there. As we will see later, the *Shapiro* Court was not alone in failing to make this distinction. Still, the glossing over of any difference between travel and migration and the failure to ground either right in any text of the Constitution should be early hints of the intellectual sloppiness of this area of jurisprudence.

Once the *Shapiro* Court labeled the right to travel "fundamental," it would not have had to proceed to equal protection analysis. Indeed, the more logical

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13. This article discusses only the right to interstate travel, not the right to international travel, which has been based explicitly upon the Due Process Clause of the Fifth Amendment. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958).

14. *Shapiro*, 394 U.S. at 638. Justice Brennan delivered the opinion of the Court, which was joined by Justices Douglas, Stewart, White, Fortas, and Marshall. Justice Stewart also wrote a separate, concurring opinion. *Id.* at 642-44 (Stewart, J., concurring). Chief Justice Warren wrote a dissenting opinion which Justice Black joined. *Id.* at 644-55 (Warren, C.J., dissenting). Justice Harlan wrote a separate dissent. *Id.* at 655-77 (Harlan, J., dissenting).

15. *Id.* at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."). John Hart Ely wrote that "the Court has been almost smug in its refusal to provide [a basis for the right to travel]." JOHN HART ELY, DEMOCRACY AND DISTRUST 177 (1980).

16. *Shapiro*, 394 U.S. at 629-31.

17. *Id.* at 627-38. The Court rejected a number of proffered justifications for the waiting periods, including 1) preserving the fiscal integrity of state welfare programs, 2) facilitating budget planning, 3) providing an objective residency test, 4) minimizing welfare fraud, and 5) encouraging newcomers to enter the labor market promptly. *Id.* at 633-34.

next step would have been substantive due process analysis along the lines of that in *Sherbert v. Verner*.[18] In *Sherbert*, the Court struck down on free exercise grounds a state unemployment program that denied benefits to workers who would not work on Saturdays. *Sherbert* was one of the first "unconstitutional conditions" cases, recognizing that the modern welfare state has more ways to deter the exercise of constitutional rights than just using fines and imprisonment.[19] As the Court stated in that case, denying benefits to those who practice their religion by not working on Saturdays would impose "the same kind of burden upon the free exercise of religion as would a fine imposed" for Saturday worship.[20]

This type of substantive due process analysis was clearly at work in the *Shapiro* Court's reasoning because the Court cited *Sherbert*.[21] Surprisingly, however, the Court cited *Sherbert* for the *equal protection* proposition that "any *classification* which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[22] The Court most likely did not want to rely exclusively on substantive due process doctrine because had it done so, the Court would immediately have faced tough problems of limiting the rationale's reach.[23]

More specifically, the Court would have had to define exactly how a state waiting period burdened or penalized the right to interstate migration. In the normal "penalty" case, one can at least point to a lost benefit that a person would have received had she not exercised some constitutional right.[24] *Shapiro* is an unusual penalty case, however, because no state denied anything to migrants that they would have received had they not exercised their right to migrate. If the migrants had not exercised that right and just stayed in their old states, they certainly would not have received benefits from the new state, and they might not even have been entitled to benefits in their old state. Indeed, the

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18. 374 U.S. 398 (1963).

19. *See generally* Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1073 (1995).

20. *Sherbert*, 374 U.S. at 404.

21. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

22. *Id.* (first emphasis added).

23. *See* Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 997-1000 (1975). This article's analysis of *Shapiro's* flaws is admittedly not original and draws heavily upon prior critiques, particularly Professor McCoy's. Before, however, one can make the more original argument that recent developments justify overruling *Shapiro*, one must first show that it was wrongly decided.

24. Whether the loss of a benefit is actually a penalty or merely the loss of a subsidy depends, of course, on what baseline is used. *See generally* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352-59 (1984). See *infra* Part IV for further consideration of the doctrine of unconstitutional conditions.

opportunity to receive *any* benefits in the new state, albeit after a year's wait, might have been a net improvement for many migrants.

The only sense in which the right to migrate was penalized was that imposing a waiting period made interstate migration less attractive for many people. That argument, however, proves far too much because *any* decision about the level of welfare benefits (or other governmental services) could make interstate migration less attractive. A state, for example, that wanted to deter migration could do a far more effective job by simply passing a statute eliminating its entire welfare program. Although such a statute would not *on its face* deal with interstate migrants, its *effect* on migration could be quite severe. And if the right to migrate is grounded on a substantive due process rationale, courts would immediately have to decide whether such statutes "penalize" the right to migrate. Indeed, Professor McCoy suggests that

> all states would be required under substantive due process to demonstrate a compelling state interest for their refusal to offer welfare benefits at least as high as the most generous available anywhere in the United States or to have eligibility provisions at least as liberal as the most liberal in force in any of the other forty-nine states.[25]

In reality, courts would probably not have to go that far under a substantive due process rationale. Some differences in benefits between states could presumably be tolerated as having only incidental or negligible effects on the right to migrate. Nonetheless, just as they do regarding other substantive constitutional rights, the courts would have to enter the messy business of deciding (based on legislative motive, severity of effect, etc.) which statutes, although neutral toward newcomers on their face, unconstitutionally penalize the right to migrate. Not only might this analysis involve, as Professor McCoy suggests, comparing welfare benefits across states, but it would also force courts to make empirical judgments regarding how the statutes affect interstate migration. For neither of these tasks, however, is the judicial branch well-suited.

The *Shapiro* Court apparently tried to avoid these implications of a substantive due process rationale by instead grounding its holding upon the Equal Protection Clause.[26] As we will see, however, the Court's equal

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25. McCoy, *supra* note 23, at 999.

26. *Shapiro*, 394 U.S. at 638 ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.").

protection rationale is plagued by the same overbreadth that would have plagued a substantive due process rationale. In its equal protection analysis, the Court used the relatively-new "fundamental rights" branch—first used in *Skinner v. Oklahoma*[27]—rather than the more traditional "suspect class" branch of equal protection doctrine. The Court presumably employed an equal protection rationale because it did not want courts to have to deal with interstate differences in welfare benefits. The Court might have thought equal protection would do the trick because equal protection scrutiny is generally limited to *intrastate* differences. In other words, whereas a substantive due process rationale would have scrutinized differences in benefits *between* states, an equal protection rationale would scrutinize only differences in benefits *within* a state. The overbreadth of substantive due process would thus apparently be avoided because a state could satisfy equal protection by paying the same benefits to all of its welfare recipients.

This effort to limit *Shapiro*'s reach fails, however, because of an inevitable problem with the "fundamental rights" branch of equal protection doctrine. Justice Harlan identified the problem in his *Shapiro* dissent when he noted that because "[v]irtually every state statute affects important rights," the fundamental rights strand of equal protection doctrine "creates an exception which threatens to swallow the standard equal protection rule."[28] This is evident in the welfare context because when a state provides welfare benefits to some of its citizens, it necessarily denies benefits to other citizens and thereby creates a classification subject to at least rational basis scrutiny. If the classification "penalizes" a fundamental right, however, strict scrutiny is triggered. The key issue, therefore, is what constitutes a penalty, and we are right back to the same problems that plagued a substantive due process rationale.[29]

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27. 316 U.S. 535 (1942) (applying strict scrutiny to a statute that required habitual criminals to be sterilized).

28. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). Harlan continued:

> When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

Id. at 661-62.

29. It should not be surprising that the fundamental rights branch of equal protection leaves us in the same predicament as a substantive due process rationale. To quote one commentator, the *Shapiro* Court's citation of *Sherbert* "blur[red] the distinction between equal protection challenges to conditional allocations and claims brought under substantive, enumerated constitutional rights." Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1206 n.85 (1990).

As mentioned above, a state's denial of welfare benefits to migrants cannot be a penalty in the normal sense of the term because migrants do not lose anything they would have received from the new state had they not migrated. The definition of penalty can, of course, be broadened to include anything that deters interstate migration or that makes migration less attractive. Indeed, that seems to be what the *Shapiro* Court did when it stated that any classification that "*touches on* the fundamental right of interstate movement" is subject to strict scrutiny.[30] This definition of penalty, however, even in the equal protection context, has unacceptably broad consequences. Although the *Shapiro* Court may have hoped its equal protection rationale would preclude interstate benefit comparisons, virtually any state decision regarding welfare benefits could "touch on" the right to migrate and thus trigger strict scrutiny.

Consider, for example, a hypothetical suggested by Professor McCoy.[31] Suppose California gives welfare benefits only to residents who make less than $10,000, while Indiana gives benefits only to residents who make less than $5000. If a California resident making $7500 moves to Indiana, he will lose his welfare benefits because of Indiana's classification denying benefits to people making more than $5000. Thus, Indiana's classification among its own residents makes migration less attractive and consequently "penalizes" the right to migrate. In short, states can impinge upon the right to migrate not just with *Shapiro*-type classifications against new residents but also with virtually any welfare rule less liberal than those in other states.

If equal protection will not limit *Shapiro*'s reach, what else can? The *Shapiro* Court itself stated in a footnote that residence requirements for voting privileges, tuition-free education, and hunting licenses "may not be penalties upon the exercise of the constitutional right of interstate travel."[32] Justice Marshall used this footnote in a subsequent case, *Memorial Hospital v. Maricopa County*, to suggest that *Shapiro* was limited to classifications denying "basic necessities of life" such as welfare and free medical care.[33] Although such a limitation on what counts as a penalty does narrow *Shapiro*'s holding, it does nothing to cure the overbreadth of *Shapiro* in Professor McCoy's hypothetical which involved welfare benefits themselves. More fundamentally, however, Justice Marshall's notion of a penalty provides no criteria to determine what qualifies as a "basic necessity of life." The benefits Marshall includes are not themselves fundamental rights under either equal protection or substantive due

30. *Shapiro*, 394 U.S. at 638 (emphasis added).

31. McCoy, *supra* note 23, at 1000-01.

32. *Shapiro*, 394 U.S. at 638 n.21.

33. 415 U.S. 250, 269 (1974) (striking down a statute requiring a year's residence in county as a condition of receiving nonemergency medical care at county's expense).

process doctrine,[34] and Marshall did not limit the list to benefits that might actually affect interstate travel.[35] Indeed, Professor McCoy argues persuasively that the conclusion is "inescapable that inclusion in or exclusion from Marshall's list of disabilities that qualify as 'penalties' is . . . simply a matter of '*ipse dixit.*'"[36]

B. Dunn v. Blumstein *and the Idea that Newcomers Are a Suspect Class*

Despite *Shapiro*'s logical and textual failings, the Court directly applied its rationale in two subsequent cases. The second of the two, *Memorial Hospital v. Maricopa County*, was discussed briefly above. The first case, *Dunn v. Blumstein*,[37] held that denying the vote to new state residents penalized the right to travel and triggered strict scrutiny. The Court struck down the durational residency requirement because, in Justice Marshall's words, "such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote."[38]

Dunn, however, did more than just apply *Shapiro*, as the Court made two doctrinal clarifications as well. First, the Court broadened *Shapiro* by rejecting any notion that *Shapiro* was limited to cases where there was either an intent to deter migration or actual deterrence. The Court said strict scrutiny applies to any classification that "penalizes" the right to travel regardless of legislative intent or actual deterrence.[39] The Court may be criticized for divorcing the idea of penalty from deterrence. In the words of one commentator, if the validity of a classification depends on the importance of lost benefits rather than the classification's deterrent effect, "what is being protected is not the right to travel, but the right to the withheld benefit."[40]

The second doctrinal clarification, by contrast, attempted to narrow *Shapiro*. Justice Marshall, apparently realizing the overbreadth of *Shapiro*'s fundamental rights analysis, tried to escape the logical implications of that analysis. He used an example similar to Professor McCoy's hypothetical discussed above:

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34. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 484 (1970) (upholding state welfare limitation because rational basis review governs "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights").

35. McCoy, *supra* note 23, at 1002.

36. *Id.*

37. 405 U.S. 330 (1972).

38. *Id.* at 342.

39. *Id.* at 340-41.

40. *The Supreme Court, 1973 Term—Leading Cases*, 88 HARV. L. REV. 43, 117-18 (1974).

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.[41]

Justice Marshall thus foreclosed the myriad of equal protection challenges that would logically follow from the Court's fundamental rights equal protection analysis. This foreclosure was accomplished, however, only by brute judicial force and not by logic. Marshall was entirely correct that a higher driving age is not imposed solely because the newcomer is a new resident. That, however, does not change the fact that one state's higher driving age may well deter migration and may make some migrants significantly worse off for their migration. Under conventional fundamental rights analysis, this classification penalizes the right to migrate.[42]

Marshall's distinction would make sense, however, if the Court relied upon the other strand of equal protection doctrine, the "suspect class" branch. Under that branch, a classification is subject to strict scrutiny if it purposely disadvantages members of a suspect class.[43] Suspect class analysis provides a cleaner judicial analysis because, rather than trying to measure the burden that a statute imposes on a right, it focuses on purposeful and facial distinctions based on membership in a particular class.[44] If newcomers were a suspect class, for example, a state could satisfy equal protection simply by paying newcomers the same benefits as longtime residents. *Shapiro*'s overbreadth would thus be eliminated without Justice Marshall's *sui generis* contortion of fundamental rights equal protection doctrine. The ambiguities of penalty analysis would disappear, and states would be free to allocate welfare benefits however they wished, provided that newcomers are treated the same as existing residents. Indeed, Professor McCoy persuasively argues that this simple shift would rationalize *Shapiro* and its progeny:

> [D]espite the logical inadequacy and practical disutility of the theoretical reasoning of *Shapiro*, *Dunn*, and *Maricopa*, the actual

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41. *Dunn*, 405 U.S. at 342 n.12.

42. McCoy, *supra* note 23, at 1006.

43. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (classifications based on race subject to strict scrutiny); Hernandez v. Texas, 347 U.S. 475 (1954) (classifications based on national origin treated the same as those based on race).

44. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

> result in each of those cases is defensible on the basis of classic fourteenth amendment principles that lead to neither the undesirable results nor the arbitrary distinctions required by application of the *Shapiro-Dunn-Maricopa* reasoning to other cases.[45]

Although Professor McCoy's clever scheme would *rationalize* this area of case law, it would not by itself *justify* the case law under either interpretivist or representation-reinforcing constitutional theory.[46] Although McCoy argues, for example, that the Equal Protection Clause protects generally against unequal distribution of government benefits, he presents no argument that the original intent of the Fourteenth Amendment was to protect newcomers. Moreover, McCoy's argument that newcomers are in "the same position with respect to state government as that occupied by blacks,"[47] and thus worthy of suspect class protection, is not convincing.

The Equal Protection Clause, though intended immediately to protect African-Americans,[48] has long been held to protect other suspect classes. The famous footnote in the 1938 case, *United States v. Carolene Products Co.*,[49] suggested that heightened scrutiny may be warranted for statutes showing "prejudice against discrete and insular minorities" because such prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[50] The Warren Court drew upon this process-based notion of equal protection, and John Hart Ely more recently elaborated a similar "participation-oriented, representation-reinforcing approach to judicial review."[51]

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45. McCoy, *supra* note 23, at 988.

46. Interpretivism and representation-reinforcement are certainly not the only constitutional theories that could justify protection for newcomers. *See generally* MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (1993). They tend, however, to be among the more widely-accepted theories in academia and the more widely-used in the judiciary.

47. McCoy, *supra* note 23, at 1017.

48. *See generally*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1965).

49. 304 U.S. 144 (1938).

50. *Id.* at 152-53 n.4.

51. *See* ELY, *supra* note 15, at 87. Ely argues that:

> the pursuit of these 'participational' goals of broadened access to the processes and bounty of representative government, as opposed to the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court.

Id. at 74-75.

Professor McCoy's attempt to place newcomers under the umbrella of suspect class protection founders, however, because newcomers do not fit the criteria traditionally used in equal protection doctrine. Newcomers may be somewhat "discrete" (meaning distinct) and somewhat "insular" (meaning isolated), but they surely assimilate into communities and the political process far more easily than those classes traditionally given strict scrutiny protection. A newcomer, for example, is not distinguishable by any outward characteristic (like skin color), and newcomers show no particular pattern of sticking together outside the rest of society (as people of a particular national origin might). Moreover, newcomer status is a temporary condition—hardly an immutable characteristic like race, national origin, or sex. And finally, any history of discrimination against newcomers pales against the discrimination blacks and women have faced. Indeed, one might reasonably suppose newcomers have at times been favored in communities that have tried to attract residents from other states. In sum, equal protection doctrine alone simply cannot justify making newcomers a suspect class.

C. More Recent Doctrinal Confusion

With the evident problems of *Shapiro*'s fundamental rights rationale and the difficulty any court would face in declaring newcomers to be a suspect class, it should not be surprising that this area of the law has continued to be a mess long after *Shapiro*'s initial misstep.[52] Although *Shapiro* remains good law and its influence permeates more recent decisions, the Court has subtly moved away from *Shapiro*'s troubling fundamental rights analysis. No majority of the Court has used *Shapiro*'s strict scrutiny since *Maricopa*, and the Court has moved towards something of a suspect class approach in right to migrate cases.

The Court first backed off *Shapiro*'s strong holding in *Sosna v. Iowa*.[53] This 1975 case held that a state could require individuals to be residents for one year before they could file for divorce. Writing for the Court, Justice Rehnquist cited two major factors that distinguished the case from *Shapiro*, *Dunn*, and *Maricopa*. First, a delay in getting a divorce did not "irretrievably foreclose[]" anyone from ultimately obtaining it, unlike the prior cases where some benefits never would have been recovered.[54] Second, the state's residency requirement

52. It should be noted that *Shapiro* itself did not prohibit the use of durational residency requirements as tests of *bona fide* residence. The Court said the waiting periods in *Shapiro* did not serve that purpose. Shapiro v. Thompson, 394 U.S. 618, 636 (1969). However, the Court said in a later case, for example, that a state has the "right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." Vlandis v. Kline, 412 U.S. 441, 452 (1973).

53. 419 U.S. 393 (1975).

54. *Id.* at 406.

was not justified by mere budgetary considerations but by the state's need to control domestic relations, an area which Rehnquist said "has long been regarded as a virtually exclusive province of the States."[55] Although *Sosna* represents a significant shift away from *Shapiro*, the Court has never again used such an *ad hoc* balancing test in right to migrate cases, and *Sosna* is probably best viewed as *sui generis*.

A more discernible trend in the case law appeared in the 1982 case of *Zobel v. Williams*.[56] In *Zobel*, the Court struck down an Alaskan scheme that distributed oil revenues to residents based on how long they had lived in Alaska. Surprisingly, however, the Court never reached the question of whether *Shapiro*'s fundamental rights strict scrutiny applied. Indeed, the Court shifted the analysis towards the suspect class branch of equal protection. Chief Justice Burger, writing for the Court, made no mention of penalties and wrote in a footnote that the "right to travel analysis refers to little more than a particular application of equal protection analysis."[57] He further emphasized that "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents."[58] Although the Court did not make newcomers a suspect class, a shift in emphasis towards newcomer discrimination is clearly evident. Indeed, the Court would have been hard-pressed to strike down the Alaska statute as a penalty because this unique program of sharing oil revenues would make any new resident better off for migrating to Alaska.

Perhaps more surprisingly, the Court did not find it necessary to apply strict scrutiny to Alaska's discrimination against newcomers, instead holding that the benefit scheme did not even pass minimum rationality. The Court found that two of Alaska's legislative justifications were not rationally related to the distinctions made in the statute and that the third justification—rewarding citizens for past contributions—was not a legitimate state purpose.[59]

Zobel's rational basis review, of course, is far different from normal rational basis review, which upholds virtually all legislation. Professor Tribe has argued that the Court's enhanced review appears "more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with [discrimination against newcomers] than of any overall shift in the Court's

55. *Id.* at 404.

56. 457 U.S. 55 (1982).

57. *Id.* at 60 n.6.

58. *Id.*

59. *Id.* at 62-65. Alaska's first two objectives were to create a financial incentive for individuals to establish and maintain Alaskan residence and to assure the prudent management of the state's natural and mineral resources.

scrutiny of how well various purposes fit legislatively chosen means."[60] The Court, while unwilling to make newcomers a suspect class, thus was willing to infuse rational basis review with enough teeth to reach a similar result.

The crux of the Court's holding was its declaration that rewarding past citizen contributions was an impermissible state purpose. This is hardly self-evident, however. As Justice O'Connor argued in her concurrence, "Nothing in the Equal Protection Clause itself . . . declares this objective illegitimate."[61] Although it could have been illegitimate had the Court invoked some other provision of the Constitution or at least some implied constitutional right such as the right to travel, the Court explicitly disclaimed any such reliance.[62] We are thus left with only more doctrinal confusion. The Court in *Zobel* clearly shifted away from *Shapiro*'s penalty analysis, but it moved only hesitantly, contorting rational basis review in the process.

Adding one final dose of confusion to the case law is the Court's most recent right to migrate decision, *Attorney General of New York v. Soto-Lopez*.[63] This 1986 case struck down a civil service employment preference for veterans who had lived in New York when they entered the service. Although the Court only one year earlier had used *Zobel*'s enhanced rational basis approach in a remarkably similar case, *Hooper v. Bernalillo*,[64] the Court in *Soto-Lopez* failed to produce a majority opinion. Four justices—Brennan, Marshall, Blackmun, and Powell—tried to bring back *Shapiro*'s penalty analysis, invoking strict scrutiny to strike down the state's program favoring longer-term residents. Chief Justice Burger and Justice White concurred, but only on the grounds that New York's program failed *Zobel*'s minimum rationality test. Justices O'Connor, Rehnquist, and Stevens dissented, arguing 1) that New York's program passed equal protection rational basis, and 2) that the program's minimal effect on interstate migration was insufficient to invoke the higher scrutiny of the Comity Clause,[65] on which these justices now grounded the right to migrate.

Soto-Lopez thus leaves the right to migrate doctrine in disarray. Only four justices, all of whom are now retired, were willing to invoke *Shapiro* in its

60. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2 (2d ed. 1988).

61. *Zobel*, 457 U.S. at 72 (O'Connor, J., concurring). Justice Rehnquist made a similar argument in his dissent. *See id.* at 82-83 (Rehnquist, J., dissenting).

62. Zobel v. Williams, 457 U.S. 55, 59-61 (1982).

63. 476 U.S. 898 (1986).

64. 472 U.S. 612 (1985) (holding unconstitutional a New Mexico tax exemption for Vietnam veterans who resided in the state before 1976).

65. The Comity Clause, also known as the Article IV Privileges and Immunities Clause, reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

purest form. The two justices wanting to follow *Zobel*'s enhanced rational basis analysis are also now gone from the Court. And the three justices who remain on the Court were intent on transforming right to migrate doctrine into a matter of Article IV Privileges and Immunities. This area of jurisprudence is obviously unstable, and it appears ripe for both clarification and fundamental correction.

D. Trying to Apply the Case Law to Current Cases

The incoherence of right to migrate doctrine is perhaps best exemplified by the difficulty courts are having in applying *Shapiro* and its progeny. Three recent cases in particular demonstrate the unneeded complexity of right to migrate doctrine. And as we will see, proposed federal welfare reform legislation promises to test the boundaries of current doctrine even further.

In *Jones v. Milwaukee County*,[66] for example, the Wisconsin Supreme Court upheld a sixty day waiting period for general relief. The court did not apply strict scrutiny, arguing that the sixty day waiting period did not penalize the right to travel because it was "so substantially less onerous than the one year waiting period of *Shapiro*."[67] The court, however, provided no further explanation as to why a sixty-day wait is so much less burdensome that it does not qualify as a penalty. The Wisconsin court instead applied equal protection rational basis analysis, but neither the majority nor the dissent even mentioned *Zobel* and its enhanced rational basis scrutiny.[68] The court thus easily upheld the statute as being minimally rational. The court acknowledged, however, that doctrinal confusion plagues this area of the law. The majority said it was upholding the statute even while it recognized "the unsettled nature of the amount of impact necessary to give rise to the compelling state interest standard, and that the parameters of *Shapiro*'s penalty analysis admittedly remain undefined. . . ."[69]

The neighboring Minnesota Supreme Court, however, took a different view a year later in *Mitchell v. Steffen*.[70] The Minnesota court held unconstitutional a statute that gave new residents only sixty percent of the standard general assistance work readiness benefits during the first six months. The court followed the *Soto-Lopez* plurality's approach by applying *Shapiro*'s strict

66. 485 N.W.2d 21 (Wis. 1992).

67. *Id.* at 26.

68. *Zobel* relied on *Shapiro* for the proposition that rewarding past resident contributions was not a legitimate state interest, even if the right to migrate was not technically penalized. Similar reasoning would have applied *Shapiro* to hold that Wisconsin's fiscal concerns were not legitimate reasons to discriminate against new residents.

69. *Jones*, 485 N.W.2d at 26.

70. 504 N.W.2d 198 (Minn. 1993).

scrutiny analysis. Because a basic necessity of life was being denied to new residents, and because this might discourage needy individuals from migrating, the Minnesota court held that the statute violated "the fundamental constitutional right to migrate."[71]

The legal morass thus evident in lower courts could have been cleared up last year by a case that was actually briefed and argued before the U.S. Supreme Court. *Anderson v. Green*[72] presented the Court with an imaginative California AFDC benefit scheme that defied easy categorization under current Court doctrine. This novel case provided an ideal opportunity to place the right to migrate on a surer textual foundation as well as to clarify judicial application of that constitutional right. The Court, however, vacated the lower court judgment and dismissed the case as nonjusticiable because California's failure to receive a federal waiver for the program prevented the state scheme from even taking effect.[73] Nonetheless, the basic issue presented in *Anderson* is likely to reach the Court again now that Congress has enacted welfare reform legislation that allows "tiered" welfare plans exactly like California's proposed scheme.

In late 1992, the California legislature enacted a welfare reform statute that established a two-tier AFDC benefit structure.[74] Under the statute, eligible migrants received benefits immediately upon entering the state. The benefits were limited for one year, however, to the amount the migrants received or would have received in their previous states. The statute was designed to prevent California, with its relatively high level of benefits, from becoming a "welfare magnet" to poor families in other states.[75] This welfare magnet phenomenon will be discussed in more detail in Part IV below. For now, the question is only how California's scheme fares under current constitutional doctrine.[76]

Whether California's scheme passes constitutional muster depends on which case law is applied to the problem. Indeed, the petitioners and respondents in *Anderson* had to cover all the bases in their briefs by analyzing the case under

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71. *Id.* at 203.

72. 513 U.S. 557 (1995).

73. *Id.* at 557.

74. CAL. WELF. & INST. CODE § 11450.03 (West. Supp. 1994).

75. If a migrant came from a state with benefits higher than California's, however, she would receive only California's standard benefits. CAL. WELF. & INST. CODE § 11450.03(a) (West. Supp. 1994). Because California's benefits are among the most generous in the nation, most migrants would be receiving lower benefits than existing California residents.

76. A federal trial court struck down the California statute as unconstitutional because it penalized the right to migrate and failed strict scrutiny. Green v. Anderson, 811 F. Supp. 516, 523 (E.D. Cal. 1993). The Ninth Circuit summarily affirmed. Green v. Anderson, 26 F.3d 95 (1994).

each strand of the Court's conflicting case law.[77] If one applies *Zobel*'s reasoning, for example, the California statute appears to fail enhanced rational basis review. Indeed, the California statute resembles Alaska's scheme in *Zobel* because in neither case were new residents being denied anything they would have received in their old states. In *Zobel*, no other state would have given the Alaskan migrants oil revenues; in *Anderson* migrants by definition received exactly what they would have received in their old states.

One might distinguish *Zobel*, however, on a number of grounds. First, the Alaska statute made a permanent classification among all residents in Alaska, dividing them up into countless classes based on years of residence. California's statute makes only one classification, and that classification disappears for a new resident after twelve months. Second, *Zobel* hinged on the conclusion that rewarding past contributions is not a legitimate state end. California's plan arguably is trying only to level the playing field among states in terms of AFDC benefits. If this is at least a legitimate state end, the California statute might pass rational basis scrutiny.

Even if *Anderson* is plausibly distinguishable from *Zobel*, however, the California statute might still face strict scrutiny. *Zobel* avoided the issue of whether *Shapiro*'s strict scrutiny applied by using rational basis scrutiny to strike down the Alaska statute. No majority of the Court has applied *Shapiro* penalty analysis since 1974 in *Maricopa*, so what the Court would do if California's plan passed rational basis depends on *Shapiro*'s unknown vitality.

If one applies the approach of *Shapiro* and the *Soto-Lopez* plurality, the inquiry shifts to whether the classification among California residents penalizes the right to travel. On the one hand, giving lower benefits to new residents clearly makes migration less attractive than if new residents were given California's standard benefits. On the other hand, the lower benefits do not make new residents any worse off because the new residents receive exactly what they were receiving previously in their prior states.[78] A fair reading of *Shapiro*, however, requires that the California statute be struck down. As discussed above, *Shapiro* itself made no inquiry into whether the migrants were better or worse off in their new state compared to their old state. And as

77. *See* Petitioners' Brief at iii, Anderson v. Green, 513 U.S. 557 (1995) (No. 94-197), 1994 WL 646105; Respondents' Brief at iii, Anderson v. Green, 513 U.S. 557 (1995), (No. 94-197), 1994 WL 699703.

78. The California statute made no adjustment in benefits for California's high cost of living. Thus, new residents could be marginally worse off in California even if they are receiving the same absolute level of benefits. This article ignores the cost of living issue for two reasons. First, the differences in cost of living between states, as discussed below, are not huge. And second, a statute could easily make some adjustment for cost of living, still leaving the more fundamental constitutional questions discussed here.

Professor McCoy suggested, the true logic of *Shapiro* requires that any discrimination against newcomers pass strict scrutiny. Unless the Court redefines what constitutes a penalty on migration, *Shapiro*'s reasoning prohibits the California statute.

Finally, it remains possible that Justice O'Connor's Article IV Comity Clause analysis is now controlling. If so, the inquiry becomes an ad hoc balancing test, incorporating whether the new residents "constitute a peculiar source of the evil at which the statute is aimed" and whether a "substantial relationship" exists between the evil and the discrimination against the new residents.[79] How exactly this test would apply to California's statute is not evident from the case law, but the issue is discussed in more detail in Part V of this Article. In particular, Part V argues that something akin to Justice O'Connor's balancing test should be considered in right to migrate analysis, even if one does not base the right to migrate on the Comity Clause itself.

III. RECONSTRUCTING THE RIGHT TO MIGRATE

The obvious shambles in which right to migrate jurisprudence currently stands creates the opportunity for a fresh start. Two vital tasks are readily apparent. First, the Court still has yet to ground either the right to travel or the right to migrate in any textual provision of the Constitution. Although this failing may not have troubled the justices of the Warren Court, interpretivist constitutional theory and the recent resurgence of textualism on the Rehnquist Court demand that a better effort be made on this front. Part III.D of this Article will attempt to make that effort by arguing that the Fourteenth Amendment's Citizenship Clause is the proper textual source for the right to migrate.

Second, regardless of the textual inadequacy of current doctrine, the current case law provides judges no clear or practical framework to apply to cases implicating the right to migrate. The above review of recent cases should have shown that courts need, at the very least, clarification regarding how to implement the right to migrate. Part V of this Article will focus on this more practical issue.

Of course, the textual foundations of the right to migrate and the doctrinal framework implementing that right are hardly separate issues. As the rest of this Article will argue, however, basing the right to migrate upon the Citizenship Clause both is textually sound and lends itself well to a doctrinal framework that

79. *See* Hicklin v. Orbeck, 437 U.S. 518, 525-27 (1978); Toomer v. Witsell, 334 U.S. 385, 398 (1948).

is judicially manageable. But before we can reach that conclusion, we must first consider other possible textual bases for the right to migrate.

A. Commerce Clause

The Commerce Clause[80] (or more accurately, the so-called "dormant" Commerce Clause) appears at first to be an appealing textual provision on which to base the right to travel and the right to migrate. To the extent, for example, that the Constitution was meant to transform a confederation of states into a more perfect union, the right of citizens to move freely within the nation would seem to be a corollary to the free flow of commerce among the states. Moreover, under current Commerce Clause doctrine, not only does Congress have virtual carte blanche to regulate interstate commerce, but the states themselves are precluded from unduly burdening interstate commerce, even in the absence of congressional legislation.[81] Establishing the right to travel and the right to migrate upon the Commerce Clause would thus be consistent with existing case law that limits state power to impede commerce across state lines. Moreover, the dormant Commerce Clause would subject states to a more flexible undue burden standard rather than *Shapiro*'s rigid strict scrutiny review. And the power of Congress to override both state regulation and judicial decisions would rest final authority with elected national policymakers rather than with either the parochial states or the unelected judiciary.

The notion that the Commerce Clause is the source of the right to travel has some support within the case law. In the first major right to travel case, *Crandall v. Nevada*,[82] the Court struck down a state tax on anyone leaving Nevada by any vehicle for hire. Justice Clifford and Chief Justice Chase, who essentially concurred in the judgment, argued that the state's tax was unconstitutional because it was inconsistent with Congress's power to regulate interstate commerce.[83] More recently, in *Edwards v. California*,[84] the Court explicitly relied upon the Commerce Clause to strike down a California statute that forbade the transportation of indigent nonresidents into the state. Because the statute was not deemed to be within the police power of the state, the Court held that the statute was "an unconstitutional barrier to interstate commerce."[85]

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80. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

81. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

82. 73 U.S. (6 Wall.) 35 (1867).

83. *Id.* at 49 (Clifford, J., dissenting).

84. 314 U.S. 160, 172-73 (1941).

85. *Id.* at 173.

Despite this history, the Commerce Clause is probably not an appropriate source for the right to migrate for a number of reasons. First, the majority in *Crandall* disclaimed any reliance on the Commerce Clause for its holding. Writing for the Court, Justice Miller stated that "we do not concede that the question before us is to be determined" by the Commerce Clause.[86] Instead, the Court held that the right to travel was an incident of national citizenship, needed to allow a citizen "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."[87]

Second, the Commerce Clause will not suffice because the word "commerce" tends to connote the movement of goods, not people. As Justice Barbour wrote for the Court in the 1837 case, *Mayor of New York v. Miln*:

> How can the [Commerce Clause] apply to *persons*? They are not the subject of commerce; and, not being *imported goods*, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods.[88]

The commerce power has, of course, expanded radically since 1837, but one still has the sense of an incongruity between commerce and the right to travel.[89] To quote Justice Douglas, "[T]he right to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."[90] Indeed, even if the Commerce Clause can support a right to travel in conjunction with commerce, can it also protect migration or travel not immediately tied to or substantially affecting commerce?

Finally, even if these considerable objections can be overcome, our textual search for the right to migrate would still not be over. As mentioned above, any right to migrate based on the dormant Commerce Clause would be subject to plenary revision by Congress. The AFDC waiting periods that Congress authorized (but the Court found unconstitutional) in *Shapiro*, for example, would

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86. *Crandall*, 73 U.S. (6 Wall.) at 43.

87. *Id.* at 44.

88. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 136-37 (1837).

89. *Cf.* United States v. Lopez, 115 S. Ct. 1624, 1642-51 (1995) (Thomas, J., concurring) (arguing that modern cases have inappropriately broadened the definition of commerce beyond its original understanding).

90. Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); *see also id.* at 182 (Jackson, J., concurring) ("To hold that the measure of [a migrant's rights] is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.").

be a constitutional exercise of Congress' commerce power. Other provisions of the Constitution, however, might constrain Congress' discretion. Thus, even if we accept the dormant Commerce Clause as a limit on what states may do regarding travel and migration, we still need to examine the Constitution's text for limitations on federal power.

B. Comity Clause

A more fruitful source for the right to travel (but not the right to migrate) is the Comity Clause. Justice O'Connor has, of course, suggested that right to travel jurisprudence be recast in terms of Article IV "Privileges and Immunities," and her dissenting opinion in *Soto-Lopez* gained the votes of both Justice Rehnquist and Justice Stevens.

The Comity Clause guarantees that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[91] Its antecedent, however, was Article IV of the Articles of Confederation, which provided in part:

> [t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively . . . .[92]

The Constitution's version is obviously shorter and makes no reference to "ingress and regress" between states, but the drafter of the Constitution's Article IV, Charles Pinckney, told the Constitutional Convention at Philadelphia that the Comity Clause was "formed exactly upon the principles of the 4th article of the present Confederation."[93] Indeed, even arch-originalist Raoul Berger reads the Comity Clause to include the right to travel:

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91. U.S. CONST. art. IV, § 2. In *The Federalist Papers*, Alexander Hamilton said the Comity Clause "may be esteemed the basis of the Union." THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

92. ARTICLES OF CONFEDERATION art. IV.

93. 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1934).

> To my mind, ingress into a sister State was implicit in "privileges and immunities." How could a citizen of one State fully enjoy the privileges of a sister State without entry therein . . . [?][94]

The early case law interpreting the Comity Clause also supports the right to travel. In the most famous privileges and immunities case, *Corfield v. Coryell*,[95] Justice Bushrod Washington, sitting on circuit, mentioned numerous rights protected by the Comity Clause, including the "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."[96]

Although the Supreme Court never accepted the full natural rights logic of Justice Washington's opinion,[97] the Court has cited the Comity Clause as supporting the right to travel. In *Paul v. Virginia*,[98] the Court, per Justice Field, stated that the clause gives citizens of one State "the right of free ingress into other States, and egress from them."[99] More recently, the Court has read the Comity Clause to forbid discrimination against nonresidents that burdens an "essential activity" or the exercise of a "basic right,"[100] which could easily encompass interstate travel. Moreover, the Court's current two-part Comity Clause test would, like the Commerce Clause's undue burden analysis, provide a more contextual and coherent standard than *Shapiro*'s strict scrutiny and the makeshift doctrine it has engendered.

The Comity Clause's ability to support the right to travel does not imply, however, that it can also support the right to migrate as Justice O'Connor would have it do. First, the right of free ingress and egress between States does not necessarily imply the right to enter a State and become a permanent citizen. Second, as the Court itself has pointed out in response to Justice O'Connor, the Comity Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[101] Because

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94. Raoul Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 863 (1981).

95. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

96. *Id.* at 551-52.

97. *See* TRIBE, *supra* note 60, § 6-34, at 529-30.

98. 75 U.S. (8 Wall.) 168 (1869).

99. *Id.* at 180. *See also* Ward v. Maryland, 79 (12 Wall.) 418, 430 (1871); United States v. Wheeler, 254 U.S. 281, 297-98 (1920).

100. Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 387 (1978).

101. Zobel v. Williams, 457 U.S. 55, 59 n.5 (1982) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)). Although Justice Rehnquist later joined Justice O'Connor's dissent based on the Comity Clause in *Soto-Lopez*, in *Zobel* he too criticized her use of the Comity Clause because it "has no application to a citizen of the State whose laws are complained of." *Id.* at 84 n.3 (Rehnquist, J., dissenting).

right to migrate cases typically involve discrimination against new *citizens* of a particular state, the clause technically provides them no protection. Although this reading of the clause is admittedly formalistic, it is not without substantive merit. Once people have chosen to change their state citizenship, they may have lost the protection of the Comity Clause but they have also gained a voice in the political process of their new states. This protection may be weaker than what the Comity Clause gives to non-citizens, but the question, of course, is whether the Constitution mandates *any* protection for new citizens.

Finally, even if the Comity Clause could support some version of the right to migrate, it could not be the basis for striking down welfare waiting periods. If Justice O'Connor wants to argue that the Comity Clause's scope mirrors that of its Articles of Confederation predecessor,[102] she will have to take the bitter with the sweet. Thus, although the Articles provide (to her liking) for free interstate "ingress and regress," they also provide (presumably to her disliking) that "paupers, vagabonds, and fugitives" are exceptions to this freedom. If a state may exclude the poor altogether, it would be hard to argue that the state may not withhold public assistance during some waiting period.[103]

As Raoul Berger has documented, the right of a sovereign under Anglo-American law to exclude paupers originated over 600 years ago and continued well into American constitutional jurisprudence.[104] In the 1837 *City of New York v. Miln* case, for example, the Supreme Court upheld a New York law that required masters of vessels arriving in New York to report certain information about the vessels' passengers. The Court acknowledged that "the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the States . . . [and] to prevent them from becoming chargeable as paupers."[105] Nonetheless, the Court upheld the statute, stating that it was "as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it

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102. Justice O'Connor quotes *Wheeler*, for example: "[T]he text of Article IV, § 2 . . . makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations." *Zobel*, 457 U.S. at 80 n.10 (quoting United States v. Wheeler, 254 U.S. 281, 294 (1920)).

103. "Pauper" could, of course, be a narrower category than "poor." Even if pauperism is defined more narrowly to include only those poor in need of public assistance, however, one would still be hard pressed to justify *Shapiro*'s obligation to provide benefits immediately.

104. *See generally* Berger, *supra* note 94, at 854-58.

105. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 133 (1837).

is to guard against the physical pestilence . . . ."[106] Even Justice Story in dissent acknowledged that states "have a right to pass poor laws, and laws to prevent the introduction of paupers . . . ."[107]

Moreover, the Court repeated these views in seriatim opinions in the 1849 *Passenger Cases*.[108] Chief Justice Taney's dissent in these cases is often cited to support the right to travel and indeed was cited by *Shapiro* itself: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[109] Although this language may support the right to travel, other parts of Taney's opinion (conveniently ignored by the *Shapiro* Court) stand squarely against the right of paupers to migrate. Taney denied, for example, that a "mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it."[110]

In short, the Comity Clause may support the right to travel, but it provides scanty support for the right to migrate. Moreover, constitutional jurisprudence during the nation's first century flatly refutes any notion that the poor have a right to migrate, let alone receive public assistance in a new state. Contrary to Justice O'Connor, we must look elsewhere for a right to migrate that would rationalize the modern case law. If the states, through the Comity Clause, retained the power to exclude paupers, only an intervening constitutional amendment could justify modern right to migrate jurisprudence.

C. *Fourteenth Amendment Privileges or Immunities Clause*

The Privileges or Immunities Clause[111] of the Fourteenth Amendment has been periodically invoked by individual justices as support for the right to travel and the right to migrate. Four justices in *Edwards*, for example, thought the decision should have been based explicitly on the Privileges or Immunities Clause. Justice Douglas's concurring opinion[112] (which was joined by Justices Black and Murphy) and Justice Jackson's solo concurring opinion[113] both argued that the Court's Commerce Clause rationale was not textually sound and

106. *Id.* at 142.

107. *Id.* at 156 (Story, J., dissenting).

108. 48 U.S. (7 How.) 283, 402, 425, 526 (1849).

109. Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (quoting *The Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting)).

110. *The Passenger Cases*, 48 U.S. (7 How.) at 472 (Taney, C.J., dissenting).

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

112. Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring).

113. *Id.* at 181 (Jackson, J., concurring).

that the Privileges or Immunities Clause would have been a better choice. Justice Harlan's dissent in *Shapiro* similarly suggested that the Privileges or Immunities Clause was the provision of the Constitution that prevented states from interfering with interstate travel and migration.[114]

Although the Privileges or Immunities Clause argument is a good one, it is not quite sufficient on its own. The clause, of course, was interpreted in *The Slaughter-House Cases* to protect only against state interference with rights of *national* citizenship, which the court concluded were rather few.[115] Judges and commentators have argued for decades that *Slaughter-House* was wrongly decided because the Privileges or Immunities Clause was meant to provide citizens broader protection against the states.[116] Overruling *Slaughter-House* and resurrecting this dead clause at this late date seems far-fetched, however. For better or for worse, we must assume that we are stuck with the *Slaughter-House* interpretation of the Privileges or Immunities Clause.

Justice Jackson in *Edwards* was content with the *Slaughter-House* interpretation, however, because he thought the right to travel was one of those few rights of national citizenship that the Privileges or Immunities Clause protects.[117] The problem with Justice Jackson's opinion is that after *Slaughter-House*, the clause accomplishes nothing that the Supremacy Clause[118] does not. As Justice Field argued in his *Slaughter-House* dissent, "no State could ever have interfered by its laws" with rights of national citizenship, and "no new constitutional provision was required to inhibit such interference."[119] Under *Slaughter-House*, the Privileges or Immunities Clause has no independent function, except as an alternative to using the Supremacy Clause.[120]

If we accept *Slaughter-House* but want to "use" the Privileges or Immunities Clause to support the right to migrate (as suggested by Justices

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114. *Shapiro*, 394 U.S. at 666-69 (Harlan, J., dissenting). Justice Harlan ultimately would not have decided *Shapiro* on Privileges or Immunities Clause grounds. He argued that Congress had authorized the states' waiting periods, and the Privileges or Immunities Clause restricted only the states, not Congress. See *infra* Part IV for further discussion of this issue.

115. 83 U.S. (16 Wall.) 36, 78-79 (1873).

116. *See, e.g.*, ELY, *supra* note 14; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Adamson v. California, 332 U.S. 46, 71-72 (Black, J., dissenting).

117. *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

118. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. IV, cl. 2.

119. *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

120. *See generally* EDWARD CORWIN, THE CONSTITUTION OF THE UNITED STATES 965 (1953); David Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. CHI. L. REV. 329, 348 (1983).

Jackson and Douglas), we must find some independent source for that national right. Justice Jackson was aware of this, despite his invocation of the Privileges or Immunities Clause in *Edwards*. In fact, Jackson's references to the Privileges or Immunities Clause indicate that he was really referring to the Privileges or Immunities Clause in conjunction with the Citizenship Clause.[121] Thus, the Privileges or Immunities Clause itself does little independent work even in Justice Jackson's argument.[122] It is the Citizenship Clause that carries the load,[123] and it is to that clause that we now turn.

D. Citizenship Clause

This Article is not the first to suggest that the right to migrate should be derived from the Citizenship Clause. As discussed below, at least one academic commentator and a few Supreme Court justices have made such arguments. These analyses, however, have generally been based on only the text of the clause and on vague notions of citizenship. This Article attempts to break new ground by placing the Citizenship Clause argument within the historical context of both the Fourteenth Amendment and the case law that the amendment was reacting against.

As asserted above, Justice Jackson's concurrence in *Edwards* was a Citizenship Clause argument disguised in the trappings of the Privileges or Immunities Clause. His Citizenship Clause rationale, however, is explicit although unsatisfying. He argued correctly, for example, that the Fourteenth Amendment creates a national citizenship and relegates state citizenship to a secondary status based only on residence.[124] "State citizenship is ephemeral," according to Jackson, because "[i]t results only from residence and is gained or lost therewith."[125] From this elementary premise, however, Jackson immediately jumped to the conclusion that "[i]f national citizenship means less

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121. "I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which [the indigent in the case] is a citizen of the United States and which forbids any state to abridge his privileges or immunities as such." Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring).

122. Justice Douglas also repeatedly invokes the Privileges or Immunities Clause in his *Edwards* concurrence, even though he too relies on other sources to supply the national right that the clause protects. Douglas, however, is more ambiguous than Jackson about the source of the right, denying that the Comity Clause is the source yet claiming that the right was "fundamental" even before the Fourteenth Amendment. *See id.* at 178-81 (Douglas, J., concurring).

123. For this reason, Raoul Berger's attack on Jackson's argument on originalist grounds is misdirected because Berger focuses exclusively on why the Privileges or Immunities Clause cannot support the right to migrate. *See* Berger, *supra* note 94, at 866-68. As argued above, Jackson mislabelled his argument, which should properly be considered a Citizenship Clause argument.

124. *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

125. *Id.*

than [the right to migrate], it means nothing."[126] Justices Brennan and Stewart have made similar passing references to the Citizenship Clause in connection with the right to migrate, but they too have failed to make a thorough historical argument that the clause is the foundation for that right.[127]

Professor William Cohen is perhaps the most recent exponent of the Citizenship Clause argument.[128] Although Cohen's analysis is more satisfying than Justice Jackson's, it too neglects to flesh out the historical context of the Citizenship Clause itself:

> United States citizens become citizens of the state wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states.[129]

Based on little more than this analysis, Cohen concludes that states may not deny benefits to new citizens except to gain reasonable assurance that the newcomers are *bona fide* residents.[130]

Although these Citizenship Clause arguments are somewhat persuasive, they all fail to place the Citizenship Clause in its proper historical context. They ignore the state of the law before the Citizenship Clause, and they fail even to consider the passage and ratification of the Fourteenth Amendment. Although the history of the Citizenship Clause is not crystal clear in its support of the right to migrate, consideration of the clause's origins must be the place to start the analysis.

The historical argument that the right to migrate depends on the Citizenship Clause is based primarily on two cases: *Scott v. Sanford*[131] and *Slaughter-House*. Admittedly, these two vilified cases have little generative force in modern constitutional analysis. Nevertheless, the two cases fit together

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126. *Id.*

127. *See* Zobel v. Williams, 457 U.S. 55, 69 (1982) (Brennan, J., concurring); Oregon v. Mitchell, 400 U.S. 112, 285-86 (1970) (Stewart, J., concurring).

128. William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMM. 73 (1994) [hereinafter Cohen, *New State Citizens*]; William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMM. 9 (1984) [hereinafter Cohen, *Equal Treatment for Newcomers*].

129. Cohen, *New State Citizens*, *supra* note 128, at 79.

130. *Id.*

131. 60 U.S. (19 How.) 393 (1856).

nicely to support the right to migrate, with *Dred Scott* demonstrating why Congress passed the Citizenship Clause and *Slaughter-House* showing that even Justice Miller understood the right to migrate implications of Congress' action.

Dred Scott is probably best known for its holding that the Missouri Compromise was unconstitutional because the Court found that the right of property in slaves was guaranteed by the Constitution. What is less known, however, is that this holding was dicta because the Court had already held that the Circuit Court never had jurisdiction over the case in the first place. The Circuit Court did not have jurisdiction, according to Chief Justice Taney's majority opinion, because no person of African descent could ever be a citizen of the United States. Not being a citizen of the United States, Dred Scott therefore could not bring an action in federal court.

To understand this holding of *Dred Scott*, one must know something about antebellum citizenship law. Prior to the Fourteenth Amendment, the nature of citizenship was a confused and hotly-debated topic in the law. As Professor Harrison has written:

> The Comity Clause assumes that there is a law of state citizenship without saying what that law is, just as other provisions of the Constitution assume that there is a law of national citizenship without saying what it is . . . . This silence, and the importance of the issue for a variety of questions concerning slavery, made citizenship one of the most hotly contested legal questions in the decades preceding the Civil War.[132]

Holding an extreme but influential view were states' rights supporters such as Vice-President and Senator John C. Calhoun. Viewing the United States as only a confederation of sovereign states, Calhoun asserted that national citizenship was merely derivative of state citizenship.[133] In other words, a person had to be a state citizen before one could receive any national privileges. The Comity Clause, after all, does not refer to citizens of the United States, but rather to "Citizens of each State" who are entitled to the privileges and immunities of "Citizens in the several States." In his famous 1833 Senate debates with Daniel Webster, Calhoun acknowledged that a state citizen was entitled to the protection

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132. Harrison, *supra* note 116, at 1398 n.38.

133. *See generally* TRIBE, *supra* note 60, § 7-2.

of the Comity Clause, but he said, "[I]t is in this and no other sense that we are citizens of the United States."[134]

The Supreme Court largely adopted this constricted view of national citizenship in *Dred Scott*. Chief Justice Taney's opinion emphasized that through the Comity Clause, the Constitution "gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States."[135]

A citizen of state A was thus protected in state B not, strictly speaking, because he was a citizen of the United States, but because he was a citizen of state A. Without state citizenship, a person was at the mercy of whatever state in which he found himself. The Comity Clause, said the Court, does not apply to a person who, being the citizen of a State, migrates to another State:

> For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he is removed. And the State in which he resides may then, unquestionably, determine his *status* or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.[136]

Indeed, the Court declared that the Comity Clause "is confined to citizens of a State who are temporarily in another State without taking up their residence there."[137] *Dred Scott* is thus further evidence that although the Comity Clause may well support the right to travel, Justice O'Connor's argument that it also protects the right to migrate cannot be correct.

Dred Scott's theory of state citizenship, however, was not by itself sufficient to support the Court's judgment. If, after all, any state citizen was entitled to the protection of the Comity Clause, any African-American made a citizen by a free state would immediately gain the protection of the Comity Clause throughout the nation, including in slave states. Such a result was an anathema to the South and to Chief Justice Taney, who thus was forced to hold

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134. John C. Calhoun, *Speech on the Force Bill*, *in* 12 THE PAPERS OF JOHN C. CALHOUN 45, 79 (Clyde N. Wilson ed., 1979); *cf.* John C. Calhoun, Speech in Reply to Daniel Webster on the Force Bill, *id.* at 101, 116 ("[T]he people of the States are united under [the Constitution] as States and not as individuals.").

135. *Scott*, 60 U.S. (19 How.) at 406-07.

136. *Id.* at 422.

137. Scott v. Sanford, 60 U.S. (19 How.) 393, 422 (1856).

that even some state citizens might not receive the protection of the Comity Clause.

Taney reasoned that no state would have entered a union in which other states had the unlimited power to determine who the first state had to respect as citizens equal to its own citizens.[138] Indeed, Madison himself stated that the Constitution places the naturalization power with Congress to prevent one state from granting citizenship to people whom other states did not want to recognize as citizens.[139] The Court said states could therefore recognize any person as a citizen for the state's own purposes, but the only people who would get the protection of the Comity Clause were people who were considered citizens of the several states at the time of the Founding and their descendants.[140] In other words, even if a state recognized an African-American as a state citizen, the Comity Clause would not protect that citizen because African-Americans, according to the Court, were not considered citizens when the Constitution was adopted. Indeed, Taney went further, stating that even Congress did not have the "power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage . . . belongs to an inferior and subordinate class."[141]

After the Civil War, of course, this states' rights theory was decisively overruled by the Fourteenth Amendment. By defining who are the citizens of the United States and how state citizenship is established, the Citizenship Clause permanently refuted Calhoun and the *Dred Scott* Court. The first draft of the Fourteenth Amendment was proposed in February 13, 1866 by Representative John Bingham of Ohio. The language that ultimately became the Citizenship Clause, however, was added in an amendment proposed on May 30, 1866 by Senator Jacob Howard, a Republican from Michigan. Howard said his amendment "settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."[142] Howard noted that "[t]his has long been a desideratum in the jurisprudence and legislation of this country."[143]

Representative Thaddeus Stevens of Pennsylvania called Howard's amendment an "excellent amendment, long needed to settle conflicting decisions."[144] And Senator John Brooks Henderson, a Democrat from

138. *Id.* at 417-18.
139. THE FEDERALIST No. 42, at 270-71 (James Madison) (Clinton Rossiter ed., 1961).
140. *Scott*, 60 U.S. (19 How.) at 406-07.
141. *Id.* at 417.
142. Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).
143. *Id.*
144. *Id.* at 3148.

Missouri, said that Howard's amendment "makes plain only what has been rendered doubtful by the past action of the Government," by which he meant the *Dred Scott* decision.[145]

Indeed, the conventional interpretation of the Citizenship Clause is that it directly overrules *Dred Scott*.[146] The Court recognized this in *Slaughter-House*, stating that the Citizenship Clause allows persons to "be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States."[147]

If the Citizenship Clause thus reverses *Dred Scott*'s state citizenship rationale and makes state citizenship secondary to national citizenship, one can logically argue that the Citizenship Clause is the basis of the right to migrate. The Citizenship Clause, although not obliterating state boundaries, certainly made states less consequential, resembling departments of a national government more than independent sovereigns. If we are national citizens first and state citizens only based on the happenstance of where we reside, states no longer have the power to control who may become state citizens.

The Court in *Slaughter-House* appears to have accepted this implication of the Citizenship Clause even as Justice Miller's opinion simultaneously eviscerated the Privileges or Immunities Clause. Trying to defend the Court's position against the charge that it was gutting the Privileges or Immunities Clause, the Court cited the right to migrate as a privilege "*conferred* by the very article under consideration" and protected by the Privileges or Immunities Clause.[148] After the adoption of the Citizenship Clause, Justice Miller wrote, "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."[149]

Although *Dred Scott* and *Slaughter-House* are thus persuasive evidence that the right to migrate derives from the Citizenship Clause, the argument has at least two weaknesses. First, long before *Dred Scott*, the Supreme Court had considered and decided differently the issue of whether mere residence in a state creates state citizenship. The issue arose as early as 1798 in the context of proving diversity of citizenship for federal court jurisdiction. In *Bingham v.*

145. *Id.* at 3031.
146. *See, e.g.*, TRIBE, *supra* note 60, § 7-2; Harrison, *supra* note 116, at 1409 n.85.
147. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872) (emphasis added).
148. *Id.* at 80 (emphasis added).
149. *Id.* (emphasis added).

Cabot,[150] the Court dismissed the case because the plaintiffs' pleadings had stated only the parties' residences and not their state citizenships. The defendant argued (and the Court apparently agreed) that this was insufficient to create diversity jurisdiction because "citizenship is clearly not co-extensive with inhabitancy."[151]

By 1832, however, the Court had reversed its position. In *Gassies v. Ballon*,[152] Chief Justice Marshall held that asserting a party's residence was sufficient because "[a] citizen of the United States, residing in any state of the Union, is a citizen of that state." In his influential and roughly-contemporaneous *Commentaries on the Constitution*, Justice Story also wrote that "every person, who is a citizen of one state and removes into another, with the intention of taking up his residence and inhabitancy there, becomes *ipso facto* a citizen of the state where he resides . . . ."[153]

Although these sources may cast doubt on *Dred Scott* and our Citizenship Clause basis for the right to migrate, we should be careful not to put too much emphasis on the opinions of Chief Justice Marshall and Justice Story. That nationalists like Marshall and Story would relegate state citizenship to a secondary status should not be surprising, especially when one considers that Calhoun was at the very same time advancing his state supremacy theory. Marshall and Story may have won the first legal battles in the early 1800s, but the Calhoun and Taney view seems to have gained legal dominance by mid-century. It took a civil war to resolve the debate between the nationalists and the states' rights advocates, but that only emphasizes the importance of post-Civil War amendments like the Citizenship Clause.

The second problem with the Citizenship Clause thesis is that nothing in its legislative or ratification history suggests that it was specifically intended to overrule the state power to exclude paupers that was discussed above in connection with the Comity Clause.[154] Indeed, nine years after the Fourteenth Amendment was ratified, the Court in *Railroad Co. v. Husen* admitted that a state may use its police power to "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge . . . ."[155] This second difficulty can be addressed in one of two ways. One way would simply be to accept its force, maintaining that the Citizenship Clause establishes

150. 3 U.S. (3 Dall.) 382 (1798).

151. *Id.* at 382.

152. 31 U.S. (6 Pet.) 761, 762 (1832).

153. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1693 (1833).

154. *See generally* Berger, *supra* note 94, at 866-69.

155. 95 U.S. 465, 471 (1877).

the right to migrate but not the right of paupers to migrate. Although this approach may be textually rigorous, it would also have the unpleasant ramification that the law would be parceling out civil rights on the explicit basis of wealth.[156] Alternatively, the *Husen* Court's language could be dismissed as dicta. *Husen*, after all, involved a state's exclusion of cattle, not paupers, and the Court may simply have never considered the migration implications of the relatively new Citizenship Clause.

A third way, however, might also be possible. It would base the right of all citizens to migrate on the Citizenship Clause, but it would also incorporate the concerns that gave rise to a state's right to exclude paupers. This idea becomes more relevant in Part V of this Article, which discusses a judicially-manageable standard to implement the right to migrate. First, however, we must consider whether replacing *Shapiro* with a Citizenship Clause rationale can overcome stare decisis objections.

IV. STARE DECISIS CONSIDERATIONS

Even if *Shapiro* was flawed for the reasons discussed in Part II, overruling precedent requires more than just showing that a case was wrongly decided. The doctrine of stare decisis requires that courts have very good reasons before upsetting established precedent. Stare decisis is generally at its weakest, however, in constitutional cases because "correction through legislative action is practically impossible."[157] Indeed, between 1971 and 1992, the Court overruled 34 prior constitutional cases in whole or in part.[158] In its most recent thorough discussion of stare decisis, the Court suggested a number of situations that would justify overruling constitutional precedent.[159] One of these situations is where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[160]

Part IV of this Article argues that *Shapiro*'s ban on welfare waiting periods created an unintended race to the bottom in state AFDC benefits as states tried to avoid becoming "welfare magnets." This distressing fall in welfare benefits might alone justify overruling a constitutionally-flawed decision such as *Shapiro*.

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156. *Cf.* Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring) ("Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.").

157. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

158. Planned Parenthood v. Casey, 505 U.S. 833, 959 (1992) (Rehnquist, J., dissenting).

159. *See generally id.* at 853-68.

160. *Id.* at 855.

Adding even more urgency to the task, however, is the recent federal welfare reform legislation that threatens to accelerate the race to the bottom. This policy shift is a change in the underlying factual context and thus robs *Shapiro* of any stare decisis justification. In short, devolution to the states will make *Shapiro*'s bad rule into an intolerable one.

A. Welfare Benefits in a Federal System

1. Background on AFDC

The program that came to be called Aid to Families with Dependent Children was established as part of the Social Security Act of 1935. Prior to AFDC, all but two states had established their own "mothers' pensions" programs, and most of these programs included some residency requirement for newcomers.[161] The existence of these state programs made it difficult to nationalize this area of welfare completely, so the federal program for dependent children developed as an optional monetary supplement to individual state plans. States were given great latitude in setting benefit levels, although state plans received some federal scrutiny to assure minimum standards in investigation, amounts of grants, and administration.[162] As discussed above,[163] the federal government allowed states to retain a one year waiting period for newcomers. The federal government also agreed to pay two-thirds of the program costs to encourage legislatures to increase benefits. The idea was that the more generous a state was with its own money, the more federal dollars that state would get.

AFDC grew over the years into a program that provided over $22 billion in benefits in 1993.[164] Although total program expenditures rose over time, the average real monthly benefit did not. When considered in 1993 dollars, the average monthly benefit rose steadily from $344 in 1940 to $676 in 1970, only to start a rapid and continuing decline to $373 in 1993.[165] Why real benefits decreased since 1970 is a complex question, but, as discussed below, perhaps it is not coincidental that *Shapiro* was decided in 1969.

In recent years, approximately fifty-five percent of AFDC benefits were paid by the federal government with the remainder paid by the individual

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161. *See generally* PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD 84-118 (1990).

162. *Id.* at 99.

163. *See supra* note 12 and accompanying text.

164. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., OVERVIEW OF ENTITLEMENT PROGRAMS 325 (Comm. Print 1994).

165. *Id.*

states.[166] The percentage paid by the federal government varied by state and was inversely proportional to state per capita income (to encourage higher benefit levels in poorer states). Thus, the federal government paid over seventy-eight percent of Mississippi's AFDC bill in 1995 as compared with only fifty percent of New York's AFDC benefits.[167] Even with this targeted injection of federal money, however, AFDC benefits varied widely by state. Before the recent welfare reform legislation, for example, Mississippi granted a maximum monthly benefit of $120, while New York's Suffolk County gave $703, with the national median being $366.[168]

This interstate variation in welfare benefits is exaggerated, however, by two factors. First, federal food stamp benefits were based on total recipient income, which included AFDC benefits. A family receiving low AFDC benefits would therefore receive correspondingly higher food stamp benefits. After including food stamps, the $583 gap between Mississippi and Suffolk County narrows to $489. Second, none of these figures were adjusted for a state's cost of living.[169] According to Professor Paul Peterson, however, cost-of-living differences cannot fully explain the wide variation in welfare benefits. Even after including food stamps, the measured interstate variation in benefit levels was more than twice the interstate variation in cost of living.[170]

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)

The recent federal welfare reform legislation abolishes the AFDC entitlement and replaces it with block grants to the states. Under the new Temporary Assistance for Needy Families program, the federal contribution to a state's "family assistance program" is essentially fixed until 2002 at the level of the federal government's 1994 AFDC contribution to the state.[171] The states, meanwhile, must maintain their overall welfare expenditures at eighty percent or more of their 1994 levels.[172] In addition, the states must encourage welfare recipients to work. Welfare recipients are limited to a total of five years of assistance,[173] and by 2002, states must have fifty percent of the families receiving assistance either working or participating in some type of "work activity," such as job skills training or community service.[174]

166. *Id.* at 383.
167. *Id.* at 383-85.
168. *Id.* at 366-67.
169. *Id.*
170. PETERSON & ROM, *supra* note 161, at 12.
171. 42 U.S.C.A. § 603(a)(1) (Supp. 1997).
172. *Id.* § 609(a)(7).
173. *Id.* § 608(a)(7).
174. *Id.* § 607.

Except for these restrictions, states are essentially free to do whatever they want with their welfare programs. As Peter Edelman, a former assistant secretary in the Department of Health and Human Service under President Clinton and a critic of the PRWORA, summarizes:

> [T]he block grants mean that the states can now do almost anything they want—even provide no cash benefits at all. There is no requirement in the new law that the assistance provided to needy families be in the form of cash. States may contract out any or all of what they do to charitable, religious, or private organizations . . . . Or a state could delegate everything to the counties, since the law explicitly says that the program need not be run "in a uniform manner" throughout a state, and the counties could have varying benefit and program frameworks.[175]

In other words, welfare programs are now even less centralized than they were under AFDC. States have new latitude in deciding who gets how much assistance and for how long. States no longer gain federal dollars by increasing their state benefits, and benefit levels may dwindle as states allow spending to drop to eighty percent of 1994 levels and as inflation erodes the fixed-sum federal block grants.

The new law also contains a provision that allows states to treat interstate immigrants for one year under the welfare rules (including benefit amounts) of the states from which they have moved.[176] This provision thus explicitly authorizes state plans such as the California one that reached the Supreme Court in *Anderson*.

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175. Peter Edelman, *The Worst Thing Bill Clinton Has Done*, THE ATLANTIC MONTHLY, Mar. 1997, at 49. For a response to drastic scenarios envisioned by liberal critics of the legislation, see Olasky, *supra* note 3, at A14.

176. 42 U.S.C.A. § 604(c) (Supp. 1997) provides:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

3. Theoretical Advantages and Disadvantages of Decentralized Welfare[177]

As discussed above, welfare benefits vary greatly between states. One might reasonably suppose, therefore, that people deciding either whether to migrate or where to migrate would consider these differences in benefits. If so, the level of benefits that any particular state provides will affect the number of welfare recipients in other states. Each state's welfare policies, in other words, will have ramifications beyond that state's borders. Such "externalities" between states are actually quite common, and economists and others have written extensively about how to manage these externalities within a federal system like the United States. Therefore, before looking at the empirical evidence regarding whether welfare policies actually do affect migration, it will be helpful to place the issue within the broader theoretical context of externalities in federal systems of government.

If no externalities exist between jurisdictions, a decentralized federal system of government has many advantages.[178] Legal commentators and economists have often suggested, for example, that competition among states for new residents disciplines state governments just as competitive economic markets

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177. In analyzing the policy ramifications of *Shapiro* and the 1996 welfare law, this article employs, among other things, basic principles of economics. Law and economics distinguishes itself from other modes of legal analysis in two ways. First, law and economics assumes that people are rational, self-interested actors whose behavior is affected by the incentives created by legal rules. Second, law and economics analyzes legal rules by one criterion, allocative efficiency. Using these two fundamental premises, law and economics can provide disciplined, systematic analysis of legal rules by drawing upon the considerable tools of economic theory. *See generally* Thomas S. Ulen, *The Lessons of Law and Economics*, 2 J. LEGAL ECON. 103 (1992).

Without going into a full defense of law and economics, it is worth anticipating two possible objections to its methodology. First, the ample evidence showing that people are less than perfectly rational does not nullify economic analysis. *See* John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE. 669 (1996). One need not assume, for example, that welfare recipients engage in a fully-informed study of all 50 states' welfare benefits when deciding where to migrate in order to gain insight from economic analysis. Indeed, the needed rational behavior may be much less conscious, as when a family in a low-benefit state moves to another state for a reason unrelated to welfare but *stays* in the new state because the welfare benefits are more generous. Second, allocative efficiency does not exclude the consideration of other normative values. Although efficiency itself has a strong normative pull with its insistence that society's resources not be wasted, a legal decisionmaker can always balance efficiency against other normative concerns. Moreover, economic analysis can often incorporate other normative values. If society desires to redistribute wealth, for example, economic analysis can demonstrate how to redistribute most efficiently. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). For a thoughtful discussion of normative justifications for law and economics, see Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105 (1982).

178. *See generally* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994).

discipline firms.[179] If a state offers poor public services or restricts civil rights, that state will tend to lose residents and its tax base to other states that offer a better "product" to residents. Just as consumers in a perfectly competitive market are better off than consumers facing a monopolist, citizens are better off if states are forced to compete for the citizens' "business."

This competition among states would be desirable even if all citizens had identical preferences. But if citizens have different ideas about the optimal bundle of public services and civil rights, the argument for federalism only becomes stronger.[180] If some citizens favor a strong social safety net while others favor an individualistic *laissez-faire* regime, both groups can be satisfied if states are allowed to have different policies.

Finally, federalism allows states to function as "laboratories of democracy." In the famous words of Justice Brandeis, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[181] Whether states actually innovate much is a matter of some debate, but Professor Shapiro concludes that "there is no doubt that they have served that function" on many issues, including welfare reform.[182] Even as Congress and the President reached an agreement on welfare reform legislation, for example, "some of the most significant welfare changes contemplated by Congress . . . [were] already being tested at the state level."[183] And allowing states to experiment even more became the overriding theme of the recent federal welfare reform legislation. House Speaker Newt Gingrich, for example, argued that the Republican's welfare block grant proposal would "unleash 51 state experiments."[184]

These theoretical advantages of decentralized government are at least partially offset, however, when externalities exist between states. Just as government intervention is justified in private markets when individuals' actions confer benefits or impose costs on other individuals, externalities among states may justify coordination from higher governmental authority.[185] If pollution

179. *See, e.g.*, LeBoeuf, *supra* note 178, at 559-61; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

180. *See* WALLACE D. OATES, FISCAL FEDERALISM 11 (1972) ("A basic shortcoming of a unitary form of government is its probable insensitivity to varying preferences among the residents of the different communities.").

181. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

182. SHAPIRO, *supra* note 178, at 87-88.

183. Kenneth B. Noble, *Welfare Revamp, Halted in Capital, Proceeds Anyway*, N.Y. TIMES, Mar. 10, 1996, at 1.

184. Eliza Newlin Carney, *Taking Over*, NAT'L J., June 10, 1995, at 1382.

185. *See generally* LeBoeuf, *supra* note 178, at 567-73.

flows across state lines, for example, the polluting state will not regulate efficiently because it will not consider the negative externality that its emissions impose on other states. Alternatively, if individual states tried to provide national defense on their own, the amount of defense provided would be inefficiently low because no state would get credit for the positive externality its efforts bestowed on other states. Thus, if an externality exists, states find themselves in a "race to the bottom" in which each state tries to impose as many costs and confer as few benefits as possible on other states.[186]

As the defense example above demonstrates, externalities need not be as tangible as industrial pollution to justify national coordination. In fact, economists have explicitly modeled the externalities that exist between jurisdictions that try to redistribute wealth.[187] Charles Brown and Wallace Oates, for example, have constructed a particularly instructive model that demonstrates why a decentralized redistribution system will provide inefficiently low levels of redistribution. Although the details of the model are beyond the scope of this Article, its basic conclusions are quite relevant.

The model assumes 1) that the population is divided into two groups of people, the poor and the nonpoor, and 2) that the nonpoor want to redistribute wealth to the poor. With these two assumptions, the model explores how well the nonpoor will be able to accomplish the redistribution in a decentralized governmental system.[188] Assuming that poor households can migrate across state lines, any individual state will be hesitant to increase benefit levels for fear

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186. *See generally id.* at 578-79; Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233-35 (1992). Both LeBoeuf and Revesz correctly note that the "race to the bottom" argument is often mistakenly invoked in the absence of externalities. *Id.* Commentators often claim, for example, that national environmental regulation is needed (even where no interstate externalities exist) because states will compete to lower environmental standards in order to attract industry. If the states that get the business benefits also pay the environmental costs, however, national regulation would not increase efficiency.

187. *See, e.g.*, Charles C. Brown & Wallace E. Oates, *Assistance to the Poor in a Federal System*, 32 J. PUB. ECON. 307 (1987); CHARLES V. BROWN & P.M. JACKSON, PUBLIC SECTOR ECONOMICS 497-543 (2d ed. 1982).

188. The model admittedly makes a number of simplifying assumptions to make the model comprehensible. The authors note, however, that making the model more realistic would only strengthen the model's conclusions. *See* Brown & Oates, *supra* note 187, at 325-29. The model, for example, considers only how well the nonpoor are able to accomplish their redistributive goals. Factoring in the utility of the poor would only strengthen the conclusion that the amount of redistribution is too low. Similarly, the model assumes that the nonpoor are concerned only about the poor in their own jurisdiction. Assuming that the nonpoor in Massachusetts have some concern about the poor in Mississippi, however, again strengthens the conclusion that state benefit payments are insufficient.

that it will attract more poor households and drive away taxpaying households unwilling to pay the higher welfare costs.

This hesitancy will affect even the most generous and altruistic states which, though willing to redistribute to their own poor, are not willing to become welfare providers for the rest of the nation. In terms of externalities, a state willing to pay high benefits confers a positive externality on other states by taking on a share of their poor households. Because a generous state gets no credit for the benefits it confers, states engage in a race to the bottom in terms of their welfare programs. In short, no state wants to be the welfare magnet.

Brown and Oates thus conclude, based on their theoretical simulations, that "in the presence of mobility of the poor, *average* support payments are lower under a system of local poor relief than under a centralized system of assistance."[189] How much lower support payments are depends on a number of factors. The mobility of the poor, for example, will clearly affect benefit levels. The externality problem arose, of course, only because the poor could migrate to states with higher benefits, and Brown and Oates predictably conclude that "increased mobility reduces transfers in each jurisdiction."[190] The English Poor Laws, according to Brown and Oates, maintained a relatively successful system of purely local poor relief only by prohibiting migration.[191] In the United States, however, the poor are relatively mobile and are presumably more so after *Shapiro* abolished welfare residency requirements. A system of purely local poor relief in the United States would therefore struggle to maintain benefit levels.

AFDC, however, was not a system of local poor relief, but rather was a joint federal-state program that mitigated (but did not prevent) the race to the bottom. Indeed, AFDC's significant federal subsidies, which increased as the number of poor people in a state increased, are similar to the centralized welfare system that Brown and Oates (and Peterson and Rom) suggest as a remedy to the externality problem.

Nonetheless, AFDC was never a pure centralized system, and the PRWORA only decentralizes welfare benefits further. States now have even more latitude when setting benefit levels, so the welfare magnet phenomenon must still be considered a potential problem. Indeed, Professor Edelman forecasts trouble:

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189. *Id.* at 320.
190. *Id.*
191. *Id.* at 323-25.

> Given this framework [of the PRWORA], what can we predict will happen? No state will want to be a magnet for people from other states by virtue of a relatively generous benefit structure. This is common sense, unfortunately. As states seek to ensure that they are not more generous than their neighbors, they will try to make their benefit structures less, not more, attractive.[192]

All of this so far, however, has been mere theoretical speculation. Whether the race to the bottom is in reality a problem will depend on 1) whether the poor consider benefit levels in their migration decisions, and 2) whether state legislatures lower benefits in response to the mobility of the poor. These, of course, are questions that require empirical data for answers.

4. Empirical Evidence

Four relatively recent statistical studies have investigated these empirical questions.[193] Reviewing this literature, economist Robert Moffitt summarized that all four studies "show positive and significant effects of welfare on residential location and geographic mobility."[194] Indeed, Moffitt does not find these results surprising because "most long-distance migration is motivated by economic rather than non-economic considerations."[195]

To take one example, Peterson and Rom's complex statistical model finds that a state with high benefit levels will attract poor migrants and increase the state's poverty rate by 0.9 percentage points compared to a state with low benefits.[196] Moreover, Peterson and Rom's data also reveal that politicians react to this migration by cutting benefits. According to their model, "a state with a high welfare guarantee [relative to other states] at the beginning of our five-year period would, all else equal, slash its annual benefits by $1212 by the period's end."[197] Peterson and Rom thus summarize:

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192. Edelman, *supra* note 175, at 52. Edelman makes no mention of 42 U.S.C. § 604(c) which, as discussed below, might mitigate the race to the bottom. Edelman may either not know about the provision or think that the courts will find it unconstitutional under *Shapiro*.

193. *See* PETERSON & ROM, *supra* note 161, at 50-83; Rebecca Clark, Does Welfare Affect Migration? (1990) (unpublished manuscript, Urban Institute) (on file with author); Rebecca Blank, *The Effect of Welfare and Wage Levels on the Location Decisions of Female-Headed Households*, 24 J. URB. ECON. 186 (1988); Edward Gramlich & Deborah Laren, *Migration and Income Redistribution Responsibilities*, 19 J. HUM. RESOURCES 489 (1984).

194. Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LITERATURE 1, 34 (1992).

195. *Id.*

196. PETERSON & ROM, *supra* note 161, at 79.

197. *Id.* at 81.

> The research that we have reported is consistent with theoretical analyses showing that state and local governments in a federal system will tend to provide less income redistribution than a national government would. Each state government acts as if it prefers that welfare services should be provided by other governments and fears that its state will become attractive to poor people if it provides generous benefits.[198]

In fairness, Professor Moffitt does not think the empirical case is closed regarding welfare-induced migration. He cites methodological difficulties that make all of these studies less-than-perfect tests of the migration hypothesis.[199] He concludes that these studies are "suggestive but inconclusive."[200]

A Wisconsin study finished since Moffitt's review, however, also reports that benefit levels influence migration. According to the consulting firm study, twenty-nine percent of welfare recipients who recently migrated to southern Wisconsin from Chicago cited Wisconsin's higher welfare benefits as a reason for their migration.[201] Moreover, Moffitt does not consider the significance of the fact that while recent studies have uniformly shown a strong migration response to welfare benefits, pre-1970 studies did not.[202] Just as the fact that real AFDC benefits began to fall around 1970 suggests *Shapiro* was playing a role,[203] it is at least plausible to argue (and Peterson and Rom do argue)[204] that *Shapiro* is the cause of this newfound migration response. Welfare benefits may not have affected migration before *Shapiro* when states could deny benefits to newcomers for up to a year, but with benefits now immediately available to migrants, the level of benefits does seem to be affecting migration decisions.

Even if statistical evidence cannot prove that the poor migrate towards states with higher benefits, abundant anecdotal evidence suggests that legislatures act on that assumption. Peterson and Rom detail, for example, how even a traditionally progressive state like Wisconsin came to cut AFDC benefits in response to Governor Tommy Thompson's claim that Chicago's poor were

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198. *Id.* at 82-83.

199. Moffitt, *supra* note 194, at 34-36.

200. *Id.* at 56.

201. Rogers Worthington, *Study Finds Evidence Some View Wisconsin as a Welfare Magnet*, CHICAGO TRIB., May 23, 1995, at 4.

202. Moffitt, *supra* note 194, at 34.

203. *See supra* text accompanying notes 164-65.

204. PETERSON & ROM, *supra* note 161, at 17-19, 81, 151. They note, for instance, that although before 1970 welfare recipients made interstate moves less often than nonrecipients, by the mid-1970s welfare recipients were moving across state lines more frequently than nonrecipients.

migrating to Wisconsin's welfare magnet.[205] As Thompson himself recounts from his 1986 gubernatorial campaign against then-Governor Tony Earl: "In one of the debates, Tony Earl used a classic line: 'Tommy Thompson wants to reform welfare and make Wisconsin like Mississippi.' I came back immediately: 'With you in charge, we're attractin' all the people from Mississippi up here anyway.'"[206]

Consider also Connecticut Governor John Rowland, who claims that forty-eight percent of the 3000 new people on his state's welfare rolls in 1994 were new state residents.[207] Connecticut's recent move to lower AFDC benefits and to institute a two-tier benefit structure for new state residents should thus hardly come as a surprise. Or consider New Jersey Assemblyman Monroe Jay Lustbader, whose bill to lower new residents' welfare benefits for their first nine months recently came within one vote of final passage. "I have testimony," says Lustbader, "from township welfare officers who say they feel helpless because they have no way to stop [welfare shopping]—people just call up and say they think they could do better in New Jersey."[208]

Although these states' fears may be exaggerated, they can hardly be labeled irrational given the theoretical, statistical, and anecdotal evidence discussed above. And if one accepts the plausibility of the welfare magnet phenomenon, one also has to recognize the tradeoff between high welfare benefits and the mobility of the poor in a decentralized welfare system. High welfare benefits will simply be unattainable in a federal system if the poor are perfectly mobile. How one should balance high welfare benefits versus the mobility of the poor is by no means an easy policy question. *Shapiro*, however, constitutionalized that question by banning any limitation on mobility. In our decentralized welfare system, *Shapiro*'s holding—however well-intentioned—acted as the starter's gun in a race to the bottom.

One could, of course, stop the race to the bottom without limiting mobility, but only by completely nationalizing our welfare system. We would lose, however, the experimentation and other advantages of federalism discussed above. And in today's political climate where devolution of power to the states

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205. *Id.* at 24-49 ("Like its mascot, the badger, Wisconsin tenaciously defended its own but was reluctant to succor those from outside the family.").

206. Norman Atkins, *Governor Get-a-Job*, N.Y. TIMES MAG., Jan. 15, 1995, § 6, at 24.

207. ABC World News Tonight (ABC television broadcast, May 24, 1995); *see also* Christopher Keating, *Rowland Welfare Plan Likely to Face Federal Rejection*, HARTFORD COURANT, Oct. 28, 1995, at A3.

208. Iver Peterson, *Do Poor Shop for Best Welfare Deal? New Jersey Officials Say Yes and No*, N.Y. TIMES, Dec. 9, 1995, at 29.

seems like an irresistible trend, it hardly seems imaginable that welfare could be nationalized.

The policy choices we are left with are summarized below:

	Economic Mobility	*High benefits*	*Decentralization*
Option 1	•	•	
Option 2	•		•
Option 3		•	•

Of these three desirable features for our welfare system—high benefits, mobility, and decentralization—only two are attainable at any one time. *Shapiro*, for example, requires that we protect economic mobility, but that forces us to choose between high benefits (Option 1) and decentralization (Option 2). Decentralization does not seem negotiable in the present political landscape, so unless *Shapiro* is overruled, we are stuck in Option 2 and state benefits will continue to be low. *Shapiro* thus has bought mobility for the poor, but only at the high cost of stable welfare benefits.

More importantly, federal welfare reform threatens to turn the race to the bottom into a free fall because block grants remove much of the centralization that has tempered the decrease in welfare benefits. First, states are no longer rewarded with federal dollars for providing high welfare benefits. The block grants are in fixed amounts, and states now may even *lower* their welfare spending to eighty percent of 1994 levels and still get the same number of federal dollars. Second, the fixed-sum grants do not increase as the number of poor people in a state increases. In the past, a state that attracted new poor migrants had to pay more out of its own treasury, but it also received more assistance from the federal government. Under block grants, that extra money disappears.[209] As Professor Peterson testified to Congress, "If block grants

209. The PRWORA does make some adjustment in the block grants for increases in population, but the extra money is only imperfectly tied to the number of poor people in a state. Section 603(a)(3) of Title 42 increases the family assistance grant to a state if 1) the state's population growth rate is above the national average, *and* 2) the state's welfare spending per poor person is below the national average. A state faced with an influx of poor interstate immigrants might well not receive extra federal money because 1) the new immigrants may not push the state's population growth rate above the national average, or 2) benefit levels in the state may simply be too high. Most states will therefore not be able to count on extra federal money for new immigrants, and high-benefit states will *never* get the supplemental funding.

are enacted, the cost of becoming a welfare magnet will double."[210] Third, by allowing states to set time limits on welfare benefits, current welfare reform legislation gives states a whole new dimension on which they can compete to have the least-attractive benefit package. Until now, states may have competed to lower benefit levels, but they have not been allowed to compete on benefit duration. Now, however, states may implement time limitations on welfare assistance, and it seems indisputable that a state's decision on the issue will be affected by the desire not to be seen as a welfare haven. Any state giving benefits for a longer time than the minimum will be under immediate pressure to shorten its time limit. Indeed, even before the new federal law, Connecticut used a special federal waiver to impose a twenty-one month limit on AFDC benefits.[211]

Shapiro may also hamper the experimentation that welfare reform is intended to promote. The time limits that states may impose, for example, are ideally intended to test what it takes to get welfare recipients off welfare. This experimentation will be foiled, however, if after state A kicks a long-term welfare recipient off welfare that person can migrate to state B and immediately receive another few years worth of benefits. If allowed, this circumvention of time limits and work requirements would make welfare reform toothless.

This potential "state jumping" to avoid time limits could be stopped, however, with a national rule. Congress could require that after a certain number of years on welfare in any state, a person is ineligible for benefits anywhere. Thus, if a welfare recipient used up his benefits in state A and moved to state B, state B could refuse to pay benefits—not because the migrant is a new resident—but because he received his allotment of benefits in state A. In other words, the denial of benefits would not violate *Shapiro* because it would have nothing to do with the welfare recipient's migration. Congress included such a limitation in its recent legislation, forbidding assistance to an adult "who has received assistance under *any* State program funded under this part . . . for 60 months."[212]

Even this solution poses problems, however, because states are free to impose time limits shorter than the five-year national ceiling. The national time limit may soon be considered too long because people will still be able to jump from state to state at least a couple of times. The five-year national ceiling, for example, would allow a person to dodge a state three-year limit by moving to

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210. *Testimony Before the Senate Finance Committee*, 104th Cong. (1995) (statement of Paul E. Peterson).

211. Jennifer Preston, *Region's Governors Draw Own Blueprint for Welfare*, N.Y. TIMES, Feb. 17, 1996, at 1, 29.

212. 42 U.S.C.A. § 608(a)(1)(B) (Supp. 1997) (emphasis added).

another state where the person could get benefits for up to another two years. If this state-jumping is viewed as a problem, Congress will be under pressure to shorten the national time limit. Such a shorter national time limit could not only be quite harsh, but would also prohibit states from experimenting with longer, more generous time limits. Setting time limits is obviously a difficult policy question for which no one has an obvious answer. The point here, however, is that *Shapiro* forces us to choose between either an ineffectively-long uniform national time limit or a shorter, potentially-harsh national limit that narrows the room for state experimentation. *Shapiro*, in other words, forbids a compromise solution in which 1) states would be free to experiment with time limits of longer duration, but 2) the experiments would be effective because residency requirements would prevent recipients from dodging the limits.

The new welfare law contains an obvious solution to all of these problems, but *Shapiro* may well preclude it from having its beneficial effect. The PRWORA contains a provision that allows states to treat interstate migrants for one year as they would have been treated in their prior states.[213] This provision would lessen the pressure on state legislatures to cut benefits because recent migrants would not receive their new state's benefits for a full year after arrival. Moreover, welfare recipients would not be able to avoid a state time limit by moving because other states could honor the cutoff in benefits for a full year. This solution, however, is akin to the California statute at issue in *Anderson*, which Part II of this Article concluded was of doubtful constitutionality under *Shapiro*.[214] Although the federal provision is potentially distinguishable because Congress (and not a state) passed it, *Shapiro* held that Congress may not authorize a state to violate the Equal Protection Clause.[215] *Shapiro*, therefore, stands in the way of stopping the race to the bottom and promoting effective state experimentation.

In sum, *Shapiro* sent welfare benefits falling because of the race to the bottom that it created. Although these consequences may have been tolerable in an era of relatively centralized welfare, the political reality today promises a whole new cycle of welfare cutbacks. States will soon compete to have the strictest time limits, and states will have new incentives to keep benefits low because federal assistance will not vary with the number of poor in a state. Moreover, even the experimentation that welfare reform envisions will be hampered by the ability of recipients to migrate and avoid state time limits. This new factual context makes it time to overrule a decision that was wrongly decided in the first place.

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213. *See supra* note 176 and accompanying text.
214. *See supra* text accompanying notes 72-79.
215. Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

V. CONSTRUCTING A CITIZENSHIP CLAUSE JURISPRUDENCE

If *Shapiro* was wrong and the consequent race to the bottom justifies overruling it, the question remains what to replace it with. Part III.D argued that the Citizenship Clause should be the basis for the right to migrate, but identifying a textual source for a right unfortunately does not always spell out the details of how courts should enforce that right. This final section of the Article is admittedly the most speculative, but it is intended only to suggest one possible alternative to *Shapiro*'s confused framework.

Professor Cohen, who also argues that the Citizenship Clause is the basis for the right to migrate, has suggested that it be unconstitutional for a state "to deny benefits to new citizens that are extended to other citizens similarly situated —subject only to reasonable assurances that claims of new residence are bona fide."[216] This standard would essentially be the same as making newcomers a suspect class, as suggested by Professor McCoy. And indeed, if the Citizenship Clause truly makes national citizenship paramount, there is a certain logic to forcing states to treat all national citizens equally. Prohibiting discrimination against migrants also has the advantage of providing a clear bright-line rule for courts to apply, and it avoids *Shapiro*'s nebulous penalty analysis. Nonetheless, such a standard ignores the possibility that the states retained the power to exclude paupers even after the Fourteenth Amendment. Moreover, such a standard would have the side effect of perpetuating the race to the bottom in welfare benefits.

Adopting a more flexible balancing test, however, would pose its own problems. More specifically, any test other than a bright-line rule would be difficult to manage judicially. If states were allowed to withhold welfare benefits from migrants, for example, how long could the states treat the new residents differently? Is one year too long? If so, what about ten months? And how differently could states treat the new residents during that time? Could they deny *all* benefits for some period of time? And would a balancing test allow states to discriminate against newcomers in the provision of public services other than welfare? Could new residents, for instance, be charged more for fire protection?

To sort out these concerns and construct a textually-sound, judicially-manageable framework for the right to migrate, two other areas of constitutional doctrine are helpful. First, the unconstitutional conditions doctrine can provide some guidance in separating state statutes that deny benefits to preserve the benefit program itself from state statutes that discriminate against newcomers

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216. Cohen, *New State Citizens*, *supra* note 128, at 79.

only to keep outsiders away. Second, the idea of constitutional common law may provide a useful way to prevent the courts from becoming bogged down with implementing the right to migrate.

A. Incorporating Germaneness into Right to Migrate Analysis

As discussed in Part III.D, the right to migrate should be based upon the Citizenship Clause of the Fourteenth Amendment. One of the problems with this argument, however, was that after the Fourteenth Amendment the Supreme Court declared in dicta that states still had the right to exclude "paupers . . . and persons likely to become a public charge." A strict reading of this language would thus give states the power not only to deny benefits to poor migrants but to exclude them from entry altogether. If we interpret this power, however, in light of its underlying purpose, a more generous interpretation of the right to migrate becomes possible.

As Raoul Berger recounts from the common law history of residence requirements, the Elizabethan Poor Law was premised on the belief that local responsibility for the poor was best.[217] Brown and Oates also describe how efforts to nationalize English public assistance were resisted because "[l]ocal experience and direct contact with poor persons were seen as necessary to restrict assistance to the truly deserved poor."[218] If local communities were in charge of poor relief, however, each community needed some assurance that all of the other communities were doing their fair share.

The common law thus allowed communities to prevent the migration and settling of paupers from other communities. Berger cites one 1629 English case, for example, in which the Judges of Assize at Lancaster upheld the ability of Manchester to exclude migrant paupers. The court stated that whereas the Manchester inhabitants

> from time to time have made great provisions for the poor of said town which good actions and the want of execution of some convenient course to restrain poor people, that come from several places to inhabit and in short time chargeable unto the said town, has been such a motive and invitation of strangers that are poor and weak

217. *See* Berger, *supra* note 94, at 855.
218. Brown & Oates, *supra* note 187, at 325.

> in estate as the town is at this present so pestered and overburdened as the native poor is wronged . . . .[219]

Seventeenth century England thus was well aware of the race to the bottom and how it can "wrong" the "native poor." Unlike modern America, however, the English put a stop to the race by allowing the exclusion of paupers.

Viewed in this light, the power of states to exclude paupers was primarily a means to limit the race to the bottom in public assistance. An entirely decentralized system of welfare like that in England and nineteenth century America may have required an absolute ban on migration by the poor migrating to prevent a race to the bottom. Given our modern semi-centralized system of welfare, such a prohibition certainly is not necessary. But as long as our welfare system remains at least partly the responsibility of the states, some limitation on the right to migrate may be necessary to preserve welfare benefits themselves.

This reasoning dovetails nicely with unconstitutional conditions doctrine and particularly with the use of germaneness as a baseline within that doctrine. Unconstitutional conditions doctrine, of course, deals with how the Constitution limits government discretion in allocating government benefits. Historically, constitutional doctrine rarely had to address these issues until the twentieth century because government benefits before then were so limited. If we start from the premise, however, that the Constitution's restraints on government are justified primarily because of the government's monopoly on the legitimate use of force vis-à-vis any individual,[220] unconstitutional conditions doctrine follows quite naturally once one recognizes that government can exploit this monopoly not only through imprisonment and taxation but also through selective allocation of government benefits.

A government, for example, that confiscates all property but gives it back only to those who speak in favor of the government could place as much or more pressure on the right of free speech as a government that makes certain speech criminally punishable.[221] In Professor Kreimer's phraseology, unconstitutional conditions doctrine attempts to take the Constitution's "negative

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219. Berger, *supra* note 94, at 855-56 (quoting Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 178 (1955)).

220. *See* Kreimer, *supra* note 24, at 1296.

221. Professor Romberg explains more generally:

> The government can gather wealth and power virtually without limit, so long as it is careful to avoid constitutionally protected areas when it is acting directly. The government can then trade back the excess wealth and power it has gathered in exchange for access to those constitutionally protected areas.

Romberg, *supra* note 19, at 1069-70.

rights" against physical coercion and apply them to modern America's "positive state" that can coerce by withholding benefits as well.[222]

The difficulty comes, however, in trying to decide when government conditions on benefits actually infringe upon constitutionally-protected rights. That question requires some benchmark against which to judge conditioned benefits. In the abortion context, for example, does the government's failure to pay for abortions under Medicaid infringe upon a woman's constitutionally protected right to choose or is it merely a permissible spending decision by the government?[223] Numerous commentators have attempted to specify proper baselines for distinguishing conditions on benefits that are permissible from those that are unconstitutional.[224]

Among the most prominent and coherent theories is Professor Kreimer's. Kreimer premises his theory on the notion that constitutional rights seek to protect individual choices. An allocation of some benefit can therefore be judged by how that allocation affects the range of choices available to a person. Threats, according to Professor Kreimer, are "allocations that make a citizen worse off than she otherwise would be because of her exercise of a constitutional right."[225] Offers, meanwhile, are allocations that expand a citizen's range of options, leaving her better off. Kreimer argues that threats should be subject to constitutional constraints while offers generally should not be.

The obvious difficulty, as Kreimer recognizes, is how to "specify an appropriate baseline against which to determine whether the proposed allocation improves or worsens the citizen's situation."[226] In other words, if we want to judge whether a person is better or worse off after a government allocation, we have to know how the person would have fared in the normal course of events had the government not acted. For the Constitution's negative rights, providing a baseline is not hard. A fine on churchgoers, for example, is an easy case because we assume that in the normal course of events people would not pay a tax for going to church absent government action. For positive rights, however, the issue becomes challenging. If the government provides national health care, for example, but refuses to pay for abortion services, are recipients

222. Kreimer, *supra* note 24, at 1295.

223. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding federal statute denying federal Medicaid benefits for some medically necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding state regulation denying Medicaid benefits for nontherapeutic abortions).

224. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Baker, *supra* note 29.

225. Kreimer, *supra* note 24, at 1300-01.

226. *Id.* at 1301.

better or worse off? On the one hand, the provision of some health coverage appears to be an improvement over no coverage at all. But, if the government requires high taxes to finance the coverage, people may be left with less money to exercise their constitutionally-protected right to an abortion than if the government had left health care to the private market. The government, in other words, would have constrained people's choices and left them worse off in terms of their ability to exercise their constitutional rights.

Kreimer suggests three baselines to be used as the "normal course of events" against which we can judge government actions. One of these baselines—what Kreimer calls "prediction"—is particularly relevant for right to migrate analysis. Under this baseline, the normal course of events "is the course of events that would follow if the government could not impose the condition in question, or could not take the exercise of constitutional rights into account."[227] In other words, would the government provide the benefit if it may not impose the condition in question? If the government would provide the benefit anyway, attaching a condition to the benefit is like threatening to make the citizen worse off unless he accepts the condition. If, however, the government would never provide the benefit without the condition, the citizen is made no worse off by being offered the benefit with the condition.

This baseline, often called germaneness, is suggested by a number of commentators other than Kreimer and is often implicitly used by the Court itself.[228] Professor Romberg, for example, argues that the "germaneness inquiry smokes out those conditions that the government imposes simply for the purpose of pressuring a constitutional right."[229] Conditioning welfare benefits on giving up the right to practice religion, for example, is clearly not germane. On the other hand, government agencies could not run if employees were free to exercise the same free speech rights as protesters in the street, so requiring people to give up some of their free speech rights in exchange for a government paycheck would be germane. In short, says Professor Romberg, "If the justification for a condition must be linked to and proportional to the reason for denying the benefit in the absence of the condition, the government is precluded from leveraging its power over economics and social welfare into constitutionally protected areas."[230]

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227. *Id.* at 1372.

228. *See, e.g.*, Romberg, *supra* note 19, at 1084-87. "Germaneness requires that a condition placed on a benefit be reasonably necessary in order for the government to offer the benefit at all." *Id.* at 1084; Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 291-92 (1989) ("[W]here [a citizen] would 'otherwise be' means the level of benefits or burdens that the government would confer upon her if it were not permitted to attach to its proposal the condition to which she objects.").

229. Romberg, *supra* note 19, at 1085.

230. *Id.*

In a number of contexts, the Court seems to recognize, at least implicitly, the power of this germaneness analysis. In a recent Takings Clause case, for example, the Court prohibited municipalities from demanding any property interests from property owners seeking development permits unless the property interests are roughly proportional to the public costs imposed by the developments.[231] In germaneness terms, the Court was saying that municipalities would normally approve development permits if the owners pay for any costs imposed on the public. Any extra concession demanded by municipalities, however, is simply extortion using the government's monopoly power. Similarly, modern Comity Clause analysis also reflects germaneness considerations. The Court's "substantial reason" test is a flexible standard that permits discrimination against non-citizens but only where the discrimination is reasonably related to a peculiar "evil" caused by the non-citizens.[232] Finally, germaneness has to be the reason why many government user fees and service charges are not unconstitutional. No one argues, for example, that it would infringe upon abortion rights for a state hospital to charge a reasonable fee for the abortions it provides. The fee is distinguishable from a fine or tax on abortion, however, only because it is germane. That is, if the state could not charge the fee, the state presumably would not provide the service at all. Similarly, whereas a state would violate the right to travel by levying a tax on people entering and exiting the state, presumably no one would argue that a state could not levy a toll to finance a bridge that connects two states. Again, germaneness is all that distinguishes the tax from the toll.

The obvious weakness of the germaneness baseline is, in Professor Kreimer's words, that it "gets the courts into the risky business of predicting what the government would do, and the courts' normative vision of the public interest will inevitably intrude."[233] For many government benefits, it is far from clear what the government would do if it were not allowed to impose certain conditions.

In the case of the right to migrate, however, the counterfactual analysis is much easier because states have not been allowed to impose residency requirements for the past twenty-eight years. And during that time we have seen that states have not provided the same of level of benefits as they did before *Shapiro*. Without the ability to impose residency conditions on welfare benefits, states have simply reduced benefits to avoid becoming welfare magnets. The germaneness inquiry therefore suggests that some residency conditions should not be considered unconstitutional. More specifically, to the

231. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994).
232. TRIBE, *supra* note 60, § 6-33.
233. Kreimer, *supra* note 24, at 1373.

extent that any residency condition allows states to maintain higher welfare benefits, that condition should be constitutional.

B. Finding a Judicially-Manageable Standard to Implement the Right to Migrate

As discussed above, welfare benefits were maintained in Anglo-American history through the common law tradition that allowed communities to restrict the migration of the poor. Modern germaneness analysis also suggests that some limitations on migration would be justified to preserve welfare benefits today. So under either a constitutional theory based on historical and traditional practice[234] or a theory based on the more abstract unconstitutional conditions analysis, states should be permitted to impose some residency requirements for welfare benefits.

Although germaneness analysis seems vital to Citizenship Clause jurisprudence, asking courts to judge the germaneness of numerous state residence requirements may not be a good idea. The Supreme Court has traditionally been reluctant to employ an intermediate level of scrutiny because of the inherent indeterminacy and manipulability of such a test. Instead, the Court has employed a two-tier categorical approach that ostensibly precludes judicial manipulation—virtually no statute survives strict scrutiny and virtually all statutes pass rational basis scrutiny. Making courts determine the germaneness of every state residency condition, however, would require courts to use an intermediate scrutiny balancing test and would force courts to draw artificial lines based on fact-finding that courts are ill-suited to do. For example, is a ninety day waiting period for benefits germane? What if a state gives benefits immediately to new residents but only at a reduced rate for six months? Or how about a state like California that wants to give migrants the same level of benefits they would have received in their prior states? And once a court has ruled on a specific state requirement, is the court's holding permanently constitutionalized even as the welfare system becomes more or less centralized?

A better approach to finding a judicially-manageable standard is to return to the text of the Fourteenth Amendment itself. The Fourteenth Amendment was passed, of course, as a limitation on the power of states, not the federal

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234. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion of Scalia, J.).

government.[235] The text of the amendment speaks in terms of what a *state* may not do, and Section 5 grants to Congress the "power to enforce, by appropriate legislation, the provisions of this article."[236] Although the Court has extended the Equal Protection Clause's scope to the federal government through the Fifth Amendment's Due Process Clause,[237] the Court has never suggested that the Citizenship Clause limits federal power. Instead, the Citizenship Clause places national citizenship outside the realm of state manipulation and makes state citizenship contingent on mere residency. Admittedly, the fact that the Citizenship Clause defines state citizenship suggests that states may still make some distinctions between their own citizens and citizens of other states. But, in the words of Professor Cohen, "One aspect of full sovereignty denied to the states is the power to determine membership in the community."[238]

The focus of constitutional doctrine should therefore be on state—not federal—laws, and it should particularly be on those state laws that treat new residents differently than longtime citizens. Indeed, this was the approach taken by Justice Harlan in his *Shapiro* dissent. Harlan argued that the Privileges or Immunities Clause prohibited state interference with rights that arise "out of the relationship of United States citizens to the national government."[239] State welfare waiting periods could therefore infringe on the right to migrate, but

> [t]his kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not), Congress has full power to define the relationship between citizens and the Federal Government.[240]

Prohibiting any state residency requirements (except to prove bona fide residence) would thus be faithful to the Fourteenth Amendment and would go a long way towards making the right to migrate judicially-manageable. Any state discrimination against newcomers would be per se unconstitutional unless Congress specifically authorized it. The number of right to migrate challenges

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235. *Cf.* TRIBE, *supra* note 60, § 7-2 ("The fourteenth amendment, in § 1 . . . made state citizenship derivative of national citizenship and transferred to the Federal Government a portion of each state's control over civil and political rights.").

236. U.S. CONST. amend. XIV, § 5.

237. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

238. Cohen, *Equal Treatment for Newcomers*, *supra* note 128, at 17.

239. Shapiro v. Thompson, 394 U.S. 618, 667 (1967) (Harlan, J., dissenting) (quoting Hague v. CIO, 307 U.S. 496, 520 (1939) (Stone, J., concurring)).

240. *Shapiro*, 394 U.S. at 668.

would therefore be limited, and Congress would be free to give states at least some latitude to impose residence requirements.[241]

Congress' authority to allow residence requirements would not necessarily be unfettered, however. Justice Harlan argued that interstate travel, like international travel, was a liberty protected by Fifth Amendment Due Process.[242] This substantive due process protection might be justified, for example, on process-based grounds because the right of exit from any jurisdiction is, like the right of voice, a safeguard against government abuse and thus deserving of some constitutional protection.[243] A congressional authorization to impose residence requirements that went beyond all bounds of germaneness would therefore be unconstitutional. Alternatively, if one views substantive due process review as too contrived or too intrusive, one could simply bite the bullet and leave the right to migrate in the exclusive control of national political processes.[244]

Is there any precedent, however, for such extreme deference to Congress in matters of constitutional law? How could the Court possibly declare state residency requirements unconstitutional and then effectively allow Congress to overrule it by authorizing such requirements? Professor Henry Monaghan has argued that such an arrangement is not nearly as strange as it might first seem.[245] In fact, Monaghan argues that much of constitutional doctrine is explicable only as judicially created "substantive, procedural, and remedial rules

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241. This proposed framework would also apply to residence requirements for benefits other than welfare. Consider, for example, a waiting period for in-state tuition at a state university. Such a waiting period would be per se unconstitutional unless either 1) Congress authorized states to impose such limits, 2) or the state could justify the waiting period as a test of *bona fide* residence. *Cf.* Cohen, *Equal Treatment for Newcomers*, *supra* note 128, at 18-19. Given the extreme mobility of college students and the often large monetary benefit at stake, such a waiting period might well be appropriate—not as distinction among state citizens based on length of residence but as a test of who actually qualifies as a resident (and therefore as a citizen). *See generally* Martinez v. Bynum, 461 U.S. 321, 330-31 (1983) (upholding *bona fide* residence requirement and defining "residence" as physical presence *with an intention to remain*).

242. *Shapiro*, 394 U.S. at 669-71.

243. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992) (analyzing the right of exit as a bulwark against government exploitation); *see generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

244. *Cf.* Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting).

> [I]t is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.

Id.

245. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."[246]

How else, for example, can we explain dormant Commerce Clause jurisprudence, in which courts strike down state regulations inconsistent with free commerce but in which Congress has the power to overrule the courts' decisions?[247] "[T]he most satisfactory explanation," says Monaghan, "is that the Supreme Court is fashioning federal common law on the authority of the commerce clause."[248] Considering the right to migrate's close connection with the Commerce Clause,[249] creating constitutional common law for the right to migrate seems like a natural extension of the principle. Both the Commerce Clause and the Citizenship Clause, for instance, are assertions of federal power to bind the states together into one Union. State legislation that interferes with the unity of the nation is therefore suspect under both clauses. And in both commerce and migration, Congress has both the incentive and the ability to rise above the parochialism of the individual states and prohibit state interference not in the national interest.

One might distinguish the two clauses because the Commerce Clause is a grant of plenary national legislative authority and is not conventionally assumed to protect civil liberty as the Citizenship Clause does. Monaghan points out, however, that the Court has fashioned federal common law even where civil liberties are concerned.[250] The Court has indicated, for example, that *Miranda* warnings are only prophylactic and not constitutionally compelled. The *Miranda* Court stated that it could accept other legislative schemes that implement the underlying Fifth Amendment guarantees.[251] Furthermore, Monaghan persuasively argues that the exclusionary rule, *Bivens* actions, and many procedural due process holdings are also common law doctrines subject to legislative revision.

Moreover, fashioning a federal common law that denies states the power to discriminate against newcomers but gives Congress at least some latitude would fit in well with the theory of constitutional common law as developed by Monaghan and other commentators. The Citizenship Clause and Section 5 of the Fourteenth Amendment clearly make the right to migrate an area where, in

246. *Id.* at 2-3.

247. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (recognizing congressional power to overrule dormant Commerce Clause decisions).

248. Monaghan, *supra* note 245, at 17.

249. *See supra* text accompanying notes 80-90.

250. Monaghan, *supra* note 245, at 18-26.

251. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

the words of Professor Field, "there has been a federal decision . . . to assume responsibility for lawmaking."[252] Furthermore, regarding the race to the bottom, Congress has a "special ability to develop and consider the factual basis" of the problem and to make "finely tuned distinctions . . . in a manner not generally thought open to a court"—two of Monaghan's justifications for constitutional common law.[253] And the right to migrate exemplifies a situation where, in the words of Professor Meltzer, a "refusal to engage in such lawmaking threatens either the improvident constitutionalization of particular implementing rules (thereby imposing an inflexible regime upon Congress and the states), or the subjection of important national interests to state rules that impair federal policy."[254] *Shapiro* has shown the potential consequences of improvident constitutionalization, but the common law framework proposed here would avoid such extremes while still preserving a constitutional right to migrate.

VI. CONCLUSION

Shapiro v. Thompson stands as an exemplar of the Warren Court's judicial excesses. Convinced that the normal political processes were not protecting the poor, the Court dispensed with any need to consult the text of the Constitution. Instead, the Court forged into constitutional doctrine a policy that upset a centuries-old political accommodation that had, in fact, preserved welfare benefits against the downward pressure of interjurisdictional competition. Although possibly motivated by the honorable intention of helping the poor, the Court has unwittingly precipitated a welfare race to the bottom. *Shapiro*'s inflexible regime meant that lowering benefits was the only rational policy remaining for states operating in a decentralized welfare system. In today's era of further devolution to the states, *Shapiro*'s regime has become untenable.

The right to migrate doctrine should therefore be refounded upon the Citizenship Clause of the Fourteenth Amendment. Although the germaneness inquiry suggested by this Article may not be judicially-manageable, a federal common law prohibiting state interference unless authorized by Congress would obviate much of the need for judicial review. Only if Congress authorized states to implement residence requirements far beyond the bounds of germaneness would the Court arguably have to step in and define what is germane. The court challenges that will inevitably accompany current federal and state welfare reform plans present the perfect opportunity to place the right to migrate on a

252. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 979-80 (1986).

253. Monaghan, *supra* note 245, at 28-29.

254. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1173-74 (1986).

surer textual footing and to rescue the poor from *Shapiro*'s vicious race to the bottom.