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Etudiants Sans Frontières: Out-of-State Tuition, The Right to Travel, and the European Union

John J. Garman*

> The medieval city was the classic type of closed town, a self-sufficient unit, an exclusive Lilliputian native land. Crossing its ramparts was like crossing one of the still serious frontiers in the world today. You were free to thumb your nose at your neighbor from the other side of the barrier. He could not touch you. The peasant who uprooted himself from his land and arrived in the town was immediately another man. He was free—or rather he had abandoned a known and hated servitude for another, not always guessing the extent of it beforehand. But this mattered little. If the town had adopted him, he could snap his fingers when his lord called for him.[1]

I. Introduction

This article will address the United States and European Union law relating to the free movement of persons, with special attention to the rights of students to study in other states without tuition discrimination. Free movement is guaranteed by several provisions in the European Union treaties[2] and by a number of United States Supreme Court decisions interpreting Article IV and Amendment Fourteen of the Constitution of the United States. For the purposes of this paper, the term "free movement" as applied in the European Union will refer to the

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1. FERNAND BRAUDEL, IN CAPITALISM AND MATERIAL LIFE 1400-1800, 402-403 (Miriam Kochan trans. 1967).

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 37 I.L.M 56 (1998) [hereinafter EC Treaty]. The provisions that deal with the free movement of people are in Title III, "Free Movement of Persons, Services and Capital."

freedom of European Union citizens to travel, live and work within other European Union member states. As applied to United States law, the term "free movement" or "the right to travel" will refer to the right of persons holding United States citizenship to travel, live and work, and study in different states.

First, the article analyzes the development and current status of the right to travel, especially in light of the United States Supreme Court's 1999 decision in *Saenz v. Roe*.[3] The development of the European Union's freedom of movement of persons is similarly described. Finally, the article argues that the United States should adopt the European Union's policy encouraging students to travel outside of their home member-state to attend university, rather than the current discrimination against out-of-state students.

II. Overview of Law of Free Movement

A. *Right To Interstate Travel in the United States*

1. Sources of the Right

The constitutional basis for the freedom of interstate travel in the United States is less clear than the explicit provisions for the free movement of persons in the European Union treaties. Because the United States Constitution does not mention a "right to travel,"[4] a direct reference to the document itself is unavailable. Notwithstanding this handicap, federal constitutional jurisprudence has, since the beginning of the Republic, recognized this right of citizens to move freely from one state to another. As discussed in detail in succeeding sections of this paper, the United States Supreme Court has tapped one or more of a number of provisions of the Constitution to serve as the foundation for a citizen's right to travel interstate.[5] Which provision or set of provisions the Court chooses as the source of the right to cross over from one state to another seems to depend upon the circumstances under which the right is demanded.

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

4. Some have speculated that the right was so fundamental a part of our Nation as it was conceived, that specific mention of it was unnecessary. *See, e.g.*, United States v. Guest, 383 U.S. 745, 758 (1966).

5. "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution." Williams v. Fears, 179 U.S. 270, 274 (1900).

Article I, Section 8 of the United States Constitution states:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .—And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[6]

Roughly paralleling the European notion that free movement is necessary to conduct business, this provision allocates power to the federal government to restrict the power of states to erect barriers to interstate commerce.

Article IV, Section 2 adds: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[7] Known as the "Privileges and Immunities Clause," Section 2 of Article IV prevents a state from discriminating against non-residents. The United States Supreme Court has held that it only operates with respect to rights that are fundamental to national unity.

Finally, the Fourteenth Amendment, Section 1, states:

> 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[8]

This Amendment contains three sub-sources for the right of interstate travel: (1) the "Privilege *or* Immunities Clause," as it is tediously called;[9] (2) the Due Process Clause; and (3) the Equal Protection Clause.

These foundations of the constitutional right of American citizens to travel from one state to another without harassment were not created for, or even always consistently recognized as, sources for the right of interstate travel itself. Rather, over the course of the development of constitutional and civil rights jurisprudence, as jurists looked to the Constitution for the solutions to a new nation's ills, these became the most oft-cited provisions supporting an American citizen's right to freely travel without molestation at the hands of foreign States. To better

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6. U.S. CONST. art. I, § 8, cl. 3, 18.
7. U.S. CONST. art. IV, § 2, cl. 1.
8. U.S. CONST. amend. XIV, § 1.
9. Tedious because the "privileges *or* immunities" referred to in the Amendment, as discussed in more detail herein, are of a different stripe than the "privileges *and* immunities" of the Article IV variety.

understand how United States law has arrived at its current position on the subject, and to bring clarity to a comparison of the law of an American citizen's right to interstate travel and the European Union's freedom of movement of persons, a study of the historical development of the U.S. citizen's right to interstate travel is instructive.

2. Historical Development of Right To Travel Jurisprudence

Following the declaration of peace between the United States and Great Britain in 1783,[10] the Congress and the King set out to normalize their relations and strengthen their "true and sincere friendship."[11] The Jay Treaty of 1794 between the United States and Great Britain was, by its terms, "a treaty of amity, commerce and navigation," which proclaimed the intent of the parties to put aside their differences so as to, among other things, "regulate the commerce and navigation between their respective countries, territories and people, in such a manner as to render the same reciprocally beneficial and satisfactory."[12] Commerce and navigation was addressed in the fourteenth article of the Treaty:

> There shall be between all the dominions of his Majesty in Europe and the territories of the United States, a reciprocal and perfect liberty of commerce and navigation. The people and inhabitants of the two countries respectively, shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places and rivers, within the dominions and territories aforesaid, to enter into the same, to resort there, and to remain and reside there, without any limitation of time. Also to hire and possess houses and ware-houses for the purposes of their commerce, and generally the merchants and traders on each side, shall enjoy the most complete protection and security for their commerce; but subject always as to what respects this article to the laws and statutes of the two countries respectively.[13]

The leaders of the post-Revolution colonies sought protection against external aggression through a formal association of the colonies, but also saw the wisdom of creating a more harmonious coalition among

10. DEFINITIVE TREATY OF PEACE BETWEEN THE UNITED STATES OF AMERICA AND HIS BRITANNIC MAJESTY, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80 art. 7 ("There shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all hostilities, both by sea and land, shall from henceforth cease. . . .").

11. THE TREATY OF AMITY, COMMERCE AND NAVIGATION, BETWEEN HIS BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA WITH THE ADVICE AND CONSENT OF THEIR SENATE, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116 art. 1.

12. *Id.* at pmbl.

13. *Id.* at art. 14.

the States.[14] Thus, by the Articles of Confederation, the States formed a league for their common defense, the security of their liberty, and their mutual and general welfare.[15] Moreover, there was created a new brand of unity in the United States of America:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges 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, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.[16]

Despite their many mutual goals, the leaders of the infant nation found themselves dealing with jealous States still hesitant to loosen their grip on old parochial philosophies. Under the Articles of Confederation, the powers of the sovereign States were limited only as specified in the Articles, and the only express limitation on State power under the Articles[17] dealt with State interference with the national government's dealings with foreign countries.[18] The temptation for self-preservation by the States, and the local interests of the citizens residing within their borders, caused the development of such conflicting and hostile local legislation as threatened to cause the degeneration of the union so hard-won in the Revolution.[19] It was against this backdrop, realizing the

14. Lemmon v. People, 20 N.Y. 562, 607 (1860).

15. U.S. Art. of Confed. art. III (March 1, 1781).

16. U.S. Art. of Confed. art. IV, § 1 (March 1, 1781).

17. Smith v. Turner, 48 U.S. 283, 393-394 (1849) [hereinafter *The Passenger Cases*].

18. The Sixth Article, section 3 provided: "No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain." U.S. Art. of Confed. art. VI, § 3.

19. *The Passenger Cases*, 48 U.S. at 394. Justice Catron's description of the intent of the Constitution as to commerce among the states is likewise instructive:

> Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution,—more than all other causes it led to the result; and the provision prohibiting the States from laying any duty on imports or exports, and the one which declares that vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another, were especially intended to

defects in the confederation as then organized,[20] that the leaders set out to "form a more perfect union."[21] The Constitution of the United States was completed on September 17, 1787.[22]

Soon, the United States Supreme Court was confronted with disputes arising out of State overreaching as citizens of one state attempted to cross boundaries into another. In 1849, the master of a British ship who had been required under a New York statute to pay over one dollar for each of the 290 steerage passengers landed at the port of New York, complained that the statute was an attempt by the State to regulate commerce.[23] "Commerce," said one justice, encompassed not only "an exchange of commerce," but included "navigation and intercourse."[24] As such, it was beyond question that the transportation of passengers was a part of commerce.[25]

> prevent the evil. Around our extensive seaboard, on our great lakes, and through our great rivers, this protection is relied on against State assumption and State interference. Throughout the Union, our vessels of every description go free and unrestrained, regardless of State authority. They enter at pleasure, depart at pleasure, and pay no duties. Steamboats pass for thousands of miles on rivers that are State boundaries, not knowing nor regarding in whose jurisdiction they are, claiming protection under these provisions of the Constitution. If they did not exist, such vessels might be harassed by insupportable exactions. If it be the true meaning of the Constitution, that a State can evade them by declaring that the master may be taxed in regard to passengers, on the mere assertion that he shall have a remedy over against the passengers, citizens and aliens, and that the State may assess the amount of tax at discretion, then the old evil will be revived, as the States may tax at every town and village where a vessel of any kind lands. They may tax on the assumption of self-defence, or on any other assumption, and raise a revenue from others, and thereby exempt their own inhabitants from taxation.

Id. at 445-446 (opinion of Justice Catron).

20. Hon. Robert Yates, Notes of the Secret Debates of the Federal Convention of 1787 (May 25, 1787), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, at 746 (Charles C. Tansill, ed. 1927) ("His excellency Governor Randolph, a member from Virginia, got up, and in a long and elaborate speech, showed the defects in the system of the present federal government as totally inadequate to the peace, safety, and security of the confederation, and the absolute necessity of a more energetic government."). *Id.*

21.
> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. CONST. pmbl.

22. U.S. CONST. art. VII.

23. *The Passenger Cases*, 48 U.S. at 393. The Court was first faced with deciding whether the power of Congress to regulate commerce was an exclusive one. *Id.* Having decided in the affirmative, the Court could then take on the issue whether the New York law was an infringement on Congress's exclusive power. *Id.* at 400.

24. *Id.* at 401.

25. *Id.* The Court cited the Constitution as inferential support of this proposition,

The State of Nevada likewise sought to levy a tax on every person leaving the State by railroad or stage coach.[26] The validity of the tax had been tested in the lower courts against two provisions of the Constitution: Article I, Section 8, Clause 3 (the "Commerce Clause"); and Article I, Section 10, Clause 2 (prohibiting States from laying imposts or duties on imports or exports except as provided).[27] The Court refused to be limited in its decision by these two constitutional provisions alone, choosing instead to expand its reasoning to encompass the very essence of the Republic born out of that document:

> The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. . . . That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered.
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> But if the government has these rights on her own account, the citizen also has correlative rights. . . . He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, . . . and this right is in its nature

saying "[t]he provision of the Constitution, that 'the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808,' is a restriction on the general power of Congress to regulate commerce." *Id.* (quoting U.S. CONST. art. I, § 9, cl. 1). The Court continued, "As a branch of commerce, the transportation of passengers has always given a profitable employment to our ships, and within a few years past has required an amount of tonnage nearly equal to that of imported merchandise." *Id.*

The constitutionality of a second, similar Massachusetts law under consideration in the *Passenger Cases* depended, in the view of a dissenting Justice on the Court, not on whether the State was regulating commerce in violation of an exclusive grant of power to Congress, but on whether Congress was infringing on the sovereignty of the State in forcing it to accept alien passengers on its shores. *Id.* at 465 (Justice Taney, dissenting). The States should not, he opined, have to sacrifice the opportunity to prevent from coming to mingle and reside among its citizens any person "whom it may deem dangerous or injurious to the interests and welfare of its citizens." *Id.* at 467.

Justice Taney was in fact hard-pressed to find any imposition on Congress's commerce power in the Massachusetts law: "Undoubtedly, vessels engaged in the transportation of passengers from foreign countries . . . are a part of the commerce of the country. . . . But the law of Massachusetts now in question does not in any respect attempt to regulate this trade or impose burdens upon it." *Id.* at 473.

26. Crandall v. Nevada, 73 U.S. 35, 39 (1867).

27. *Id.* at 40-41.

> independent of the will of any State over whose soil he must pass in the exercise of it.[28]

Having completed its brief detour into lessons of civics, the Court returned to connect the principles outlined to the issue of the tax under consideration. A State cannot, it concluded, lay a tax that burdens the exercise of a federal power.[29] If a State could tax the means of transportation by which a citizen might be called upon to serve the federal government, or by which he might seek redress from it, then a State could tax other instruments used by the federal government to execute its powers.[30] Further, if a State may levy a tax of one dollar, it may levy a tax of one thousand dollars.[31] If one State may so tax, every State may do so, thereby "totally prevent[ing] or seriously burden[ing] all transportation of passengers from one part of the country to the other."[32] Thus, the *Crandall* Court recognized "the right of passing through a State by a citizen of the United States" as "one guaranteed to him by the Constitution."[33]

In *Paul v. Virginia*, the Supreme Court upheld a Virginia statute that favored domestic insurance corporations over foreign ones against a constitutional challenge based on the Privileges and Immunities Clause of Article IV, Section 2.[34] Despite its holding that a corporation was not a "citizen" for purposes of the Privileges and Immunities Clause, the Court nevertheless provided a valuable lesson on the purpose of that section that has remained relevant to the constitutional right to interstate travel:

> It was undoubtedly the object of the clause in question to place the

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28. *Id.* at 43-44. The Court decided the case without the benefit of oral or written submission by the plaintiff in error. *Id.* at 39. Interestingly, the opinion includes a statement of the Court's regret over this state of affairs, perhaps offering some insight into its careful focus on the individual citizen's rights in this battle of state versus federal power. *Id.*

29. *Id.* at 44-45.

30. *Id.* at 46. For example, "They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." *Id.*

31. *Id.*

32. *Crandall*, 73 U.S. at 46.

33. *Id.* at 47.

34. Paul v. Virginia, 75 U.S. 168, 177 (1868). The statute was also challenged under the Commerce Clause of Article I, Section 8. *Id.* In holding that the statute did not violate the Commerce Clause, the Court stated that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. The Court would overrule this holding in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-553 (1944), but Congress quickly returned control over the insurance industry to the States by enacting the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.* (1945)). *See, e.g., United States Dept. of Treas. v. Fabe*, 508 U.S. 491, 499-500 (1993).

> citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them*; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[35]

The Louisiana State Legislature passed a statute in 1869 attempting to give to a handful of incorporators a monopoly on livestock and slaughter-house operations, against which statute challenges were brought by individuals and entities that would be prohibited by its operation from engaging in their trade.[36] In *The Slaughter-House Cases* the Court would, for the first time, construe the Fourteenth Amendment to the Constitution in answering the accusations that the statute: (1) abridged the privileges or immunities of U.S. citizens; (2) denied to citizens the equal protection of the laws; and (3) deprived citizens of their property without due process of law.[37]

35. *Paul*, 75 U.S. at 180 (emphasis added). So essential was the Privileges and Immunities Clause to the Constitution, the Court maintained, its function touched the very nature of the nation itself:

> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Id. See also Blake v. McClung, 172 U.S. 239, 254 (1898) (Tennessee statute held unconstitutional because it gave priority to resident creditors of insolvent debtors over those creditors residing elsewhere). In *Blake*, the Court noted that the privileges and immunities protected by Article IV, Section 2 included "the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." *Id.* at 251 (quoting Ward v. Maryland, 79 U.S. 418, 430 (1870)). Here, however, the *Blake* Court opens the door to allow states leeway to regulate its local affairs, conceding that such local regulation would not be hostile to the fundamental rights of non-resident citizens. *Id.* at 256. Based on the character of the examples given in its explanation, i.e., residence requirements for the privileges of suffrage or eligibility for elective office, the Court would not allow State infringement of that broader category of "rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established." *Id.* at 256-257.

36. The Butchers' Ben. Assoc. of New Orl. v. The Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. 36 (1872) [hereinafter *The Slaughter-House Cases*].

37. *Id.* at 66-67. The challengers also cited the Thirteenth Amendment to the

The Court held that the Fourteenth Amendment had set out a pronounced distinction between citizenship of the United States and citizenship of a State,[38] at last putting to rest the theoretical debates in legal circles as to the definitions of the two political conditions.[39] Seizing on this distinction, the Court proceeded in its analysis of the privileges and immunities issue to place the rights allegedly violated by the Louisiana statute into the appropriate classification.[40] The rights guaranteed to the citizens of the several States included such as were

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Constitution against involuntary servitude in support of their allegation that the statute was unconstitutional. *Id.* This provision of the Constitution is not relevant to the present discussion, and therefore will not be discussed in this essay. However, *The Slaughter-House Cases* Court viewed as acutely relevant the historical context in which both the Thirteenth and Fourteenth Amendments were adopted:

> The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. . . .
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> . . . [N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. . . .
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> These circumstances . . . forced upon the statesmen . . . the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment.

Id. at 68, 70.

The framers of the Amendment also accomplished a second objective in specifying that "all persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside." *Id.* at 73. According to the Court, the Amendment was to overturn Dred Scott v. Sandford, 60 U.S. 393 (1856), which held that negro slaves were not—and could never become—citizens of the United States. *The Slaughter-House Cases*, 83 U.S. at 73.

38. *The Slaughter-House Cases*, 83 U.S. at 73.

39. *Id.* at 72.

40. *Id.* at 74. The Court noted that the phrase "privileges and immunities" was first used in the Articles of Confederation. *Id.* at 75. The Privileges and Immunities Clause of Article IV, Section 2, while omitting much of the language included in the superseded Articles, had an identical purpose and was meant to refer to the same set of privileges and immunities. *Id.* Justice Miller, writing for the Court, stated:

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Id. at 77.

fundamental: government protection, acquisition and possession of property, and the pursuit of happiness.[41] In contrast, a proper case for the Fourteenth Amendment would be one in which there had been an infringement of a citizen's right to bring a claim to the federal government, serve in its offices, seek its protection, or conduct business with it.[42] A citizen may seek refuge in the Fourteenth Amendment for protection of her right to peaceably assemble, use the country's navigable waterways, become a citizen of a State, or vote.[43] Thus, the Court concluded that the privileges *or* immunities protected by the Fourteenth Amendment were those of citizens of the United States, as distinguished from the privileges and immunities of citizens of the several States.[44] Accordingly, the state law at issue did not invoke the protection of the Fourteenth Amendment.

In his dissent, Justice Field maintained that the Amendment expressly recognized citizens of the United States solely by virtue of "the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry."[45] Rather than a sort of separate, horizontal existence as a State citizen and a United States citizen, Justice Field interpreted the provision as describing characteristics of a more vertical, dependent status: "A citizen of a State is now only a citizen of the United States residing in that State."[46] This meant that those privileges and immunities enjoyed by citizens, while necessarily affected by state and local laws, were guaranteed to the people by the umbrella of federal government protection under the Fourteenth Amendment.[47] Article IV, Section 2 did not reference different rights; it merely served to protect "citizens of one State against hostile and discriminating legislation of other States," while the Fourteenth Amendment provided the same protection to "every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States."[48]

Justice Bradley, in his forceful dissent, maintained that

41. *Id.* at 76 (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C. Pa. 1823) (No. 3230)).

42. *The Slaughter-House Cases*, 83 U.S. at 79 (citing Crandall v. Nevada, 73 U.S. 35, 44 (1867).

43. *Id.* at 79-80.

44. *Id.* at 78.

45. *Id.* at 95 (Justice Field, dissenting).

46. *Id.* Justice Bradley agreed on this point, saying that "citizenship of the United States is the primary citizenship in this country; and State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence." *Id.* at 112 (Justice Bradley, dissenting).

47. *The Slaughter-House Cases*, 83 U.S. at 95-96.

48. *Id.* at 100-101.

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.[49]

The Due Process argument "having not been much pressed" by the plaintiffs, the Court simply concluded that both state and federal law were devoid of any construction of the Due Process Clause that would render the Louisiana statute unconstitutional.[50] Likewise, the Court carried the claim under the Equal Protection Clause no farther than to say that the provision had "clearly" been included to remedy the injustice and hardship borne by recently freed slaves, and it refused to press the issue beyond that scope absent a "strong case."[51]

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49. *Id.* at 112-113.

50. *Id.* at 80-81. On the other hand, where persons are prohibited from engaging in lawful employment, according to dissenting Justice Bradley, they have been deprived of both liberty and property. *Id.* at 122 (Justice Bradley, dissenting). A person's right to choose his trade is his liberty, and his occupation is his property. *Id.* Justice Field's dissent, though examining the question under the Fourteenth Amendment and labeling it the "right of free labor," also suggested his belief in a property right in one's individual labor:

> "The property which every man has in his own labor," says Adam Smith, ". . . as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing his strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper."

Id. at 110 n.39 (Justice Field, dissenting) (quoting Adam Smith, Wealth of Nations, b. 1, ch. 10, part 2).

51. *Id.* at 81. Here again, Justice Bradley disagreed with this narrow construction of the Amendment to apply only to circumstances surrounding slavery and its victims. Instead, the provision was intended for a much broader purpose:

> The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

Id. at 123 (Justice Bradley, dissenting). Likewise, Justice Swayne opined, "Labor is

As the Nation grew, so did the demands of a growing population. By 1941, California had experienced large numbers of migrants,[52] and it had endeavored to control the numbers of indigent persons moving to the State by passing a statute making involvement in bringing an indigent into the State a misdemeanor.[53] In this determination, according to the Court in *Edwards v. State*, California had crossed the line.[54] There were boundaries to a State's police power, and California had overstepped them in its attempt to prohibit the transportation of persons across its borders.[55] To allow such insular behavior was to invite retaliation from

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property, and as such merits protection." *Id.* at 127 (Justice Swayne, dissenting).

In observing the philosophical tug-of-war that has taken place since the beginning of the Republic in the name of constitutional construction of civil rights, it is indeed tempting to query what of human nature causes one citizen to see it proper to demand such different rights for himself than those his neighbor may find justly deserved. Perhaps the post-Revolution Amendments evidenced a federal government struggling against states which, while desirous of freedom from England's tyranny, nonetheless had an irresistible lust for a similar power over those who would be, in some form or another, "slaves." Justice Swayne would not be so cynical, believing instead that the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted once "the public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members." *Id.* at 128. Still, in the face of the notion that "citizens of the United States" could mean *all* citizens, and by "any person" might have been intended "*all* persons," he found himself answering to those alarmed by such a notion:

> It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.

Id. at 129 (Justice Swayne, dissenting).

In truth, we may be witnessing the ongoing battle between the concept of the nation our forefathers set out to create and the governed, who fear total equality—perhaps even hate it—lest in the dead of night some group steal the upper hand of power and leave the rest powerless and in servitude. This fear of equality leaves us with a society in which the boundaries of an individual's fundamental rights must remain subject to erasure and adjustment.

52. Edwards v. State, 314 U.S. 160, 173 (1941).
53. *Id.* at 171.
54. *Id.* at 173.
55. *Id.*

other states, as well as cause a mass of legislative enactments that would prove impossible for a citizen to comprehend.[56]

The *Edwards* Court relied on the Commerce Clause as support for its holding.[57] Concurring in the result while expressing no opinion on the Court's reasoning, Justice Douglas wrote separately to express his view that "the right of persons 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."[58] According to Justice Douglas, the privilege of interstate travel was a right incident to national citizenship protected by the Fourteenth Amendment against state interference.[59]

In *Toomer v. Witsell*,[60] a South Carolina regulation charging out-of-state fishermen one hundred times more than residents for a commercial shrimp license was held invalid under the Privileges *and* Immunities Clause of Article IV, Section 2.[61] Once again, the Court cited the importance of a unified United States and a citizen's right to freely journey throughout the country and interact with its citizens:[62]

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. By its very design, this clause ensures to a citizen of State A who ventures into State B the exact privileges enjoyed by the citizens of State B. . . . In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.[63]

For the first time, however, the Court introduced a new test into the privileges and immunities analysis, saying that there must be a "substantial reason for the discrimination beyond the mere fact that they

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56. *Id.* at 176.

57. *Edwards*, 314 U.S. at 177.

58. *Id.* at 177 (Justice Douglas, concurring).

59. *Id.* at 178. Justice Jackson agreed with Justice Douglas on this point. *Id.* at 182 (Justice Jackson, concurring). In his view,

> This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing. *Id.* at 183.

60. Toomer v. Witsell, 334 U.S. 385 (1948).

61. *Id.* at 403.

62. *Id.* at 395. The plaintiffs also cited the Equal Protection clause of the Fourteenth Amendment, but because the Court decided the case on Article IV, Section 2 grounds, it did not pass on the Fourteenth Amendment question. *Id.* at 403.

63. *Id.* at 395-396 (citations omitted).

are citizens of other States."[64] In some cases, it suggested, discrimination against non-residents could be justifiable; thus, said the Court, "the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."[65]

Two decades later, in *Shapiro v. Thompson*,[66] the Court rejected the State's showing of a rational relationship between the one-year waiting period to qualify for welfare benefits and its stated objectives.[67] "[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be *necessary to promote a compelling government interest*, is unconstitutional."[68] In a footnote that would ripen into one of the most relied upon authorities for a State's right to charge higher tuition to non-residents, the *Shapiro* Court declared:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[69]

The Court later admitted that it had not made clear in *Shapiro* the amount of impact on the right to travel that would give rise to its highest level of scrutiny.[70] The requisite impact, it recalled, had been referenced in *Shapiro* in two different ways: (1) whether the waiting period would deter migration;[71] and (2) the extent to which the exercise of the right to

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64. *Id.* at 396.

65. *Toomer*, 334 U.S. at 396. This would include the State's interest in governing locally: "The inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.*

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

67. *Id.* at 634. The State argued that controlling the influx of indigents helped to preserve the fiscal integrity of state public assistance programs. *Id.* at 627. The *Shapiro* Court remained inclined to allow States the latitude they needed to manage their affairs, recognizing the State's need to preserve its fiscal integrity even to the point of limiting expenditures on public assistance programs. *Id.* at 633. They could not do so, however, by way of invidious discrimination. *Id.*

68. *Id.* (emphasis added). The constitutional challenge in *Shapiro* was brought under the Equal Protection Clause, not the Privileges and Immunities Clause of Article IV, Section 2 or the Privileges *or* Immunities Clause of the Fourteenth Amendment. *Id.* at 626. The Court, in denying the need to ascribe a specific constitutional source of the right to interstate travel, noted that a variety of provisions had been tapped as the foundations of the right. *Id.* at 630 & n.8.

69. *Id.* at 638 n.21.

70. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-257 (1974).

71. *See infra*, note 74.

travel had been burdened.[72] The Court interpreted its holding in *Shapiro* to include the proposition that "denial of the basic 'necessities of life'" was a penalty on interstate travel, pointing out that it had declined to strike down state statutes with residence requirements as a condition of lower tuition at state institutions of higher education.[73]

Shapiro would be the first of a number of "waiting period" or residence requirement cases serving to feed the federal right to travel jurisprudence. *Dunn v. Blumstein*[74] held that "durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.'"[75] A residence requirement may violate the Constitution even if its effects may be *intra*state in nature.[76]

In *Baldwin v. Montana Fish & Game Comm'n*,[77] the high Court rejected an Article IV, Section 2 Privileges and Immunities claim because the statute at issue, which governed recreational big-game hunting, did not involve "those 'privileges' and 'immunities' bearing

72. *Maricopa County*, 415 U.S. at 257.

73. *Id.* at 259. Even after recognizing its lack of clarity in *Shapiro*, it is unclear whether the Court's opinion in *Maricopa County* was enlightening as to the issue. After its discussion of the degree of deterrence on the right to travel and an introduction to its discussion of the extent of the penalty on that right, the Court seemingly threw up its hands and concluded that, "Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." *Id.* (citations omitted).

74. Dunn v. Blumstein, 405 U.S. 330 (1972). The issue in *Dunn* was the legality of a Tennessee statute requiring citizens wishing to vote to have resided in the State for the previous year, and their county of residence for the prior three months. *Id.* at 331. The plaintiff challenged the statute on the basis that it violated the Equal Protection Clause. *Id.* at 331-332.

75. *Id.* at 342 (citation omitted). In response to the State's argument that its voting statute neither sought to nor actually deterred travel, the Court held that the potency of the deterrent to travel was irrelevant to the question of a citizen's right to demand protection of that privilege. *Id.* at 339. A State cannot "impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied." *Id.* at 341 (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965) citing Smith v. Allwright, 321 U.S. 649, 664 (1944)).

76. *Maricopa County*, 415 U.S. 250. The Court in *Maricopa County* held unconstitutional an Arizona statute requiring a year's residence in a county prior to receiving non-emergency hospital care at the county's expense. *Id.* at 251. The Court refused to accept the appellees' argument that the statute at issue was only intrastate in nature, even though the appellant had not actually moved out of the state, saying instead that the appellant had been "effectively penalized for his interstate migration." *Id.* at 256. "What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." *Id.*

77. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). Here, the Court was faced with constitutionality of a Montana statute charging non-residents higher rates to obtain hunting licenses. *Id.* at 373.

upon the vitality of the Nation as a single entity."[78]

The same year as its decision in *Baldwin*, the United States Supreme Court in *Hicklin v. Orbeck*[79] struck down, on Article IV, Section 2 grounds, an Alaska statute which required that Alaska residents be given precedence in hiring over non-residents for positions in the construction of the Alaska Pipeline.[80] The Court found ample support for its holding in prior decisions that held violative of the Privileges and Immunities Clause state laws discriminating against non-residents "seeking to ply their trade, practice their occupation, or pursue a common calling within the State."[81]

The most recent example of the United States Supreme Court defending the right of free movement throughout the United States is *Saenz v. Roe*.[82] *Saenz* was a challenge to California's social welfare payment system designed to discourage out-of-state welfare applicants from traveling to California seeking higher benefits.[83] The challenged statute limited the welfare benefits received by newcomers to California to the amount of the benefit in the state of their prior residence.[84]

The *Saenz* Court summarized the development of the constitutional right of travel, concluding that it has three different components.[85] First, persons have the right of movement across state lines—ingress and regress—without impediment.[86] The second is derived from the Interstate Privileges and Immunities Clause of Article IV of the United States Constitution, reaching the "citizen of one State who travels in other States, intending to return home at the end of his journey."[87] The third component of the freedom of interstate travel is "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[88]

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78. *Id.* at 383. Thus, "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union." *Id.* at 388.

79. Hicklin v. Orbeck, 437 U.S. 518 (1978).

80. *Id.* at 526.

81. *Id.* at 524. "[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." *Id.* at 525 (quoting Ward v. Maryland, 79 U.S. 418, 430 (1870)).

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

83. *Id.* at 493.

84. *Id.*

85. *Id.* at 500.

86. *Id.* at 501.

87. *Saenz*, 526 U.S. at 502. In this category, non-residents are protected who enter a State for such purposes as "to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *Id.* (citations omitted).

88. *Id.* at 502. The Fourteenth Amendment is meant to protect this category of citizens. *Id.* at 503.

3. Non-Resident Tuition and Right to Travel Jurisprudence

As previously mentioned, the Court's footnote in *Shapiro v. Thompson*[89] resurfaced in *Kirk v. Board of Regents of the Univ. of Cal.*[90] when an Ohio resident challenged California's durational residence requirement on the grounds that it burdened her constitutional right of interstate travel. Taking its cue from the United States Supreme Court, the California Court of Appeal expounded the reasons the statute was not constitutionally infirm.[91]

It is important to note that the court did *not* hold that the residence requirement promoted a compelling state interest, but instead held that the requirement did *not* infringe upon the petitioner's right of interstate travel.[92] Why? To explain, the Court engaged in an exercise of "[c]arrying the petitioner's argument to its logical conclusion" and examining "the consequence of the durational residence requirement."[93] The issue arose in the first instance because the petitioner, a female student residing in Ohio, married a California resident and wished to change her residence and live with her new husband.[94] Turning the case on its head, the court rationalized that it would be ridiculous to imagine that someone might marry a resident of a State only to secure one year's worth of in-state tuition.[95] Relying on this conclusion, the appellate court held that the requirement did not "deter any appreciable number of persons from marrying California residents,"[96] and simply latched onto its holding that it was also not a burden on a citizen's right to travel.[97]

This point did not end the court's analysis, however. Continuing, the court explained that its holding would differ from that in *Shapiro* because it could not equate the attainment of education with that of food, clothing and shelter.[98] Thus, proceeding in its appraisal of the consequences of the durational residence requirement at issue, the court painted the grim picture of great suffering and loss of life that could result from a residence requirement for eligibility for welfare benefits, such as that in *Shapiro*, as compared to a milder outcome developing as a result of the same requirement as a qualification for in-state tuition.[99]

89. Shapiro v. Thompson, 394 U.S. 618, 638 n.21.
90. Kirk v. Board of Regents of the Univ. of Cal., 273 Cal. App. 2d 430, 439 (1969).
91. *Id.* at 439-440.
92. *Id.* at 441.
93. *Id.* at 440.
94. *Id.* at 433.
95. Kirk v. Board of Regents of the Univ. of Cal., 273 Cal. App. 2d 430, 440 (1969).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id. See also* Starns v. Malkerson, 326 F. Supp. 234 (D.Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971). In *Starns*, the United States District Court for the District

The California statute was still to be tested under the rational basis test to determine whether the State's classification was rationally related to a legitimate state purpose.[100] The State justified the higher non-resident tuition to the Court's satisfaction, on the basis that it helped to offset the cost of operating and supporting the university between residents and non-residents.[101]

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of Minnesota held that the State of Minnesota could impose a residence requirement on students to be eligible for a lower in-state tuition rate at public universities. *Id.* at 241. The only issue in *Starns* was the constitutionality of a regulation creating an irrefutable presumption of non-residence for any student who had not continuously resided in Minnesota for one year prior to attending the University of Minnesota. *Id.* at 237. The Minnesota district court found no infringement of any fundamental right. *Id.* at 238. Taking its cue from the *Kirk* court, the district court reasoned that, because the effect of the regulation was not to "deny the basic necessities of life," there was "less likelihood . . . that the one-year waiting period to acquire resident status for tuition purposes would make a person hesitate when deciding to establish residency in Minnesota and to apply to the University." *Id.*

100. *Kirk*, 273 Cal. App. 2d at 441.

101. *Id.* at 444-445. Noting that there was "no way for this court to determine the degree to which the higher tuition charge equalizes the educational cost of residents attending the university," *id.* at 444, the court gives no indication as to the required showing, if any, that the State must produce to satisfy the rational basis test. It simply concedes that "it appears to be a reasonable attempt to achieve a partial cost equalization by collecting lower tuition fees from those persons who, directly or indirectly, have recently made some contribution to the economy of the state. . . ." *Id. See also Starns*, 326 F. Supp. at 241, where the district court held

> This state has a valid interest in providing tuition-free education to those who have demonstrated by a year's residence a bona fide intention of remaining here and who, by reason of that education, will be prepared to make a greater contribution to the state's economy and future. Accordingly, we hold that the regulation classifying students as residents or nonresidents for tuition purposes is not arbitrary or unreasonable and bears a rational limitation to California's objective and purpose of financing, operating and maintaining its many publicly financed educational institutions of higher learning.
>
> We believe that once the law affords recognition to the right of a State to discriminate in tuition charges between a resident and nonresident, that right to discriminate may be applied reasonably to the end that a person retains a non-resident classification for tuition purposes until he has completed a twelve-month period of domicile within the State. We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced resident's fee. Accordingly, we hold that the regulation requiring a one-year domicile within the State to acquire resident classification for tuition purposes at the University is constitutionally valid.

Id.

Another irrefutable presumption failed a constitutional challenge in *Vlandis v. Kline*, but this one was a permanent presumption. Vlandis v. Kline, 412 U.S. 441, 452 (1973). In other words, if a student was a non-resident when he applied to the University of Connecticut, he would be considered a non-resident for as long as he remained a student. *Id.* at 443. Such a presumption was violative of the Due Process Clause of the Fourteenth

Over the years, citizens have endeavored to convince the high Court that education itself is a fundamental right that should be protected by the Constitution. The plea has yet to succeed, as it did not in *San Antonio Indep. Sch. Dist. v. Rodriguez.*[102] Education is not explicitly or implicitly guaranteed in the Constitution, and thus the Court would not subject a Texas education funding statute to strict judicial scrutiny.[103] In many

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Amendment because the student is denied any opportunity to show that he is a bona fide resident entitled to in-state tuition rates. *Id.* at 452. The Court distinguished this case from *Starns*, saying that under the regulation at issue in the latter case, a student could rebut the presumption by showing he was a bona fide resident of the State. *Id.* at 453 n.9.

102. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *Rodriguez* was a class action on behalf of school children of minority groups who were poor and who lived in Texas school districts having a low property tax. *Id.* at 4. At issue was the State's system of financing the public education system, which the plaintiffs claimed violated the Fourteenth Amendment's Equal Protection guarantees. *Id.*

103. *Id.* at 33 ("Thus, the key to discovering whether education is 'fundamental' . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution"). *See also id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

The appellees in *Rodriguez* argued further that education, being so closely interrelated to other rights and freedoms protected by the Constitution, should be afforded the status of a fundamental constitutional right. *Id.* at 35. For example, a citizen's freedom of speech is trifling without sufficient education to articulate her thoughts intelligently and receive information proficiently. *Id.* An informed electorate depends on a citizen's capacity to seek and use the information needed to make an enlightened choice. *Id.* at 35-36.

The appellees enjoyed the agreement of dissenting Justice Marshall on this point. In stark disagreement with the majority, Justice Marshall would establish a "nexus" test, under which interests not specifically mentioned in the Constitution would be examined to determine whether they were dependent on constitutionally protected interests. *Id.* at 102 (Marshall, J., dissenting). Under this test, as the nexus between the non-constitutional interest and the constitutionally protected one grew closer, the right grew more fundamental and the degree of judicial scrutiny it deserved grew higher. *Id.* at 102-103. So inspected, the right to education would be undeniably fundamental, since education directly affects the ability of a citizen to exercise such constitutional rights as freedom of speech, freedom of association and engaging in the American political process. *Id.* at 112-113.

To agree with this proposition, responded the majority, would be to overstep its authority:

> Yet we have never presumed to possess either the ability or authority to guarantee to the citizeznry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.

Id. at 36.

Current statistics still support the statement made by Justice Marshall in *Rodriguez* that there is a "direct relationship between participation in the electoral process and level of educational attainment." *Id.* at 114 (citation omitted). *See* EDUCATION AND SOCIAL STRATIFICATION BRANCH, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2002, http://www.census.gov/prod/2004pubs/p20-552.pdf (last

cases, while holding that there exists no constitutional right to education, the Court takes great pains in expressing the high esteem in which it holds public education.[104]

States have justified their non-resident tuition rates by arguing that charging out of state students more to attend state universities helps

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visited on July 28, 2004).

104. *See, e.g.*, *Rodriguez*, 411 U.S. at 29-30. *See also, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (Texas statute denying undocumented alien school-age children free public education):

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and the acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Plyler, 457 U.S. at 221 (citations omitted).

See also Wisconsin v. Yoder, 406 U.S. 205 (1972):

> [S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.
>
> However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

Yoder, 406 U.S. at 221-222. The Court likely did not intend to interject this flexibility into the analysis of the value of education. With the nation's economy becoming more dependent on its ability to maintain a global reach, and its very place in the world judged in part by its technological and scientific superiority, the *necessity* of a higher education becomes more and more an unavoidable reality. It is difficult to imagine that the Court would not arrive at the eventual conclusion that a higher education is so vital to the nation's existence that it is, indeed, a fundamental right.

equalize the cost of public higher education between residents and non-residents.[105] To date, the courts have recognized the States' interest in protecting the right of its own residents to attend public institutions of higher learning at preferential rates.[106] They may use reasonable criteria to determine in-state status so as to "make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates."[107] There is no burden on a citizen's right to interstate travel, the Supreme Court maintains, because "any person is free to move to a state and to establish residence there."[108]

Is the United States still on the right track with its constitutional right to travel jurisprudence, given our Nation's heritage? Or could we learn something about the concept of "united states" and unity of purpose from the European Union?

B. *Free Movement in the European Union*

1. History of the European Union

In the aftermath of World War II, Europe was in ruins—millions had died, millions more were homeless, the means of economic production on the continent had been virtually destroyed. The predecessors to the European Union were conceived from the broken nation's efforts to reconstruct its former markets and return itself to viability.

The two prime movers behind early European integration were French Foreign Minister Robert Schuman and Jean Monnet, who served in the French civil service.[109] In May 1950, Schuman declared that "the French Government proposes to take action immediately on one limited but decisive point. It proposes to place Franco-German production of coal and steel as a whole under a common higher authority within the framework of an organization open to the participation of the other

105. *Vlandis*, 412 U.S. at 449; *Starnes*, 326 F. Supp. at 240; *Kirk*, 273 Cal. App. 2d at 443-444. States have also tried to argue that they were entitled to favor long-time residents over new residents because of their past tax contributions. *Vlandis*, 412 U.S. at 449. This argument fails, however, as to follow such reasoning "would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection clause prohibits such an apportionment of state services." *E.g., Vlandis*. at 450 n.6 (quoting *Shapiro*, 394 U.S. at 632-633).

106. Martinez v. Bynum, 461 U.S. 321, 327 (1983).

107. *Id.*

108. *Id.* at 328-329.

109. JAMES HANLON, EUROPEAN COMMUNITY LAW 2-3 (2d ed. 2000).

countries of Europe."[110]

The result of the efforts of Monnet and Schuman was the Treaty of Paris, signed in 1951 by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg which created the European Coal and Steel Community (ECSC). The ECSC was designed to put the instruments of war making, i.e., coal and steel, under a High Authority which would be a supernational independent body which would have control over the production, pricing, subsidy, and distribution of coal and steel. It would be impossible for the contracting parties to make war against each other if the ECSC had the power to allocate these resources.[111]

The next major steps toward the creation of the European Union were taken in 1957 with the signing of two Treaties of Rome which created the European Atomic Energy Community (EURATOM)[112] and the European Economic Community (EEC).[113] At that time "atomic" energy was seen as the power for the future, so this was a logical extension of the control of the war-making ability of the member states. The EEC took integration beyond mere control of the elements of war—its purpose was to establish a "Common Market" within the six member states—trade without internal borders as well as a customs union (common external tariffs).[114]

In 1993 the Treaty of Rome creating the EEC was renamed the Treaty establishing the European Community (TEC); dropping the label "Economic" symbolized the political and monetary integration of the community. At the same time the Maastricht Treaty on European Union (TEU) added provisions on common foreign and security policy as well as justice and home affairs.[115]

The geographic scope of the European Union has continued to grow since its formation by the original six countries in 1951. The United Kingdom, Ireland, and Denmark joined the EEC in 1973. Greece joined in 1981, and Spain and Portugal joined in 1986. 1995 saw the addition of Austria, Finland, and Sweden. Finally, 2004 brought the admission of ten new countries: Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Slovenia, Cyprus, and Malta. Bulgaria and Romania will likely join in 2007, and Turkey is poised to join in the future. The

110. *Id.*
111. *Id.* at 3.
112. Treaty of Rome Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 3 (1957).
113. Treaty of Rome Establishing the European Economic Community, March 25, 1957, 3 B.D.I.E.L 3 (1957).
114. Treaty Establishing The European Community, Nov. 10, 1997, 37 I.L.M. 56 (1998) art. 4 [hereinafter EC Treaty].
115. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992) art. 11, 29.

European Union has now grown to a population in excess of 450 million people.[116]

2. Free Movement in the European Union—Treaty Provisions

The free movement of persons is guaranteed by several provisions in the Treaty establishing the European Community. The basic principle of freedom of movement for European Union workers is established in Article 39 (formerly Article 48):

> 1. Freedom of movement for workers shall be secured within the Community.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> > (a) to accept offers of employment actually made;
> >
> > (b) to move freely within the territory of Member States for this purpose;
> >
> > (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
> >
> > (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
>
> 4. The provisions of this Article shall not apply to employment in the public service .[117]

While Article 39 explicitly applies to "workers," other provisions in the treaties create much broader rights of free movement. First, Article 14 (formerly Article 7a) states:

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116. *See* Europa: Activities of the European Union Enlargement, In brief at http://www.europa.eu.int/pol/enlarg/index_en.htm (last visited on June 30, 2004).
117. EC Treaty art. 39.

1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

3. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.[118]

Second, Article 18(1) (formerly Article 8(a)) states that:

"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."[119]

Third, Article 61 states:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

> (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union.[120]

In addition to these treaty provisions, the freedom of movement has been augmented by European Union legislation. For example, Article 7(1) and (2) of Regulation[121] No 1612/68 state:

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118. *Id.* at art. 14.
119. *Id.* at art. 18(1).
120. *Id.* at art. 61.
121. EC Treaty art. 249 (ex art. 189) provides that:
In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all

> 1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment;
>
> He shall enjoy the same social and tax advantages as national workers.[122]
>
> Article 10(1) of Regulation No 1612/68 provides:
>
> The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
>
> > (a) his spouse and their descendants who are under the age of 21 years or who are dependents;
> >
> > (b) dependent relatives in the ascending line of the worker and his spouse."[123]

3. Free Movement of Persons In Cases Before The European Court of Justice

A frequent issue in the case law of the European Court of Justice has been the reluctance of member-states to grant residence permits to new arrivals. In *Levin v. Staatssecretaris van Justitie*, a British woman married to a non-European Union national was working part time in Holland but had not worked for over a year when she was refused a residence permit by the Dutch authorities.[124] She argued that she had sufficient funds to support both herself and her husband, but the Dutch authorities maintained that her income from her work was inadequate.[125] The European Court of Justice held that the amount of the wage is irrelevant to the status of a worker, and that all that was required was that the work was an activity of an economic nature.[126] Rejecting the Dutch authorities' argument that Levin had taken a job solely for the purpose of obtaining a residence permit, the Court held that her motives were

Member States. *Id.*

122. Council Regulation 1612/68, art. 7(1-2), 1968 O.J. (L 257).
123. *Id.* at art. 10(1).
124. Case 53/81, Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1035.
125. *Id.* at ¶ 10.
126. *Id.* at ¶ 14.

irrelevant, so long as she was pursuing a genuine and effective economic activity.[127]

In *Kempf v. Staatssecretaris van Justitie*, the European Court of Justice extended its narrow holding in *Levin* even further, stating that even if a person's wages are so low that he must rely on state supplementary benefits to survive, he is still entitled to a residence permit.[128] Mr. Kempf was a German national living in the Netherlands whose only source of income was derived from giving music lessons for twelve hours per week. The Court held that it was "irrelevant whether those supplementary means of subsistence are derived . . . from financial assistance drawn from the public funds of the Member State in which he resides. . . ."[129]

In contrast to the right of interstate travel in the United States, however, the freedom to remain in a foreign member state for an undetermined amount of time is not unlimited. Consider *Ex parte Antonissen*, where a Belgian national came to the United Kingdom to seek work, but after three years of unemployment and a drug offense conviction, the Secretary of State sought to deport him.[130] The European Court of Justice held that Article 48 (now Article 39) gives European Union citizens not only the right to enter and move freely in the host state, but also the right to stay there while seeking employment.[131] The Court added that a Member State may deport a migrant if he has not found work within a reasonable time, unless there is some evidence that genuine opportunity to find work actually exists.[132]

In *Cristini v. Societe nationale des chemins de fer francais*, the Italian widow of an Italian working in France was denied reduced rail fare tickets, even though the discounts would be given to the widow of a French railroad worker.[133] The European Court of Justice rejected the arguments of the French national railroad and held that the equality of treatment provisions in Article 7(a) (now Article 14[134]) applied to all tax and social advantages, even those, as in this case, which arose by negotiation of a collective bargaining agreement.[135]

Discrimination against other member state nationals in the area of tax and social advantages is forbidden, even when those advantages are

127. *Id.* at ¶ 23.

128. Case 139/85, Kempf v. Staatssecretaris van Justitie, 1986 E.C.R. 1741, ¶ 16.

129. *Id.* at ¶ 14.

130. Case C-292/89, Ex parte Antonissen, 1991 E.C.R. I-745.

131. *Id.* at ¶ 13.

132. *Id.* at ¶ 21.

133. Case 32/75, Cristini v. Societe nationale des chemins de fer francais, 1975 E.C.R. 1085.

134. EC Treaty art. 14.

135. *Ex Parte Antonissen*, E.C.R. I-745, ¶ 13.

completely unconnected to employment. In *Bernini v. Minister van Onderwijs en Wetenschappen*, the European Court of Justice held that educational grants paid to the children of workers was a "social advantage" and as such, was protected by the nondiscrimination provisions of Article 7(a) (now Article 14[136]).[137] In *Ministere Pub. v. Even*, the Court stated that "the advantages which this regulation extends to workers who are nationals of other Member states are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. . . ."[138]

In *Reina v. Landeskreditbank Baden-Wurttemberg*, an Italian worker challenged the German government's policy of extending childbirth loans only to German citizens.[139] The European Court of Justice held that since the purpose of the loan was to assist low income families, it was considered a social advantage under Article 7(a) (now Article 14), despite the German government's argument that the loan had nothing to do with the free movement of workers.[140] The government claimed that the policy was designed to promote its demographic policy instead, but the Court rejected this view.[141]

Unlike the similar "freedom of interstate travel" in the United States, "freedom of movement of persons" permits Member States in the European Union to refuse permanent resident status to other European citizens in certain cases. Three grounds for refusal are laid out in Article 39[142] (formerly Article 48), which states that freedom of movement is "subject to limitations justified on grounds of public policy, public security or public health. . . ." These grounds have been the subject of a long series of decisions which go beyond the scope of this paper, but even in some cases not involving the three grounds for refusal, the European Court of Justice has been willing to allow discrimination against European Union citizens from other Member States.

In an April 2000 decision, the European Court of Justice took a restrictive view of the freedom of movement of persons. At issue in *Arben Kaba v. Secretary of State for the Home Department*, was a United Kingdom immigration law.[143] Kaba was a Yugoslav national who had

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136. EC Treaty art. 14.

137. Case C-3/90, Bernini v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1071, ¶ 29.

138. Case 207/78, Ministere Pub. v. Even, 1979 E.C.R. 2019, ¶ 22.

139. Case 65/81, Reina v. Landeskreditbank Baden-Wurttemberg, 1982 E.C.R. 33.

140. *Id.* at ¶ 18.

141. *Id.* at ¶ 14.

142. EC Treaty art. 39(3).

143. Case C-356/98, Arben Kaba v. Secretary of State for the Home Dep't, 2000

entered the United Kingdom illegally on August 5, 1991. In February 1992 he applied for asylum, and on May 4, 1994 he married a French national. In November 1994 Kaba's spouse obtained a five-year residence permit for the United Kingdom as a European Union national, and, as the spouse of a European citizen, Kaba was granted leave to remain in the United Kingdom for the same period. On January 23, 1996, Kaba applied for indefinite leave to remain in the United Kingdom, but the Secretary of State for the Home Department rejected his application. Upholding the denial, the Court stated:

> As Community law stands at present, the right of nationals of a Member State to reside in another Member State is not unconditional. That situation derives, first, from the provisions on the free movement of persons contained in Title III of Part Three of the EC Treaty and the secondary legislation adopted to give them effect and, second, from the provisions of Part Two of the EC Treaty, and more particularly Article 8a of the EC Treaty (now, after amendment, Article 18 EC), which, whilst granting citizens of the Union the right to move and reside freely within the Member States, expressly refers to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.[144]

Finally, the Court held:

> Accordingly, the Member States are entitled to rely on any objective difference there may be between their own nationals and those of other Member States when they lay down the conditions under which leave to remain indefinitely in their territory is to be granted to the spouses of such persons.[145]

4. Rights of non-member state students in the European Union

European Union students have the right to undertake university studies in other member states without paying higher tuition fees than students of the host member state, based on the right to equal treatment and the right of free movement under European Union law.[146] Some examples from the European Union are instructive: Oxford University undergraduate students from the United Kingdom and other European

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E.C.R. I-2623.

144. *Id.* at ¶ 30.

145. *Id.* at ¶ 31.

146. Going beyond non-discrimination, the European Union actively encourages university students to study in other member states. *See, e.g.*, http://europa.eu.int/comm/education/_programmes/socrates/erasmus/erasmus_en.html (last visited on June 30, 2004). Cite gives a description of the SOCRATES, ERASMUS and European Credit Transfer System programs.

Union member states pay a (means-tested) maximum of £1,125, while non-EU tuition fees range from £8,170 to £19,970 depending on the course of study.[147] In France, tuition fees at public institutions for all students (including non-EU citizens) are low, ranging from €130 to €780, depending on the course of study.[148] In Germany, no tuition fees are charged at public institutions of higher learning other than semester fees, which are generally less than €100.[149] In Ireland and Sweden, no tuition fees are charged at all.[150] At the University of Twente in the Netherlands the 2005-06 tuition fee for EU students is €1476, while the non-EU rate will be "at least" €8,100.[151]

5. Development of the Law of Free Movement for University Students In the European Court of Justice

The case of *Casagrande v. Landeshauptstadt München*,[152] while not directly addressing the issue of university studies, laid the groundwork for later cases. Donato Casagrande was an Italian citizen living in Germany with his Italian father who held the status of "worker" under EC law.[153] Casagrande attended secondary school in Munich and applied for an educational grant of 70dm per month, pursuant to Bavarian law.[154] The German authorities refused to pay the grant and, as a result, Casagrande brought an action claiming a violation of the Community right to free movement.[155]

Casagrande's claim was based upon Article 12 of Regulation 1612/68, which requires that

> the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that state, if such children are residing in its territory', and Member States

147. http://www.admissions.ox.ac.uk/finance/ (last visited on June 30, 2004).
148. http://www.france.org.sg/scac/en/edu/study_money.htm (last visited on June 30, 2004).
149. http://www.ottawa.diplo.de/en/06/Studieren_in_Deutschland/Studieren_in_Deutschland.html (last visited on June 30, 2004).
150. http://www.cfsontario.ca/policy/factsheets/fs-200301-tuitionfees.pdf (last visited on June 30, 2004); http://www.sweden.se/templates/SISCommonPage_4962.asp (last visited on June 30, 2004).
151. http://graduate.utwente.nl/education/finance/tuition_fees_for_2004.doc/ (last visited on June 30, 2004).
152. Case 9/74, Casagrande v. Landeshauptstadt München, 1974 E.C.R. 773, 2 C.M.L.R. 423 (1974).
153. *Id* at ¶ 2.
154. *Id.*
155. *Id* at ¶ 3.

are required to encourage 'all efforts to enable such children to attend these courses under the best possible conditions.[156]

Thus, the Court held that providing educational opportunities to the children of all member states under the "same conditions" meant that member states could not favor children of their own nationals in either school admissions or on "general measures intended to facilitate educational attendance," such as educational grants.[157]

The European Court of Justice directly faced the issue of post-secondary education in *Forcheri v. Belgian State.*[158] Mrs. Forchieri, an Italian citizen, was the wife of an official of the European Communities working in Brussels.[159] She enrolled at the Institut Supérieur de Sciences Humaines Appliquées—Ecole Ouvrière Supérieure (a school which trains students to become social workers) for a three year course of study.[160] Belgian law required non-Belgians whose parents did not reside in Belgium to pay an enrollment fee—in her case, 19,995 Belgian francs for the 1979-80 academic year and 21,723 Belgian francs for the 1980-81 academic year[161]—in addition to the enrollment fees paid by Belgian students.[162] This additional fee for foreign students was charged by all educational institutions subsidized by the Belgian government.[163] The court held that the additional fee was invalid under Section 7 of the EC Treaty because it discriminated on the grounds of nationality.[164] But this holding was limited to vocational training, not general university studies not designed to lead to a specific career.

In *Gravier v. City of Liège,*[165] the court examined the case of Francoise Gravier, a French national who, in 1982, moved to Liege, Belgium to study strip cartoon art at the Academie Royale des Beaux-Arts, which is a four-year course of higher art education.[166] The Belgian government charged foreign art students an enrollment fee of 24,622 Belgian francs;[167] Gravier requested that she be exempt from the fee, but the Academie Royale informed her that "all foreign students must be

156. *Casagrande*, 1974 E.C.R. 773at ¶ 5.

157 *Id.* at ¶ 9.

158. Case 152/82, Forcheri v. Belgian State, 1983 E.C.R. 2323, 1 C.M.L.R. 334 (1984).

159. Id. at 337.

160. *Id.*

161. Approximately €495.66 and €538.50 respectively. As of July 29, 2004, 1 Euro (€) is worth approximately $1.20.

162. *Forcheri*, 1 C.M.L.R. at 337.

163. *Id.*

164 *Id.* at 345.

165. Case 293/83, Gravier v. City of Liège, 1985 E.C.R. 593, 3 C.M.L.R. 1 (1985).

166. *Id.* at ¶ 5.

167. Approximately €610.36.

aware that such education is not free of charge and must anticipate payment of an enrollment fee."[168] Gravier was asked to pay the fees for the 1982-83 and 1983-84 school years, but because she did not pay in time, her Belgian residence permit was not extended.[169] She then brought an action requesting an exemption from the fee and extension of her residence permit to stay in Belgium.[170]

The Tribunal de Premiere Instance in Liege asked the European Court of Justice for a ruling on following issues: 1) whether nationals of member states who enter another member state solely for the purpose of vocational training fall within the scope of Article 7 of the Treaty of Rome, and 2) if so, what criterion would be used to decide whether a course on strip cartoon art would fall within the scope of the treaty.[171]

The court first noted that "although educational organization and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law."[172] Prior EC legislation had made it clear that when workers moved to another member state, they were to be treated equally with regard to vocational training.[173] But here, Gravier had traveled to Belgium to be a student, not a worker.

The court held that access to vocational training is likely to foster free movement of persons, and that "the conditions of access to vocational training fall within the scope of the Treaty."[174] The court laid down a broad rule to determine whether a particular program should come within the scope of the Treaty:

> It follows from those statements that any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education. The answer to the second question must consequently be that the term "vocational training" includes courses in strip cartoon art provided by an institution of higher art education where that

168. *Gravier*, 3 C.M.L.R. at ¶ 5.
169. *Id.* at ¶ 6.
170. *Id.*
171. *Id.* at ¶ 9.
172. *Id.* at ¶ 19.
173. Council Regulation 1612/68, art. 7, 1968 O.J. (L 257), provides that workers who are working in another member state must have the same access to vocational training under the same conditions as national workers.
174. *Id.* at ¶ 24-25.

> institution prepares students for a qualification for a particular profession, trade or employment or provides them with the skills necessary for such a profession, trade or employment.[175]

The ECJ amplified its holding of *Gravier* in the case of *Blaizot v. University of Liège*.[176] The plaintiffs in *Blaizot* were French nationals studying veterinary medicine in Belgium who were required to pay a "minerval," an annual registration fee, which was not required of Belgian students.[177] The President of the Tribunal de Premiere Instance, Liege referred the case to the ECJ to determine whether veterinary studies fell within the scope of EC Treaty.[178] The Court held that university education in veterinary medicine came within the definition of vocational training, so that a minerval imposed on students pursuing that course, who were nationals of other Member States, amounted to discrimination on grounds of nationality contrary to EC Treaty Art. 7 (now Art. 14).[179] Reaffirming its holding in *Gravier*, the court held that

> any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and level of training of the pupils or students, and even if the training programme includes an element of general education.[180]

The far-reaching holdings of *Gravier* and *Blaizot* were narrowed in 1988 in *Lair v. University of Hannover*.[181] Sylvie Lair was a Frenchwoman who had lived in Germany for some eight years before beginning a degree course in Romance and Teutonic languages and literature at the University of Hannover.[182] German law allowed foreigners to receive student maintenance grants after five years of employment in Germany, but Lair had long periods of unemployment during her residency and did not meet the five year requirement.[183] Lair challenged the denial of the maintenance grant in the local administrative court, which referred the matter to the European Court of Justice.[184]

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175 *Id.* at ¶ 30-31.
176. Case 24/86, Blaizot v. University of Liège, 1988 E.C.R. 379, 1 C.M.L.R. 57 (1989).
177. *Id.* at ¶ 3.
178. *Id.* at ¶ 7.
179. *Id.* at ¶ 36.
180. *Id.* at ¶ 15.
181. Case 39/86, Lair v. University of Hannover, 1988 E.C.R. 3161, 3 C.M.L.R. 545 (1989).
182. *Id.* at ¶ 3.
183. *Id.* at ¶ 4.
184. *Id.* at ¶ 1-2.

There were two issues before the ECJ:

> (1) Does Community law entitle nationals of Member States of the European Community who take up employment in another Member State and there, after giving up their employment, commence a course of higher education leading to a professional qualification (in this case, a university course in Romance and Germanic languages and literature) to claim a training grant on the same basis of aptitude and need as that social advantage is accorded to nationals of the host Member State?
>
> (2) Does the fact that a Member State accords grants for higher education leading to vocational qualifications to its own nationals on the basis of aptitude and need but accords the same grant to nationals of other Member States only if they have worked in the host Member State for at least five years before the start of the course concerned constitute discrimination contrary to Article 7 of the EEC Treaty?[185]

The court dealt with the second question first—that is, whether maintenance grants made to students fall within the ambit of Article 7. The court noted, as it did in *Gravier*, that educational policy was generally not included in the spheres of competence of EC law, so it held that

> The answer to the second question must therefore be that at the present stage of development of Community law the first paragraph of Article 7 of the EEC Treaty applies to assistance for maintenance and training given by a Member State to its nationals for the purposes of university studies only in so far as such assistance is intended to cover registration and other fees, in particular tuition fees, charged for access to education.[186]

But the court then turned to the concept of "social advantage." Article 7(2) of Regulation 1612/68 requires member states to provide "the same social . . . advantages as national workers' in the host member-state." The court stated that this right includes "the possibility of improving his living and working conditions and promoting his social advancement" and therefore includes the pursuit of university studies which, like here, would lead to a professional qualification.[187] The court held that grants to students who had some previous occupational activity in that member state would retain their status as a "worker" and would be entitled to the same benefits as nationals of that member state, "provided

185. *Id.* at ¶ 8.
186. *Lair,* 3 C.M.L.R. at ¶ 16.
187. *Id.* at ¶ 20.

that there is a link between the previous occupational activity and the studies in question."[188] But, the court carved out an exception to this rule for students like Ms. Lair—if the periods of unemployment were involuntary, the court said, and the worker was "obliged by conditions on the job market to undertake occupational retraining in another field of activity" she may still be allowed a maintenance grant, in spite of a lack of nexus between the previous occupational activity and the current course of university studies.[189] Finally, the court held that the host member-state could not impose a minimum period of prior occupational activity within that state for eligibility for maintenance grants.[190]

Another example of the court taking a more restricted view of freedom of movement for university students is found in *Brown v. Secretary of State for Scotland.*[191] Brown held dual citizenship of France and England and had lived in France for many years.[192] He applied for, but was refused, a grant from the Scottish education department, despite the fact that he had worked for eight months in the United Kingdom before entering the Scottish university.[193] The European Court of Justice held that Brown was not entitled to a Scottish grant since his prior work in the United Kingdom was merely "ancillary" to his program at the University. This holding contradicts the Court's earlier holding in *Levin* that the motive for working in a Member State was irrelevant.[194]

The holding in *Brown* has not survived. As the previous cases have shown, the right for European Union students to study in other member states without tuition discrimination has become well established. The more recent cases do not question the issue of tuition discrimination against students from other member states; rather, they are focused on the right of a student from another member state to receive state support while studying. In *Grzelczyk v. Centre Public D'Aide Social D'Ottignies-Louvain-La-Neuve,*[195] a French national moved to Belgium to study physical education at the Catholic University of Louvain.[196] During his first three years in Louvain, he supported himself with various jobs and loans.[197] But at the beginning of his fourth year of study, he applied for the local Public Social Assistance Agency for payment of the

188. *Id.* at ¶ 44.
189. *Id.* at ¶ 37.
190. *Id.* at ¶ 44.
191. Case 197/86, Brown v. Secretary of State for Scotland, 1988 E.C.R. 3205.
192. *Id.* at ¶ 3.
193. *Id.* at ¶ 3-4.
194. *Id.* at ¶ 27.
195. Case C-184/99, Grzelczyk v. Centre Public D'Aide Social D'Ottignies-Louvain-La-Neuve, 2001 E.C.R. I-6193, 1 C.M.L.R. 19 (2002).
196. *Id.* at ¶ 10.
197. *Id.*

"minimex," a subsistence payment from the government.[198] He told the agency that his father was unemployed and his mother was seriously ill, so they could not assume the cost of his education.[199]

Even though some previous cases had held that assistance to university students fell outside the scope of the EEC Treaty, the Treaty on European Union introduced the notion of European citizenship, and brought with it the right to "non-contributory" benefits, such as the minimex.[200] The court held that the payment of such benefits could not be conditioned on the status of the student as a "worker" under prior ECJ law.[201]

III. Conclusion

"The right to travel throughout the Nation has been recognized for over a century in the decisions of [the United States Supreme] Court. But the concept of that right has not been static."[202]

"The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[203] The cases set out herein, under the laws of both the United States and the European Union, demonstrate a historically similar struggle. Both jurisdictions have felt the tension between, on the one hand, the need to protect the citizenry within the borders of the various sovereign states and, on the other, the demands for equality inherent in a nation of separates yearning to be unified. The struggle has produced admirable results, without question; the boundaries have blurred, and the citizens seem no worse for the wear. What, then, should be the goal?

A nation is only as strong as the sum of its parts. Compare the journey of an older, more experienced Europe to the footprints of the maturing United States. If ever a group of individual sovereigns ought to think twice about perforating borders and introducing interstate equality, it would logically have been the nations of Europe. Cultural heterogeneity, differing currencies, and diverse languages aside, the leaders of the European Union pursued their vision of a safer, stronger whole where individuals were seen as equal members.

In contrast, the future inhabitants of a burgeoning adolescent nation, straining against the grip of English rule, yearned simply for personal

198. *Id.* at ¶ 11.

199. *Grzelczyk*, 2001 E.C.R. at ¶ A3.

200. *Id.* at ¶ 46.

201. *Id.* at ¶ R1.

202. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 280 (1974) (Justice Rehnquist, dissenting).

203. Edwards v. State, 314 U.S. 160, 173-174 (1941).

freedom, egalitarianism, and national accord. Her members declared themselves "free inhabitants" and "free citizens" of the several states, making known their intent for "mutual friendship and intercourse" among themselves as such, and agreeing at the outset that "free ingress and regress" would be granted to and from one state to another.[204] Growing pains brought an even stronger resolve to form "a more perfect Union", including the establishment of justice, insurance of domestic peace, provision of a national defense, promotion of the general welfare, and security of liberty.[205] The states have never overcome the temptation for self-preservation, however, and this short-sightedness has weakened the fabric of the nation.

An Alabamian not restrained by a shrinking bank account for having sought a college education in Pennsylvania would experience the freedom the Founding Fathers intended so long ago. She would cross several state borders unimpeded, free to follow her personal calling, and would truly enjoy the same privileges and immunities as resident Pennsylvanians. Her interstate adventure would force universities to compete for the best students nationwide, causing the entire system of higher education to become stronger. Stronger schools produce smarter and more resourceful graduates, thus enriching the citizenry of the nation.

In our capitalist society, the notion of competition among public universities may be one whose time will yet come. The question is whether such a state of affairs will be brought about because of the self-interest of politicians, the financial desperation of states or something else. If it comes as a reaction to some burdensome circumstance rather than as part of a plan of growth and of strengthening the nation, then it comes too late. By then, we as a people will have missed out on one of our best opportunities to empower the citizen-building blocks of this country to fortify it for the future.

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204. U.S. Art. of Confed. art. IV, § 1.

205. U.S. CONST. pmbl.