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I. INTRODUCTION

> For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[1]

Historically, the tendency towards migration has been fundamental to the character of the American people. Yet, the basic protection for freedom of movement within the continental limits of the United States is not specifically set forth in the Federal Constitution. This paper proposes to explore the various legal concepts and constitutional clauses relied upon by the courts to protect freedom of movement within the United States.

Interest in the constitutional basis for freedom of travel within the United States lay dormant until recently when the right to travel was asserted as an argument against the maintenance of segregated eating and sleeping facilities, and the continuance of residency requirements for the receipt of welfare payments.[2]

Of particular interest is the case of *Thompson v. Shapiro*,[3]

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[1] Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 292 (1849).

[2] Atlanta Motel v. United States, 379 U.S. 241 (1965); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967); Ramos v. Health & Social Serv. Bd., 276 F. Supp. 474 (E.D. Wis. 1967); Green v. Dep't of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967).

[3] 270 F. Supp. 331 (D. Conn. 1967).

presently on appeal to the United States Supreme Court.[4] In that case the plaintiff, an indigent mother, moved from Boston, Massachusetts to Hartford, Connecticut in order to live near her mother. Massachusetts welfare authorities discontinued disbursing welfare payments due to her change in residence. Application to the Commissioner of Welfare of Connecticut for similar aid was denied on the ground that she had not met Connecticut's one year residence requirement which applied to all persons entering the state without visible means of support for the immediate future.[5] The district court held that the one year residence requirement had a chilling effect on freedom of travel, in violation of the privileges and immunities clause of the fourteenth amendment, and that it was a denial of equal protection of the law as guaranteed by the fourteenth amendment. This case focused attention once again on the problem of determining the scope and the constitutional basis for the protection of freedom of movement within the United States.

Freedom of movement constitutes an important aspect of a citizen's liberty and has always been basic in the American scheme of values. The combination of the American tradition of freedom of movement within the United States, greater economic prosperity—which provides financial ability and leisure time and technological development—which provides the means for rapid travel, make it imperative that an unquestioned constitutional basis be established for the preservation of freedom of movement in its broadest application.

The right to travel freely without deterrence is inherent in the notion of a unified nation and harkens back to the elementary principles upon which the country was founded. Freedom of movement encompasses three separate individual rights: (1) the right to leave your present location and go elsewhere; (2) the right to travel without deterrence across various boundaries; and (3) the right to settle in a place of your choice and remain there.

The United States constitutional development of freedom of movement has had an English legal basis which in some instances has resulted in many incongruities by superimposing an under-

[4] 389 U.S. 1032 (1968). *Ed.'s Note*: one week prior to JOURNAL publication date this case was decided; *Shapiro v. Connecticut*, No. 9 (April 21, 1969), voiding the challenged statute.

[5] CONN. GEN. STAT. ch. 299, §§ 17-20 (1968).

lying anti-migratory policy upon the laws of the United States. It has been said that in England the right to personal liberty did not depend on any express statute, but "was the birthright of every freeman."[6] English law fails to provide us with any statutes or charters which grant the right of unrestricted travel within the confines of the country.[7] Article 42 of the Magna Carta stated that, "It shall be lawful to any person for the future to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war . . . ." Since this provision deals with travel outside the geographic boundaries of England, rather than internal migration, it is beyond the scope of our present concern. Blackstone stated in his *Commentaries,* that the right of movement embraced "the power of locomotion, of changing situation, or of moving one's person to whatsoever place one's inclination may direct without imprisonment or restraint, unless by due process of law."[8]

Many of the various state statutes that inhibit freedom of movement stem from the Statutes of Labourers which was first passed in 1349 and amended at various times during the following 200 years.[9] These so-called "poor laws" were enacted with the intent of confining the working class to specific places of residence and requiring them to work at predetermined wage rates. Legislators were then concerned that wandering bands of workers, having left their masters, were committing various criminal acts and as such had to be punished for wandering. Much of the flavor of those enactments can be seen in Article IV paragraph 1 of the Articles of Confederation which is set out *infra.*

There is, however, a distinct difference between the English and American experience in population migration:

> Vast movements of people motivated by urgent economic need settled this country from Europe, pushed settlement westward and fed growing cities from rural population reservoirs. England's Enclosure Acts, by withdrawing land from agricultural use, swelled the army of English vagrants; America invited migration with the lure of free land. The

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[6] Joseph v. Randolph, 71 Ala. 499, 505 (1882).

[7] Jaffee, *The Right to Travel: The Passport Problem,* 35 FOREIGN AFFAIRS 17 (1955).

[8] 1 BLACKSTONE COMMENTARIES 134 (Lewis 3d ed. 1902).

[9] *See* 3 F. STEPHEN, HISTORY OF THE CRIMINAL LA OF ENGLAND 203 (1883).

> same elements of the population who on one side of the Atlantic were rogues and vagabonds, on the other were frontiersmen.[10]

It can be assumed that the individual's freedom of movement was not a major issue during the colonial period of American development. A search of the reports of the Federal Constitutional Convention of 1787 has disclosed little which is relevant to freedom of travel.[11] The Federalist Papers and the debates of the ratifying conventions gave little attention to the freedom of movement of free citizens. Colonel Mason during the debates on the terms of admission for new states, described the freedom of travel which citizens possessed and exercised at the time:

> If it were possible by just means to prevent emigrations to the Western Country it might be good policy. . . . But go the people will as they find it for their interest and the best policy is to treat them with that equality which will make them friends not enemies.[12]

With the limitless possibilities of expansion and migration, the removal provisions, based on the older English Poor Laws, had little effect on the citizenry:

> Is free and unrestricted travel, then, a 'right' of Englishmen? It is nowhere so stated nor granted by formal charter, nor was it ever an issue in revolutionary times. It has that powerful yet ambiguous confirmation which comes from a custom which is taken for granted and upon which so many of the 'rights' and 'freedoms' of Englishmen rest.[13]

Freedom of movement across the country has become part of the American heritage, taking root in the migrational foundation of the nation and gaining greater impetus from the ceaseless migration westward that continues to this day. The concept of movement has been further shaped by the melting pot character of our population which has allowed minority elements to enter a community and take an equal part in its growth. Last of all, the general absence of legal barriers to movement out of or into a community has fostered the expansion of travel and of emigra-

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[10] Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 617 (1956).

[11] Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63, 71 (1952).

[12] S. TRANSILLE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 638 (1927).

[13] Jaffee, *supra* note 7 at 20.

tion from state to state. All of these historical aspects have affected our concept of freedom of movement for the individual.

Yet, the freedom to travel or change residence "is nowhere granted specific protection and though that is not conclusive, it suggests that the protection is something less absolute than that, let us say, of speech of religion. . . ."[14] Mobility may be protected by one or more of the following legal concepts: (1) the privileges and immunities of citizens of the several states under the U.S. Constitution, Article 4, § 2; (2) the power of Congress to regulate interstate commerce; (3) the privileges and immunities of citizens of the United States under the fourteenth amendment and (4) the due process clause of the fourteenth amendment. All four of these legal concepts which have in varying degrees contributed to the constitutional development of the freedom of movement, a freedom which over the years has become the keystone of American society and which is essential to its economic growth.

II. PRIVILEGE AND IMMUNITIES PROVISION OF ARTICLE IV § 2: *The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

Article IV of the Articles of Confederation stated that:

> To better secure and perpetuate mutual friendship and intercourse among people of 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; the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Although it is difficult to establish the exact intent of the framers of the Constitution with respect to the abbreviation of the older form of Article IV, we do have the words of Charles Pickney, the purported drafter of Article IV § 2, stating that it had been "formed exactly upon the principles of the 4th article of the present confederation."[15]

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[14] *Id.*

[15] M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, APPENDIX A 112 (1911).

The first and leading case judicially construing the meaning of Article IV § 2 of the Constitution is *Corfield v. Coryell,*[16] decided in the Circuit Court for the District of Pennsylvania in 1825. The court addressed itself to the question, what are the privileges and immunities of citizens in the several states? Mr. Justice Washington stated:

> We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments, and which have, at all times, been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign .... The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental. . . .[17]

Whether there is a privilege of free ingress and egress under Article IV § 2 which allows a citizen of one state to travel and reside anywhere he wishes has not yet been directly decided by the Supreme Court. However, there are dicta to the effect that such a privilege exists. The Supreme Court illustrated the absolute right derived from Article IV § 2 in *Paul v. Virginia*:[18]

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, 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 gives them the right of free ingress into other States and egress from the right of free ingress into other States and egress from During the early 1920's there was widespread explusion of the possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness. . . .[19]

The Court in *Ward v. Maryland,*[20] set aside a state license tax that discriminated in favor of resident traders, as being in conflict with the constitutional protection of citizens of each state with respect

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[16] 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
[17] *Id.* at 551-52.
[18] 75 U.S. (8 Wall.) 168 (1868).
[19] *Id.* at 180.
[20] 79 U.S. (12 Wall.) 418 (1870).

to the privileges and immunities of citizens in the several states. Mr. Justice Clifford stated that,

> [b]eyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation. . . .[21]

During the early 1920's there was widespread explusion of the members of the I.W.W. The notorious Bisbee deportations were noted in the case of *United States v. Wheeler*,[22] where two hundred and twenty-one citizens of the United States were forcibly removed from Arizona to New Mexico. The Supreme Court held that the expulsion had not been state action but the action of private individuals, and that Article IV § 2 dealt only with discriminatory state action. Chief Justice White stated that,

> [i]n all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from the limits of their respective States, to move from place to place therein, to have free ingress thereto and egress therefrom, with a consequent authority in the States to punish violations of this fundamental right.[23]

The *Corfield v. Corywell* and *Paul v. Virginia* pattern was followed by several state cases. In *Commonwealth v. Milton*,[24] the Kentucky court upheld the power of the City of Lexington, acting under an act of the state legislature, to impose a license tax on the agent of a foreign insurance company. Judge Marshall in speaking of Article IV § 2 said,

> [t]he clause secures to the citizens of each State in every other State, not the laws or the particular privileges which they may be entitled to in their own State, but such pro-

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[21] *Id.* at 430.
[22] 254 U.S. 281 (1920).
[23] *Id.* at 293. "Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta relied on by the District Court in the present case have been discredited in subsequent decisions." United States v. Guest, A&&°9., 16 L. ed. 239, 250n.16 (1966).
[24] 51 Ky. (12 B. Mon.) 212 (1851).

> tection and benefit of the laws of any and every other State, as are common to the citizens thereof, [by] virtue of their being citizens. . . . The Constitution certainly intended to secure to every citizen of every State the right of traversing at will the territory of any and every other State, subject only to the laws applicable to its own citizens. . . .[25]

The natural rights concept laid down by Justice Washington was enunciated again in *Joseph v. Randolph*,[26] where a license tax on persons who employed laborers for the purpose of exporting them was held invalid:

> There can be no denial of the general proposition that every citizen of the United States, and every citizen of each State of the Union as an attribute of personal liberty has the right, ordinarily, of free transit from, or through the territory of any State. This freedom of egress and ingress is guaranteed to all by the clearest implications of the Federal, as well as the State Constitution.[27]

Although Hamilton said in the *Federalist Papers* that the privileges and immunities clause "may be esteemed to be the basis of the union,"[28] and while the language may leave room for much broader interpretation, "the court has limited it to mean that citizens of state A are entitled to stand on a footing of of equality with citizens of state B in the enjoyment of privileges and immunities under the laws of state B."[29] The clause has in recent years been limited to dealing with the matter of state discrimination. Stated simply, Article IV § 2 "prevents a State from discriminating against citizens of other States in favor of its own."[30]

Thus there has been no argument sustained that the privileges and immunities clause of Article IV § 2 contains the guarantee of an absolute right to freedom of movement. Ten Broek[31] has advanced several reasons why Article IV § 2 has not received judicial acceptance as the protector of the right of free movement.

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[25] *Id.* at 218.
[26] 71 Ala. 499 (1882).
[27] *Id.* at 505.
[28] THE FEDERALIST No. 80 at 502 (B. Wright ed. 1961) (Hamilton).
[29] Comment, *State Control of Interstate Migration of Indigents*, 40 MICH. L. REV. 711, 718 (1942).
[30] Hague v. C.I.O., 307 U.S. 496, 511 (1939).
[31] J. TEN BROEK, THE CONSTITUTION AND THE RIGHT OF FREE MOVEMENT 12 (1955).

Initially, if the language of Article IV § 2 encompasses the same meaning as Article IV of the Articles of Confederation, then paupers and vagabonds would be excepted contrary to the ruling in *Edwards v. California*.[32] Secondly, the language of the Article itself doesn't really suggest the process of travel from one state to another. Furthermore, the provision emphasizes and guarantees state, not national, citizenship. Lastly, the clause does not restrain the states in dealing with their own citizens whether in the area of free travel or otherwise. For one or all of the above reasons the courts have turned away from the privileges and immunities clause of Article IV and have sought to find protection for the freedom of movement in other constitutional provisions.

III. COMMERCE CLAUSE: *The Power to Regulate Commerce . . . Among the Several States. . . .*[33]

In *Edwards v. California*,[34] it was held that the transportation of persons across state lines was commerce within the meaning of the constitutional provision, and thus subject to regulation by Congress. The predominance of Congress in the field of commerce affecting individual migration had an early precedent, but did not reach its fullest extent until the middle of the Twentieth Century.

One of the first cases partially invoking the Commerce Clause involved the transportation of slaves. Prior to the Civil War the slaveholding states, living under the constant fear of a slave rebellion, adopted legislation geared towards excluding from the confines of their states free Negroes, whether hailing from abroad or from sister states. In 1823, a South Carolina statute directed at this particular problem was declared as contrary to the Commerce Clause and certain treaties.[35]

Exclusion of paupers was upheld at an early date in *Mayor of New York v. Miln*,[36] involving a New York statute requiring

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[32] 314 U.S. 160 (1941). In this case the court struck down a state statute making it a misdemeanor to knowingly bring an indigent nonresident into the state and held that freedom of travel is protected against state abridgement by the Commerce Clause.

[33] U.S. CONST. art. I, § 8.

[34] 314 U.S. 160 (1941).

[35] Elkison v. Deliesseline, 8 F. Cas. 493 (No. 4366) (C.C.D.S.C. 1823).

[36] 36 U.S. (11 Pet.) 102 (1837).

masters of incoming vessels to report the names, place of birth and last legal settlement of each of their passengers. The Court said,

> [w]e think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported or from a ship, the crew of which may be laboring under an infectious disease.[37]

This case bolstered the theory that the exclusion of the "moral pestilence of paupers" is a valid exercise of the state's police power and does not run contrary to congressional power to regulate commerce.

In another area, state quarantine and health laws have been upheld as a valid exercise of the state's police power despite the fact that those laws tend to limit people who are moving in interstate commerce.[38]

The full reach of the Commerce Clause was achieved in *Edwards v. California*[39] in 1941. A California statute made it a misdemeanor to bring or assist "in bringing into the State any indigent person who is not a resident of the State knowing him to be an indigent person."[40] A California resident brought a jobless relative across the state line to help him get a new start in life and received a six month sentence for doing so. Mr. Justice Byrnes speaking for the majority, set aside the conviction on the ground that the section of the statute was an unconstitutional burden on interstate commerce and found it "unnecessary to decide whether the Section is repugnant to other provisions of the constitution."[41] Two concurring opinions, supported by four justices, treated the right of free movement as an incident of national citizenship protected by the fourteenth amendment, an issue which will be dealt with later. California had argued that the huge influx of migrants resulted in staggering problems of health, morals and finance. California also relied on the long-established law that each community was responsible for the relief

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[37] *Id.* at 142.
[38] Compagnie Francaise v. Louisiana Bd. of Health, 186 U.S. 380 (1902).
[39] 314 U.S. 160 (1941).
[40] CAL. WELFARE & INSTITUTIONS CODE § 2615 (McKinney 1938).
[41] 314 U.S. at 177.

of its own indigents and that states might interfere with interstate transportation of paupers. The theory of the Elizabethian Poor Laws was no longer considered to fit the facts. Justice Byrnes stated that,

> [w]e do not now think that it would be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous.[42]

He further quoted from *Baldwin v. Seelig*[43] which stated that 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.[44]

The *Edwards* decision thus ended the authority of the *Miln* case by invalidating the state police power theory on which it was based. At that time twenty-seven other states scattered across the United States had similar Anti-Migrant laws which were also invalidated by the Court's decision.[45]

The Court invoked a unity principle in conjunction with a threat of retaliation in reaching the *Edwards* result: "The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons becomes cumulative."[46]

The question remains as to how great an extent the Supreme Court has placed the protection of the right of free movement in the Commerce Clause? States lack the constitutional power to regulate matters in interstate commerce which are national in concern and which are capable of uniform regulation.[47] However, the corollary of this rule has left a residum of regulatory power in the states, in the absence of conflicting legislation by congress. Under this corollary, matters which are of purely local concern and which, because of the numbers and diversity of situations involved, do not lend themselves to a uniform rule are still areas to be regulated by the state. However states which have always

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[42] *Id.*
[43] 294 U.S. 511 (1935).
[44] *Id.* at 523.
[45] *See* Note, *Depression Migrants and the States,* 53 HARV. L. REV. 1031 (1940).
[46] 314 U.S. at 176.
[47] Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851).

legislated concerning paupers can no longer argue that the matter is of purely local concern. Interstate migration is national in scope and requires a uniform rule or it will burden commerce. But states can still regulate interstate travel under quarantine laws. Mr. Chief Justice Warren reaffirmed this power in *Zemel v. Rusk*[48] stating that the freedom of travel

> . . . does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the nation as a whole.[49]

With the residuary power in the states, the freedom of individual movment is not fully protected by the Commerce Clause.

Lastly, if freedom of travel is only protected by the Commerce Clause, then mobility is a privilege held only by the grace of the federal government.[50] Congress with its power granted by the Commerce Clause could terminate or limit any movement in interstate commerce. The federal government through Congress could, by its own concepts of social engineering choose to regulate the migration of paupers, potential rioters or others whereby it would keep them in one area for economic and political reasons. Should we ever experience another economic collapse or any sustained civil disorder it is conceivable that maintaining the stability of population in certain areas would be a legitimate goal of congressional legislation.

If protection of movement can only be found in the Commerce Clause, then it is a right that is held subject to the action of the legislative body. Congress would then have the power to expand, regulate, curtail or obliterate the right of free movement when in their judgment they deemed it wise to do so.

IV. PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT: . . . *No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . .*

The first case that intimated that the existence of the right to

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[48] 381 U.S. 1 (1965).
[49] *Id.* at 16-17.
[50] On this and other provisions covering freedom of movement, *see also* Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955).

travel was a privilege of national citizenship was actually decided before the formal enactment of the fourteenth amendment. In December, 1867, the Supreme Court held in *Crandall v. Nevada*[51] that a Nevada capitation tax of one dollar levied on all passengers for the privilege of leaving the State was unconstitutional. Speaking for the majority, Justice Miller maintained that the national government had at all times the right to require the service of its citizens at the seat of government. The citizen, he said, has

> . . . the right to come to the seat of government to assert any claim he may have upon that government, or transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right of free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices and the courts of justice in the several States, and this right is in its nature independent of the will of the any State over whose soil he must pass in the exercise of it.[52]

There is no evidence in the case that the persons involved were going to the seat of national government. Justice Miller demonstrated by the illustrations above and others mentioned in his opinion, the danger and damage which would ensue if the individual states had the power to prevent or impede the free movement of individuals from one state to another. Thus before the promulgation of the fourteenth amendment there was substantial evidence that the right of free movement was a right of national citizenship.

Justice Clifford in a concurring opinion preferred to hold the tax invalid as an encroachment on the federal power to regulate interstate commerce. He stated, that "strong doubts are entertained by me whether Congress possesses the power to levy any such tax. . . .," but he said affirmatively "I am clear that the State legislature cannot impose any such burden upon commerce among the several States."[53] Clifford thus took the initial step in an issue that still exists at the present time. Does the fourteenth amendment as applied to freedom of travel occupy a more protected position in our constitutional framework?

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[51] 73 U.S. (6 Wall.) 35 (1867).
[52] *Id.* at 44.
[53] *Id.* at 49.

The first court decision on the privileges and immunities clause of the fourteenth amendment strictly limited its application. The majority in the *Slaughter House Cases*[54] held that the only interests protected by the privileges and immunities clause were those growing out of the relationship between the citizen and national government and that the clause could not be used to impose federal controls over the activities of state governments. This narrow interpretation made the privileges and immunities clause a virtual nullity. The majority recognized that some privileges and immunities owe their existence to the federal government and its national character and went on to discuss the statement of Justice Miller in *Crandall v. Nevada* quoted above.[55]

In later years the Supreme Court sporadically talked about some protection for the freedom of movement encompassed within the privileges and immunities clause of the fourteenth amendment. A Georgia revenue act laid a specific tax on the occupation of an immigrant agent, a person engaged in hiring laborers to be employed beyond the limits of the state. The Court in *Williams v. Fears*[56] held that the levy of such a tax did not amount to an interference with the freedom of movement, as to violate the federal constitution. The Court felt that "the business was of such nature and importance as to justify the exercise of the police power in its regulation."[57] However, the Court saw fit to promote the fourteenth amendment as a protector of the right of travel. "Undoubtedly," they said,

> [t]he right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarly, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[58]

Again in 1908 when discussing the privileges and immunities of citizens of the United States the Court stated that "among the rights and privileges of National citizenship recognized by this court is the right to pass freely from State to State. . . ."[59]

The privileges and immunities clause had a short lived ap-

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[54] 83 U.S. (16 Wall.) 36 (1873).
[55] *Id* at 79.
[56] 179 U.S. 270 (1900)
[57] *Id.* at 275.
[58] *Id.* at 274.
[59] Twining v. New Jersey, 211 U.S. 78, 97 (1908).

plication in *Colgate v. Harvey*[60] when the Court declared that the right to lend money in any part of the country was a privilege and immunity of national citizenship which may not be abridged by state action. This case was overruled five years later in the 1940 case of *Madden v. Kentucky*[61] where it was held that the right to deposit money in foreign banks was not a privilege or immunity of national citizenship.

In the meanwhile the strength of the *Crandall* case was being eroded. Dictum in *United States v. Wheeler*[62] attempted to limit the *Crandall* decision to a holding that the statute in question directly burdened "the performance by the United States of its governmental functions" and limited the "rights of citizens growing out of such functions."[63] The authority of *Crandall* was weakened further in 1929 in *Helson & Randolph v. Kentucky*[64] where it was held that for a state "[t]o impose a tax on the transit of passengers . . . between states is to regulate commerce and is beyond state power. . . .," Justice Sutherland adding that the rule of the *Crandall* case "so far as it is to the contrary, has not been followed."[65] Thus the right to pass from state to state as a privilege of national citizenship needed rejuvenation if it was to be a viable constitutional concept.

The privileges and immunities clause as the protector of the right of mobility was resurrected by four justices in *Edwards v. California*.[66] As already noted, the majority chose to place its reliance on the Commerce Clause in ruling the California statute unconstitutional. Four justices saw "[T]he right to move freely from State to State . . . [as] . . . an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against State interference."[67] In one of the two concurring opinions Mr. Justice Douglas argued that to except paupers from the right to freedom of movement would

> . . . contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the

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[60] 296 U.S. 404 (1935).
[61] 309 U.S. 83 (1940).
[62] 254 U.S. 281 (1920).
[63] *Id.* at 299.
[64] 279 U.S. 245 (1929).
[65] *Id.* at 251.
[66] 314 U.S. 160 (1941).
[67] *Id.* at 178 (concurring opinion).

> spirit of our system of government. It would permit those who were stigmatized by a state as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality.[68]

Justices Black and Murphy both joined in this opinion by Justice Douglas which also tried to resuscitate the *Crandall* case when they cited it for the proposition that freedom of movement "was recognized as a right fundamental to the national character of our Federal government,"[69] before the adoption of the fourteenth amendment.

In a second concurring opinion by Mr. Justice Jackson a similar plea was heard for injecting further meaning into the privileges and immunities clause. He advocated that the Court should

> . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgement, 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. . . .[70]

Thus both concurring opinions were based on the ground that it denied a national privilege of free ingress and egress.

The doctrine expounded by Justice Douglas in *Edwards* has not yet gained majority standing, mainly due to the reluctance of a number of justices to expand the concept of national citizenship. "The reluctance has been due to the fear of creating constitutional refuges [sic] for a host of rights historically subject to regulation."[71] The fear in its simplest form is that an enlarged interpretation of the privileges and immunities clause would expand judicial control over state action.

In the area of freedom of movement, state action after the *Edwards* case was obliterated in the face of the commerce power.

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[68] *Id.* at 181.
[69] *Id.* at 178.
[70] *Id.* at 183.
[71] Bell v. Maryland, 378 U.S. 226, 250 (1964).

However, Justice Douglas maintained that this freedom should have a preferred position that would be above regulation by both state and federal government:

> . . . I am of the opinion 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.[72]

The federal district court in *Thompson v. Shapiro*[73] followed Justice Jackson's rationale, under the privileges and immunities clause of the fourteenth amendment, in holding that no enactment which would restrict an individual's freedom of travel on the ground of indigence could be upheld as constitutional. The court further agreed with Justice Jackson that the right of interstate movement embodies not only the right to pass through a state but also the right to establish a residence therein.[74]

The majority in *Thompson* stated that previous "right to travel cases" involved absolute prescriptions on travel, but interpreted the language in *United States v. Guest*[75] to mean that the *discouragement* of interstate travel was similarly forbidden. The court proceeded to cite *Dombrowski v. Pfister*[76] and *Wolff v. Selective Service Local Board No.* 16,[77] to apply the above proposition by analogy, to unconstitutional actions which had a "chilling" effect on first amendment freedoms. Since the one year residence requirement was found to have a chilling effect on the right of movement, the court concluded that the enactment was unconstitutional.

The Court in *Thompson* clearly raised the right of freedom of movement to a preferred position by analogizing the right to that of free speech and association and confirmed that the only provision under which freedom of travel could be adequately protected and given a preferred position is under the privileges and immunities clause of the fourteenth amendment.

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[72] Edwards v. California, 314 U.S. 160, 177 (1941).
[73] 270 F. Supp. 331 (D. Conn. 1967).
[74] *Id.* at 336.
[75] 383 U.S. 745 (1966), where the Court held that freedom of travel is protected against interference by individuals as well as governments.
[76] 380 U.S. 479 (1965), where the Court enjoined state officials from using state subversive control laws to discourage freedom of speech and association.
[77] 372 F.2d 817 (2d Cir. 1967), where the Court held that reclassification of a student's draft status based on his participation in anti-war demonstration had a detrimental effect on freedom of speech.

V. DUE PROCESS OF LAW OF FIFTH AND FOURTEENTH AMENDMENTS: *No person shall be deprived of life, liberty or property without due process of law*

There is little case law and only some dicta which construe the due process clause as protecting persons in their right to free ingress and egress among the states. One of the few statements that combines freedom of movement and due process is found in *Williams v. Fears*:[78]

> The liberty, of which the deprivation without due process of law is forbidden, means not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling. . . .[79]

The concept that the prohibition of interstate migration would be a valid exercise of state police power was ended when Justice Byrnes stated in *Edwards* that the California statute was "not a valid exercise of the police power of California."[80] The outcome of the future clash between the due process clause and the state police power cannot now be predicted. All that is presently available to us is the past experience of our constitutional structure under the stress of war.

The evacuation of Japanese Americans during World War II and their relocation in detention centers brought to the forefront the issue of freedom to remain where you are and go where you please. The Court felt that under the stress of war conditions and pressing public necessity American citizens could be removed from their homes without notice, hearing or fair trial.[81] In the case of *Ex parte Endo*[82] the Court invalidated relocation center detention for persons whose loyalty was conceded. Although the majority refused to face the constitutional issue, a concurring opinion by Mr. Justice Roberts stated that,

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[78] 179 U.S. 270 (1900).
[79] *Id.* at 274.
[80] 314 U.S. at 177.
[81] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
[82] 323 U.S. 283 (1944).

> [t]he Court is squarely faced with a serious constitutional question—whether the relator's detention violated the guarantees of the Bill of Rights of the federal constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned.[83]

Professor Chaffee in his study of "Freedom of Movement"[84] finds both the privileges and immunities approach and the commerce clause approach lacking and concluded that:

> [T]his valuable human right is best seen in due process terms: already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment. . . . Thus the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement.[85]

The Supreme Court has utilized the due process clause primarily in the area of passports and foreign travel:

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . Freedom of travel is indeed an important aspect of the citizen's 'liberty.'[86]

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[83] *Id.* at 310.

[84] Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 162 (1956).

[85] *Id.* at 192-93.

[86] Kent v. Dulles, 357 U.S. 116, 125-27 (1958). *See also* Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

Freedom of movement has been and continues to be one of the basic elements of American society. Among the several reasons for the formation of the United States was to facilitate commercial intercourse and to indirectly establish intellectual, cultural, scientific, social and political interchange between neighboring individuals. Although the reasons for fostering migrations may have been altered somewhat over the years, it is still a major concern to all citizens that the personality of the individual be developed to its fullest extent. It is evident that individual development is facilitated by the elimination of barriers to the free flow of peoples and the ideas that accompany them. It has been noted that one of the first acts of a dictatorial regime is to repress the freedom of movement of individuals, as that freedom is as dangerous to tryants as is freedom of speech or assembly, and is controlled with equal vigor in the interest of internal security.[87]

As noted above, there is no explicit constitutional provision guaranteeing the right of interstate movement and the courts have never established by any unanimous decision what the constitutional basis will be for the protection of the freedom of movement. The last pronouncement on the subject by the Supreme Court quite aptly summarizes the present situation: "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists."[88] The *Thompson* court noted "the Court thereby quieted any doubts that have remained about the existence of the constitutional right of interstate travel but left unanswered questions regarding its source and dimensions."[89]

Article IV § 2 places greatest emphasis on state rather than national citizenship and does not restrain the states in dealing with their own citizens—with regard to freedom of movement or otherwise. The commerce clause has gained widest acceptance as the constitutional protector for travel. Yet, four justices in *Edwards* found this basis unsatisfactory for what amounts to substantial reasons. To place this valuable human right under the protective covering of the commerce clause will lay bare this

[87] Aptheker v. Secretary of State, 378 U.S. 500, 518 (1964) (concurring opinion).
[88] United States v. Guest, 383 U.S. 745, 759 (1966).
[89] Thompson v. Shapiro, 270 F. Supp. 331, 335 (D. Conn. 1967).

right to political manipulation by the legislative body which could expand, regulate, curtail or obliterate it to meet the exigencies of the moment. The due process clause has been frequently invoked to protect the right of freedom of foreign travel, without ever being applied to internal movement. Liberty of movement, under the theory invoked by proponents of this clause, would be elevated to the same class as liberty of speech and assembly and any unreasonable restraints by government would fall in the face of the due process clause. Although this approach is somewhat appealing, the Japanese relocation experience gives rise to grave doubt as to the degree of protection afforded by this clause in national emergencies.

The privileges and immunities of the fourteenth amendment speaks to the entire issue of freedom of movement in its fullest scope and could have sufficient breadth to give the protection that the right of travel and of establishing a residence rightly deserves. The amendment speaks of "privileges as an American citizen."[90] The language lends itself to the interpretation that uninterrupted interstate travel could be regarded as a privilege and immunity of national citizenship, a concept that may well have been realized by the founding fathers as a method of breaking down state provincialism and facilitating the creation of a true federal union.

The primary judicial resistance to the establishment of the right of movement as a privilege and immunity of national citizenship stems from a fear of creating constitutional refugees for rights formally subject to regulation. Freedom of movement, however, is an appropriate right to be given a preferred position, as Mr. Justice Jackson stated in his concurrence in *Edwards*:

> . . . [I]t 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.[91]

Constant movement in America is apparent from the early immigrants moving West, to the present-day flow of persons from

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[90] Oyama v. California, 332 U.S. 633, 640 (1948).
[91] 314 U.S. at 183.

rural or depressed areas to the urban centers. Any barriers which impede the fullest possibility of individual movement curtail liberty as well as economic development. Residence requirements for the receipt of welfare payments, for example, among other state regulatory schemes, curtail mobility. As such it punishes an individual who takes the initiative to move to find employment, ultimately inhibiting the individual from seeking employment outside of his home, often a depressed area, for fear that if he is unable to secure work in the new location, there will be no means of support for himself and his family because of a failure to fulfill the residence requirements for the receipt of benefits.

Surely national citizenship can mean no less than the right of each and every citizen to travel anywhere within the continental limits of the United States and to establish a residence anywhere therein with no state or federal law impeding his progress toward his fullest social and economic development. If the courts will adopt the concept of national citizenship under the privilege and immunities clause of the fourteenth amendment, as it incorporates the right of movement, then that human right will have the protection it rightly needs and deserves.