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A Teasing Illusion? Homelessness and the Right to Interstate Travel

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A TEASING ILLUSION? HOMELESSNESS AND THE RIGHT TO INTERSTATE TRAVEL

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"On a single night in 2016, 549,928 people were experiencing homelessness in the United States."[1] Of those homeless persons, 32% (*i.e.*, 176,357 people) were without shelter.[2] While the total number of homeless persons decreased between 2015 and 2016, the number of persons unsheltered increased by 3,089.[3] "Florida had the second highest share of the unsheltered homeless population in the United States, with [9%] (15,361 people)."[4]

The U.S. District Court for the Southern District of Florida, in *Pottinger v. City of Miami*,[5] condemned the employment of city ordinances to stop homeless people from engaging in basic activities of daily life in public areas.[6] The court ruled that "enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel."[7] The court reasoned that the

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1. MEGHAN HENRY ET AL., U.S. DEP'T. HOUSING & URB. DEV. OFF. OF COMMUNITY PLAN. & DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1, 1 (2016). California, New York, Florida, Texas, and Washington contain half of all people in the United States experiencing homelessness. *Id.* at 24.

2. *Id.* at 8.

3. *Id.* at 10. It should however be noted that the number of unsheltered persons decreased by 31% (*i.e.*, 79,500 people) between 2007 and 2016. *Id.*

4. *Id.* at 12.

5. 810 F. Supp. 1551 (S.D. Fla. 1992).

6. *Id.* at 1557–85.

7. *Id.* at 1580; *see also* Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d. 929, 949 (E.D. Mo. 2004).

constitutional right to travel protects a person's right to migrate and pursue the basic necessities of life.[8] It concluded that policies and practices which, in effect, make it impossible for homeless persons to live in a city interfere with their pursuit of many of life's necessities and unconstitutionally acts as a deterrent to free movement.[9]

Pottinger's holding with respect to the right to travel has been rejected by many courts.[10] The U.S. District Court for the District of Arizona succinctly held, in *Davison v. City of Tucson*,[11] that a city resolution seeking to abate a homeless encampment did not violate the campers' right to travel, because "they do not seek to *travel* anywhere; they seek only to remain."[12] However, others, relying on *Pottinger*, have recognized that "[s]weeping ordinances prohibiting eating, sleeping, sitting, or lying down in public may also be so broad that they violate the right to travel if they make it impossible for homeless persons to live within the city."[13] This Article examines the extent to which the right to interstate travel protects the ability of homeless persons to live where they are unwelcome.

I. ORIGINS AND DEVELOPMENT OF THE RIGHT TO TRAVEL

The Articles of Confederation provided that the free inhabitants of each State were entitled to "all privileges and immunities of free citizens in the several States" and that "the people of each [S]tate shall have free ingress and regress to and from any other [S]tate, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.

8. *Pottinger*, 810 F. Supp. at 1579–80.

9. *Id.* at 1580–81.

10. *E.g.*, Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1110–11 (E.D. Cal. 2012); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996).

11. *Davison*, 924 F. Supp. at 989.

12. *Id.* at 993; *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 354 (N.D. Tex. 1994) (rejecting an assertion that the right to travel includes the right not to travel), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

13. City of Seattle v. McConahy, 937 P.2d 1133, 1141 (Wash. Ct. App. 1997); *see also* Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 392–93 (Cal. Ct. App. 1994), *overruled by* Tobe v. City of Santa Ana, 892 P.2d 1145, 1161–66 (Cal. 1995).

. . ."[14] The Constitution does not expressly mention the right to travel.[15] "It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution."[16] It also "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"[17]

Supreme Court Associate Justice Bushrod Washington wrote in 1823, while acting as a Circuit Justice in *Corfield v. Coryell*,[18]

> 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 . . . .[19]

Chief Justice Roger Taney later elaborated in the *Passenger Cases*[20] that every citizen living under our common government is entitled to free access, not only to the nation's capital but also to its public institutions throughout the country.[21] He explained that

> [f]or all the great purposes for which the Federal government was

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14. ARTICLES OF CONFEDERATION, art. 4, § 1, 1 Stat. 4 (1778). The common law right of personal liberty included "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130, ch. 1, ¶ II (Oxford, Clarendon Press 1765). *See also* Howell v. Netherland (Va. Gen. Ct. 1770), *reprinted in* THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA 90, 92 (Charlottesville, F. Carr & Co. 1829).

> Under the law of nature, all men are born free, everyone comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the author of nature, because necessary for his own sustenance.

Id.; *cf.* MAGNA CARTA, ¶ 41 (guaranteeing merchants the right to "safely and securely go away from England, come to England, stay in and go through England . . . .") ¶ 42 (securing the right of everyone "to leave our kingdom and to return in safety and security . . . .") (1215), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 12 (1971).

15. Saenz v. Roe, 526 U.S. 489, 498 (1999).

16. United States v. Guest, 383 U.S. 745, 764 (1966) (Harlan, J., concurring in part and dissenting in part).

17. *Saenz*, 526 U.S. at 501 (quoting *Guest*, 383 U.S. at 758).

18. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3,230).

19. *Id.* at 552.

20. 48 U.S. (7 How.) 283 (1849).

21. *Id.* at 492 (Taney, C.J., dissenting).

> formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[22]

In *Crandall v. Nevada*,[23] the Supreme Court invalidated a Nevada capitation tax levied upon common carriers for each passenger conveyed in or out of that state.[24] The majority in *Crandall* determined that passengers ultimately paid the tax themselves, and it rejected Nevada's attempt to limit the question to whether the tax violated the Import-Export Clause or the Commerce Clause.[25] It found instead that the tax violated rights implicit in the U.S. federal union.[26] The *Crandall* Court wrote that the United States consists of one nation governed by a federal government that has the right to call its citizens anywhere into service in either the nation's capital or secondary offices throughout the country.[27] It further recognized the federal government's need during times of war to transport troops through and over the various States of the Union.[28] The Court reasoned that these rights of the federal government could not be made dependent upon the pleasure of any State to obstruct or condition their exercise by imposition of taxes that might bankrupt the nation,[29] and it went on to explain:

> [I]f the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue

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22. *Id.*; *see also Passenger Cases*, 48 U.S. (7 How.) at 460–62 (Grier, J., concurring) (opining that one of the chief objects of the Union would fail if States could impede free passage of persons across their borders); *cf.* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 675 (Boston: Hilliard, Gray, and Company. Cambridge: Brown, Shattuck, and Co. 1833) (stating that the purpose of U.S. CONST. art. IV, § 2, cl. 1 was to confer upon the citizens of other states, "if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.").

23. 73 U.S. (6 Wall.) 35 (1867).

24. *Id.* at 39–49.

25. *Id.* at 39–43.

26. *Id.* at 43–49.

27. *Id.* at 43–44.

28. *Id.* at 44.

29. *Id.*

> offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.[30]

Despite recognition of a right to travel, the degree to which it received constitutional protection was unclear. The Comity Clause in Article IV, Section 2 of the Constitution states that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[31] The Privileges and Immunities Clause in the Fourteenth Amendment similarly provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."[32] The Supreme Court said in the *Slaughter-House Cases*[33] that the privileges and immunities protected under the Articles of Confederation, including the right of citizens of each state to "free ingress and regress to and from any other State," and those intended under the Comity Clause "are the same in each."[34] It ruled, however, that States are free to regulate fundamental rights that are aspects of state citizenship, and wrote that the sole purpose of the Comity Clause:

> [w]as 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.[35]

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30. *Id.*; *see also* Edwards v. California, 314 U.S. 160, 185–86 (1941) (Jackson, J., concurring) (opining that a citizen with the duty to render military service when called should have the right to migrate to any part of the country they might be required to defend).

31. U.S. CONST. art. IV, § 2, cl. 1. This clause has been alternatively referred to as the Privileges and Immunities Clause of Article IV and the Comity Clause. *E.g.*, Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting) ("Privileges and Immunities Clause"); Maldonado v. Houstoun, 177 F.R.D. 311, 327–28 (E.D. Pa. 1997) ("Comity Clause"), *aff'd*, 157 F.3d 179 (3d Cir. 1998). U.S. CONST. art. IV, § 2, cl. 1 is referred to as the Comity Clause throughout this Article to more easily distinguish it for the reader from the Privileges and Immunities Clause contained in U.S. CONST. amend. XIV.

32. U.S. CONST. amend. XIV.

33. 83 U.S. (16 Wall.) 36 (1872).

34. *Id.* at 75; *see also* Saenz v. Roe, 526 U.S. 489, 501 n.13 (1999); Zobel v. Williams, 457 U.S. 55, 79–80 (1982) (O'Connor, J. concurring); United States v. Wheeler, 254 U.S. 281, 294–97 (1920). The Supreme Court wrote in *Wheeler*, 254 U.S. at 297–98, that the Constitution fused a two-fold "right of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States" in both their own states and in other states through comity into a unitary principle that "one State should not deny to the citizens of other States rights given to its own citizens. . . ."

35. *Slaughter-House Cases*, 83 U.S. at 77; *cf.* THE FEDERALIST NO. 42 (James Madison) (arguing in favor of constitutionally vesting the federal government with exclusive authority to adopt uniform national naturalization rules to guard against an individual state improperly

The Court additionally held that the Privileges and Immunities Clause of the Fourteenth Amendment protects only those rights attached to national citizenship.[36] One of the few rights that the Court ventured to attribute to national citizenship was the right to free access throughout the United States.[37] The Court did not, however, elaborate on the extent to which national citizenship rights were constitutionally protected because it was deemed "useless to pursue this branch of inquiry" in the context of that case.[38]

Early cases indicated that the federal government had only a limited role in protection of the right to travel, but the Supreme Court consistently reaffirmed the right itself.[39] The Court rejected a challenge in *Williams v. Fears*[40] to a Georgia tax imposed upon emigrant agents who recruited laborers to work out of state, however, the Court recognized that "[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty. . . ."[41] The Supreme Court held in *United States v. Wheeler*[42] that the Comity Clause and the Privileges and Immunities Clause did not protect against private action, but it reconfirmed that they prohibit States from discriminatorily interfering with ingress/egress rights.[43] The Court in *Twining v. New Jersey*[44] reiterated the ruling from the *Slaughter-House Cases* that privileges and immunities of national citizenship are limited, but it also recognized that they include "the right to pass freely from State

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admitting and then saddling other states with unwanted immigrants, because the privileges and immunities clause in article 4 of the Articles of Confederation must, in Madison's view, unavoidably be construed to mean that "those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled in every other State to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State. . . ."), *reprinted in* ALEXANDER HAMILTON ET. AL., THE FEDERALIST 285–86 (Jacob E. Cook ed., 1961).

36. *Slaughter-House Cases*, 83 U.S. at 73–74.

37. *Id.* at 79.

38. *Id.* at 80.

39. *See, e.g.*, *Wheeler*, 254 U.S. at 297–300 (holding that right to free travel is protected against only state action and actions that directly burden performance of governmental functions by the United States or its citizens growing out of those functions).

40. 179 U.S. 270 (1900).

41. *Id.* at 274, 278.

42. 254 U.S. 281 (1920).

43. *Id.* at 296–98. In United States v. Guest, 383 U.S. 745, 757–60 (1966), the Supreme Court limited and departed from *Wheeler's* holding that the right to free travel was not protected against private action. It later wrote in *Saenz v. Roe* that "the right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974)).

44. 211 U.S. 78 (1908), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2–6 (1964).

to State."[45]

However, the precise source of the right to travel was unclear. *Williams* indicated that it is a liberty interest secured "by the Fourteenth Amendment and by other provisions of the Constitution."[46] *Wheeler* and other cases traced the right to the Comity Clause.[47] The *Slaughter-House Cases* opined that the right to free interstate passage is an attribute of national citizenship protected by the Privileges and Immunities Clause.[48] *Crandall* suggested that the right is derived directly from the structure of government adopted by the United States.[49] Concurring opinions in both *Crandall* and the *Passenger Cases* proposed vindication of the right through the Commerce Clause.[50]

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45. *Id.* at 97.

46. *Williams*, 179 U.S. at 274. Later cases indicate that this liberty interest "is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." Jones v. Helms, 452 U.S. 412, 418–19 (1981); *see also* City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999) (plurality opinion) (stating that the "right to remove from one place to another according to inclination" is "'an attribute of personal liberty' protected by the Constitution" (citing *Williams*, 179 U.S. at 274)); *Shapiro*, 394 U.S. at 669–71 (Harlan, J., dissenting); *Guest*, 383 U.S. at 769–70 (Harlan, J., concurring in part, dissenting in part); *cf.* Aptheker v. Sec'y of State, 378 U.S. 500, 505–14 (1964) (travel abroad); Kent v. Dulles, 357 U.S. 116, 125 (1958) (same); *but cf.* Haig v. Agee, 453 U.S. 280, 306 (1981) (stating that "[t]he Court has made it plain that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States"); Califano v. Torres, 435 U.S. 1, 4 n.46 (1977) (contrasting the right to interstate travel from the "right" of international travel and indicating that only the latter "has been considered to be no more than an aspect of 'liberty' protected by the Due Process Clause of the Fifth Amendment").

47. *Wheeler*, 254 U.S. at 294–98; Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (writing that the Comity Clause, "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. . . ."); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (writing that the Comity Clause protects the rights of citizens of each State to "free ingress into other States, and egress from them. . . ."), *overruled on other grounds by* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 543–53 (1944). This source is reconfirmed in later cases. *E.g.*, *Saenz*, 526 U.S. at 501–02; Zobel v. Williams, 457 U.S. 55, 79–81 (1982) (O'Connor, J., concurring).

48. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74, 79 (1872); *see also id.* at 95–98 (Field, J., dissenting); *id.* at 112–19 (Bradley, J., dissenting). The national citizenship approach has been repeated in subsequent opinions. *See, e.g.*, *Saenz*, 526 U.S. at 501–04; Oregon v. Mitchell, 400 U.S. 112, 285–86 (1970) (Stewart, J., concurring in part, dissenting in part); Edwards v. California, 314 U.S. 160, 178–81 (1941) (Douglas, J., concurring); *Edwards*, 314 U.S. at 183–84 (Jackson, J., concurring); *Twining*, 211 U.S. at 96–97.

49. Crandall v. Nevada, 73 U.S. 35, 44 (1867); *see also* Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting). This theory of a more generalized independent inferred right has been mentioned many times in more recent opinions. *E.g.*, Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1985) (plurality opinion); *Zobel*, 457 U.S. at 67 (Brennan, J., concurring); Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974); *Guest*, 383 U.S. at 757–58, 759–60 n.17.

50. *Crandall*, 73 U.S. at 49 (Clifford, J., dissenting); *Passenger Cases*, 48 U.S. at 464 (Grier, J., concurring). This view was animated by *Edwards*, 314 U.S. at 172–74. *But see* New York v. Miln, 36 U.S. (11 Pet.) 102, 136–37 (1837) (questioning how the Commerce Clause could

Early authorities also left doubt whether the poor enjoyed a right to travel.[51] That question was resolved in *Edwards v. California*.[52] The majority in *Edwards* struck a statute making it a crime to transport an indigent person into California on the basis that it erected an unconstitutional barrier to interstate commerce.[53] It explained that no State can isolate itself by closing its borders to problems common to all because our Constitution is framed upon the theory that we sink or swim together and benefit in the long-term from unity rather than division.[54] The majority decision was based upon Commerce Clause considerations rather than civil rights, but it did express concern that "indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy."[55] The Court also expressly dispelled the notion that the right to interstate travel contains a public morality based pauper exception, writing that "[p]overty and immorality are not synonymous."[56]

Writing for Justices Black, Murphy and himself, Justice William O. Douglas offered a more robust perspective in *Edwards* that the right of persons to move freely between States is entitled to greater protection than the movement of commerce across state lines.[57] He emphasized that the right to move freely from State to State is an attribute of national citizenship.[58] He further opined that the right to free ingress and egress rises to higher constitutional dignity than a state citizenship right, and is, therefore, afforded protection against more than just residency based discrimination.[59] Justice Douglas wrote that it would contravene the conception of national unity to allow States to restrict poor people's right of free movement, and he went on to remark:

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apply to persons).

51. Frank L. Dunlap, Comment, *Constitutional Law: Power of States to Prevent Entry of Paupers from Other States*, 26 CALIF. L. REV. 603, 605–06, 610 (1938); *see, e.g.*, *Passenger Cases*, 48 U.S. at 425–26 (Wayne, J., concurring), 463 (Grier, J. concurring), 465–70 (Taney, C.J., dissenting), 524 (Woodbury, J., dissenting); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842); *Miln*, 36 U.S. at 133–43; ARTICLES OF CONFEDERATION, art. 4, § 1, 1 Stat. 4 (1778) (excepting "paupers, vagabonds, and fugitives from justice" from the right of free ingress and regress between States).

52. *Edwards*, 314 U.S. at 176–77 (Douglas, J., concurring).

53. *Id.* at 172–74.

54. *Id.* at 173–74. The proposition that the States "sink or swim together" under the U.S. system of government originates from an opinion authored for the Court by Justice Benjamin Cardozo in Baldwin v. Seelig, 294 U.S. 511, 523 (1935).

55. *Edwards*, 314 U.S. at 174.

56. *Id.* at 177.

57. *Id.* (Douglas, J. concurring).

58. *Id.* at 178–81.

59. *Id.* at 180–81.

> It would also introduce a caste system utterly incompatible with the 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.[60]

Justice Robert Jackson agreed with Justice Douglas in *Edwards* that the ability to migrate between States is an aspect of national citizenship, but he commented that the right is not an unlimited one.[61] Poverty was not, however, a basis upon which Justice Jackson believed the right could be limited.[62] He wrote that "'[i]ndigence' in itself is neither a source of rights nor a basis for denying them."[63] Justice Jackson opined:

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test and whether the Congress could do so we are not called upon to inquire.[64]

The Supreme Court in *Shapiro v. Thompson*[65] struck residency based waiting periods imposed upon qualification for welfare benefits.[66] It rejected arguments that such waiting periods were needed to guard against influxes of indigent newcomers and to protect the fiscal integrity of state public assistance programs.[67] The Court acknowledged that a waiting period might be well suited to discourage poor persons from

60. *Id.* at 181.

61. *Id.* at 184 (Jackson, J., concurring); *see also* Jones v. Helms, 452 U.S. 412, 419 (1981).

62. *Edwards*, 314 U.S. at 184–85 (Jackson, J., concurring).

63. *Id.* at 184.

64. *Id.* at 185.

65. 394 U.S. 618 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

66. *Id.* at 621–42.

67. *Id.* at 627–29.

moving to a State, but it held that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."[68] It further wrote that a law having no other purpose than to penalize and thereby chill the exercise of a constitutional right is patently unconstitutional unless it is shown to be necessary to promote a compelling governmental interest.[69]

The Supreme Court found no need in *Shapiro* to identify the source of the right to travel,[70] because it had long before generally recognized that all citizens have a right to freely travel "throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."[71] It characterized this freedom as the fundamental right of interstate movement for purposes of equal protection analysis, and wrote that any classification touching upon that right would, therefore, have to survive review under a strict scrutiny standard.[72] The Court expressed concern that classifications based upon residency duration would create a disfavored class of short term residents who were "denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[73] It recognized that States have a valid interest in preserving fiscal integrity of welfare programs, but wrote that "a State may not accomplish such a purpose by invidious distinctions between classes of citizens."[74] The Court explained that "[m]ore fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."[75]

Justice Harlan complained in dissent that the *Shapiro* majority had carelessly extended the compelling interest principle from the Court's equal protection rubric to the right to travel without first analyzing its attributes.[76] He explained that virtually every law affects important rights, but warned that indiscriminate application of a strict scrutiny review standard risked turning the Court into a "super-legislature."[77] Justice Harlan ultimately agreed that the right to interstate travel is fundamental.[78] He felt however that it is important to identify the source

68. *Id.* at 629.
69. *Id.* at 631, 634, 638.
70. *Id.* at 630.
71. *Id.* at 629.
72. *Id.* at 638; *see also* Dunn v. Blumstein, 405 U.S. 330, 338–42 (1971); Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring) ("the right to travel achieves its most forceful expression in the context of equal protection analysis.").
73. *Shapiro*, 394 U.S. at 627.
74. *Id.* at 633.
75. *Id.* at 631.
76. *Id.* at 660–62 (Harlan, J., dissenting).
77. *Id.* at 661.
78. *Id.* at 671.

of the right to determine whether the right has been burdened and to pick the appropriate standard of review.[79] Justice Harlan reviewed each of the possible sources of the right and concluded the issues in that case should be regarded as due process questions.[80] Analyzing the restrictions at issue in *Shapiro* under a due process test, Justice Harlan concluded that their constitutionality should be sustained, because they promoted legitimate governmental purposes.[81] He recognized the importance of the right to interstate travel, but concluded that the burden imposed upon the right by welfare residency requirements did not outweigh the governmental interests that they protected.[82]

The Supreme Court applied *Shapiro* in *Memorial Hospital v. Maricopa County*[83] to invalidate a State statute that disqualified indigents from receiving non-emergency medical care at public expense until they had lived in a county for at least a year.[84] It held that "[w]hat would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction."[85] The Court reconfirmed that the right to interstate travel is a basic constitutional freedom which cannot be penalized by durational residency requirements.[86] The Court additionally indicated that free travel encompasses more than just mobility and includes the right to "migrate, resettle, find a new job, and start a new life."[87]

The statute at issue in *Memorial Hospital* affected both interstate and intrastate migration of indigent persons.[88] The Supreme Court rejected the argument that this feature of the statute took it outside the purview of *Shapiro*.[89] It wrote, even if it drew a constitutional distinction between intrastate and interstate travel, such a distinction would not matter in that case, because the statute "effectively penalized" interstate migration, albeit "under the guise of a county residence requirement."[90] The Court acknowledged that it had not made clear what amount of impact upon interstate travel was required to trigger strict scrutiny review under

79. *Id.* at 663–71.

80. *Id.* at 661–62, 666–71; *see also* United States v. Guest, 383 U.S. 745, 763–70 (1966) (Harlan, J., concurring in part and dissenting in part).

81. *Shapiro*, 394 U.S. at 671–77 (Harlan, J., dissenting).

82. *Id.* at 676–77.

83. 415 U.S. 250 (1974).

84. *Id.* at 251–70.

85. *Id.* at 256.

86. *Id.* at 254–56; *see also* Dunn v. Blumstein, 405 U.S. 330, 338–60 (1971) (applying *Shapiro* to invalidate a durational residency requirement that restricted voting rights).

87. *Mem'l Hosp.*, 415 U.S. at 255 (quoting *Shapiro*, 394 U.S. at 629).

88. *See id.* at 252 n.2; *see also id.* at 270–71 (Douglas, J., concurring).

89. *Id.* at 255–56.

90. *Id.*

Shapiro and this ambiguity had proven problematic.[91] It identified two types of impermissible impacts: (1) those that deter migration, and (2) those that penalize exercise of the right to travel.[92] The Court explained that actual deterrence need not be demonstrated if a particular classification operates to penalize interstate migration.[93] It further explained that denial of the basic necessities of life constitutes a penalty.[94]

Justice Rehnquist expressed concern in his dissent that the majority in *Memorial Hospital* had not defined the right to travel with enough precision to provide an appropriate framework for evaluating infringement claims.[95] He pointed out that the Supreme Court had not found a constitutional violation when regulations affected interstate movement only incidentally and remotely.[96] Justice Rehnquist explained that the barrier invalidated in *Edwards* was "in fact an effective and purposeful attempt to insulate the State from indigents."[97] He noted that the Supreme Court had recognized that not every impact constitutes a penalty, and wrote that it seemed from prior cases "that some financial impositions on interstate travelers have such indirect or inconsequential impact on travel that they simply do not constitute the type of direct purposeful barriers struck down in *Edwards* and *Shapiro*."[98] Justice Rehnquist criticized the majority in *Memorial Hospital* for leaving "us entirely without guidance as to the proper standard to be applied."[99]

Justice Rehnquist's dissent in *Memorial Hospital* was one in a string of opinions that expressed desire for better grounding of the right to travel.[100] Justice O'Connor proposed in *Zobel v. Williams*[101] that right to travel claims should be evaluated under the Comity Clause.[102] She acknowledged that it might not address every conceivable type of discrimination, but asserted that it "would at least begin the task of reuniting this elusive right with the constitutional principles it

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91. *Id.* at 256–57, 257 n.10.

92. *Id.* at 257.

93. *See id.* at 257–58; *see also* Dunn v. Blumstein, 405 U.S. 330, 339–41 (1971).

94. *Mem'l Hosp.*, 415 U.S. at 257–61; *see also* Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 907 (1986) (plurality opinion); Shapiro v. Thompson, 394 U.S. 618, 627–33 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

95. *Mem'l Hosp.*, 415 U.S. at 280–86 (Rehnquist, J., dissenting).

96. *Id.* at 281–83.

97. *Id.* at 283.

98. *Id.* at 284.

99. *Id.* at 285.

100. *See, e.g.*, Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 920–25 (1986) (O'Connor, J., dissenting); Zobel v. Williams, 457 U.S. 55, 73–81 (1982) (O'Connor, J., concurring); *Mem'l Hosp.*, 415 U.S. at 280–86 (Rehnquist, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 663–71 (1969) (Harlan, J., dissenting).

101. 457 U.S. 55 (1982).

102. *Id.* at 78–81 (O'Connor, J., concurring) (Justice O'Connor refers to the Comity Clause as Article IV's Privileges and Immunities Clause throughout her opinion.).

embodies."[103] Justice O'Connor later wrote on behalf of Justices Rehnquist, Stevens, and herself in *Attorney General of New York v. Soto-Lopez*[104] that "something more than a negligible or minimal impact on the right to travel" should be required before resorting to strict scrutiny analysis,[105] and opined that such heightened scrutiny should be reserved for situations touching upon the "constitutional purpose of 'maintaining a Union rather than a mere "league of States."'"[106]

In *Saenz v. Roe*,[107] the Supreme Court finally answered the repeated calls for a reformulated framework to use when evaluating right to travel claims.[108] It explained that the right to travel embraces three different components:

> It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[109]

The Court wrote that the first component (*i.e.*, free passage) protects the right to free interstate movement against direct impairment.[110] Direct impairment of interstate ingress/egress was not at issue in *Saenz*, and the Court, therefore, found it did not need to identify the exact source of that particular right.[111] It did, however, reconfirm that the right includes free ingress to and egress from a State and the use of "highway facilities and other instrumentalities of interstate commerce within the State. . . ."[112] The Court wrote that the second component to the right to travel (*i.e.*, visitation equality) is derived from the Comity Clause.[113] The Court explained that equal treatment of visitors "provides important protections for nonresidents who enter a State whether to obtain employment, . . . to procure medical services, . . . or even to engage in commercial shrimp

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103. *Id.* at 81.

104. 476 U.S. 898 (1986).

105. *Id.* at 921 (O'Connor, J., dissenting).

106. *Id.* at 923–24 (quoting *Zobel*, 457 U.S. at 73 (O'Connor, J. concurring)); *cf.* THE FEDERALIST NO. 80 (Alexander Hamilton) (remarking while arguing in favor of a national judiciary that "[i]t may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.'"), *reprinted in* ALEXANDER HAMILTON ET AL., THE FEDERALIST 537 (Jacob E. Cook ed., 1961).

107. 526 U.S. 489 (1999).

108. *See id.* at 498–504.

109. *Id.* at 500 (numbering added).

110. *Id.* at 500–01.

111. *Id.* at 501.

112. *Id.* at 500–01 (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).

113. *Id.* at 501.

fishing."[114] The protection is not absolute, but it prohibits States from discriminating against the residents of other States "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."[115] The Court found that the third component of the right to travel (*i.e.*, immigration equality) is derived from national citizenship protected by the Privileges and Immunities Clause of the Fourteenth Amendment.[116] It wrote that this aspect of the right to travel entitles a "newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[117]

Saenz, like *Shapiro* and *Memorial Hospital*, dealt with a state statute that sought to restrict welfare benefits to recent immigrants.[118] The statute provided that new arrivals were limited during their first year of residency to the amount of benefits that they would have received from their State of prior residency.[119] The Court wrote that this type of restriction implicates the third component of the right to travel under its new framework.[120] It commented that "[n]either mere rationality nor some intermediate standard of review should be used" to evaluate such immigration restrictions, and held that "[t]he appropriate standard may be more categorical than that articulated in *Shapiro*, . . . but it is surely no less strict."[121] Therefore, while recognizing the legitimacy of the fiscal interests behind the residency requirement at issue in *Saenz*, the Court held that they were insufficient to sustain discrimination between longstanding and new citizens who were otherwise equally eligible to receive welfare benefits.[122]

Chief Justice Rehnquist wrote in dissent on behalf of Justice Thomas and himself that he disagreed with the majority's recognition of the third

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114. *Id.* at 502 (citations omitted).

115. *Id.* (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). For example, the Supreme Court of Appeals of Virginia explained in an early case that voting is a type of privilege which may be denied to visitors: "[A]lthough a citizen of one state may hold lands in another, yet he cannot interfere in those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state." Murray v. McCarty, 16 Va. (2 Munf.) 393, 398 (Va. 1811) (Cabell, J.); *see also* Baldwin v. Mont. Fish & Game Comm'n, 436 U.S. 371, 383–86 (1978) (identifying situations where a State may treat citizens and visitors differently); Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230) (same).

116. *Saenz*, 526 U.S. at 502–04.

117. *Id.* at 502.

118. *Compare id.* at 493 n.1 (residency restriction at issue in *Saenz*), *with* Mem'l Hosp. v. Maricopa, 415 U.S. 250, 252 n.2 (1974) (residency restriction at issue in *Mem'l Hosp.*), *and* Shapiro v. Thompson, 394 U.S. 618, 622 n.2, 624 n.3, 626 n.5 (1969) (residency restriction at issue in *Shapiro*), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

119. *Saenz*, 526 U.S. at 493.

120. *Id.* at 502.

121. *Id.* at 504 (citation omitted).

122. *Id.* at 506–07.

component to the right to travel.[123] He reasoned that "[a] person is no longer 'traveling' in any sense of the word when he finishes his journey to a State which he plans to make his home."[124] He recognized that the majority tried to clear the "underbrush" created by earlier right to travel cases, but criticized it for not explaining how the right to travel is at all implicated by a restriction based on residency rather than movement.[125] However, Chief Justice Rehnquist did agree with the majority's clarification of the first two components of the right to travel, writing that its opinion in that regard is "unremarkable and sound."[126]

Saenz appears to limit the applicability of the Supreme Court's prior right to travel cases. Chief Justice Rehnquist proclaimed that the *Saenz* majority departed from "*Shapiro* and its progeny" and abandoned efforts to "define what residence requirements deprive individuals of 'important rights and benefits' or 'penalize' the right to travel."[127] The majority did not rebut the Chief Justice's contention, but it also did not expressly disavow *Shapiro*.[128] The majority's categorical reformulation of the right to travel did however ostensibly confine the Supreme Court's prior cases to particular subjects.[129] For example, it characterized *Edwards* as a free passage case and applied *Shapiro* in the context of immigration equality.[130] The framework adopted by *Saenz* and its reorganization of prior cases indicates that Supreme Court's free passage cases should be viewed as pertaining to that component, its visitation equality cases as pertaining to that component, and its migration equality cases as pertaining to that component.[131] At a minimum, *Saenz* demonstrates a disinclination to further muddle the right to travel by mixing and matching concepts across topics.[132]

Saenz leaves the door open that other components to the right to travel might be later recognized.[133] However, its reappraisal and categorical reorganization of the right indicates that any additional component would have to be derived from travel activity and not merely the ancillary interests of prospective travelers.[134] A Supreme Court plurality wrote in

123. *Id.* at 513–16 (Rehnquist, C.J., dissenting).

124. *Id.* at 513.

125. *Id.* at 515–16.

126. *Id.* at 511.

127. *Id.* at 515.

128. *See id.* at 506–07 (majority opinion) (citing Shapiro v. Thompson, 394 U.S. 618 (1969)).

129. *See id.* at 500–07.

130. *Id.* at 500–01, 504–07.

131. *See id.* at 500–07.

132. *See id.* at 500–04.

133. *Id.* at 500. "The 'right to travel' discussed in our cases embraces *at least* three different components." *Id.* (emphasis added).

134. *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1212–13 (10th Cir. 2013) (refusing to

a case leading up to *Saenz* that "[a] state law implicates the right to travel when it actually deters such travel, . . . when impeding travel is its primary objective, . . . or when it uses 'any classification which serves to penalize the exercise of that right.'"[135] The Court in *Saenz* further focused inquiry into whether an obstacle to entry has been erected, a traveler has been saddled with an unreasonable alienage disability while visiting a State, or a bona fide immigrant has been treated differently than an established resident.[136] Any additional components should, therefore, have to display a similar interdependence between the interest asserted and specific exercise of the travel right itself.[137]

II. *POTTINGER* AND *TOBE*

The U.S. District Court for the Southern District of Florida recognized in *Pottinger* that the number of homeless persons in Miami had grown at an alarming rate and presented an overwhelming problem.[138] The City of Miami responded to the problem by arresting thousands of homeless persons on a variety of charges.[139] Arrests were made for loitering, obstructing sidewalks, and being in public parks after hours.[140] Arrests were made for sleeping in public.[141] Arrests were made for sleeping, sitting, or standing in public buildings.[142] In summary, the court found that the City had adopted policies designed to drive the homeless from public areas and eliminate food distribution to them, and that the City had actively searched for laws to enforce against those who were not visibly violating any laws.[143]

The *Pottinger* court found that the City of Miami had violated many civil rights of homeless persons.[144] These violations included interference

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separately analyze a non-resident's desire to obtain a concealed handgun license under his right to travel); *see generally Saenz*, 526 U.S. at 500–04 (discussing the various interests protected by the right to travel).

135. Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (citations omitted).

136. *Saenz*, 526 U.S. at 501–03.

137. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7–8 (1974) (rejecting an argument that a zoning ordinance restricting land uses to single-family dwellings that violated the travel rights of unmarried persons who might wish to reside in a city because the ordinance was not aimed at transients).

138. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1558 (S.D. Fla. 1992).

139. *Id.* at 1559–60.

140. *Id.* at 1559.

141. *Id.*

142. *Id.* at 1560.

143. *Id.* at 1561, 1566–68.

144. *Id.* at 1554 (holding that the rights of homeless people had been violated), 1561–65 (cruel and unusual punishment), 1570–73 (unlawful seizures), 1575–77 (deprivation of procedural due process), 1577–83 (denial of equal protection by impinging upon a fundamental right).

with the fundamental right of homeless persons to travel.[145] The court opined that the right to travel includes freedom of intrastate movement.[146] It reasoned based upon *Shapiro* and its progeny that efforts to prevent homeless persons from performing activities that are necessities of life, when they have nowhere else to go, penalize travel.[147] The court wrote that "forcing homeless individuals from sheltered areas or from public parks or streets affects a number of 'necessities of life'—for example, it deprives them of a place to sleep, of minimal safety and of cover from the elements."[148] The court further decided that "arresting them for such harmless conduct also acts as a deterrent to their movement."[149] The court additionally noted that evidence in the case showed that the primary purpose behind Miami's efforts was to drive them from public areas.[150] Therefore, the Court concluded that "whether characterized as a penalty, a deterrent, or purposeful expulsion, enforcement of the ordinances against the homeless when they have absolutely no place to go effectively burdens their right to travel."[151]

The California Court of Appeals embraced *Pottinger* in *Tobe v. City of Santa Ana*.[152] *Tobe* involved a challenge by homeless persons to a Santa Ana ordinance that made it unlawful to camp or store personal property in public areas.[153] The court rejected the city's argument that the ordinance left homeless persons free to come and go as they pleased by rhetorically asking how they could "satisfy the essential human need for sleep under the camping ordinance?"[154] It further criticized a claim made by the city that the homeless could sleep elsewhere by asking "[w]here?"[155] The court reasoned that the right to travel "includes the right to live or stay where one will" and that laws designed to discourage migration infringe on the right to travel.[156] It found that homeless persons were left no alternative under the anti-camping ordinance other than leaving the city or going to jail.[157] Relying on *Pottinger*, the court wrote: "Simply put, as in some vintage oater, [homeless persons] are to clear out of town by sunset; and that, of course, is what the ordinance is all about,

145. *Id.* at 1578–83.
146. *Id.* at 1579.
147. *Id.*
148. *Id.* at 1580.
149. *Id.*
150. *Id.* at 1581.
151. *Id.*
152. *See* Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 393 (Cal. Ct. App. 1994), *rev'd*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1161–66 (Cal. 1995).
153. *Id.* at 389 n.3.
154. *Id.* at 392.
155. *Id.* at 393.
156. *Id.* at 392.
157. *Id.*

a blatant and unconstitutional infringement on the right to travel."[158]

Most courts have however rejected *Pottinger*'s analysis of the right to travel.[159] The court in *Joyce v. City & County of San Francisco*[160] wrote that *Pottinger* and the California Court of Appeals' decision in *Tobe* may constitute an unwarranted extension of Supreme Court precedent regarding the right to travel.[161] The court in *Joyce* wrote that it doubted whether facially neutral laws should be subject to strict scrutiny simply because they may have an impact on travel.[162] The courts in *Nishi v. County of Marin*[163] and *Allen v. City of Sacramento*[164] further explained that the right to travel is violated only by direct restrictions and not by indirect or incidental impacts.[165] Courts expressing skepticism about *Pottinger*'s reasoning have difficulty seeing a direct correlation between ordinances that neutrally proscribe undesirable local conditions and exercise of the right to travel.[166] The court in *Johnson v. City of Dallas*[167] noted that ordinances that incidentally make it difficult to reside in a city deter travel only "in the same sense that anti-smoking ordinances or laws prohibiting the sale of alcohol in certain areas might deter smokers or drinkers from migrating to particular areas having such ordinances."[168] The court in *Anderson v. City of Portland*[169] similarly explained an anti-camping ordinance that does not actually restrain movement may make a city "unattractive to homeless persons, but it does not constitute an interference with [such persons'] right to travel or freedom of movement that rises to the level of a constitutional deprivation."[170]

The California Supreme Court in *Tobe* overruled the California Court of Appeals' conclusion that the right to travel includes a right to live or stay where one will.[171] The court held that the right does not impose a corresponding constitutional obligation on a city to make

158. *Id.* at 393.

159. *See* Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1111 (E.D. Cal. 2012) ("[T]he bulk of authority has rejected or declined to follow *Pottinger* in cases concerning policies designed to prevent homeless individuals from erecting shelters and/or leaving their belongings in particular places.").

160. 846 F. Supp. 843 (N.D. Cal. 1994).

161. *Id.* at 860.

162. *Id.* at 860–61.

163. No. C11-0438 PJH, 2012 WL 566408 (N.D. Cal. Feb. 21, 2012).

164. 183 Cal. Rptr. 3d 654 (Cal. Ct. App. 2015).

165. *Nishi*, 2012 WL 566408, at *4–5; *Allen*, 183 Cal. Rptr. 3d at 671.

166. *See, e.g.*, Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *10 (D. Or. July 31, 2009); Johnson v. City of Dallas, 860 F. Supp. 344, 354 (N.D. Tex. 1994), *rev'd in part, vacated in part*, Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

167. *Johnson*, 860 F. Supp. at 344, *rev'd in part, vacated in part*, *Johnson*, 61 F.3d at 442.

168. *Id.* at 354.

169. No. 08-1447-AA, 2009 WL 2386056 (D. Or. July 31, 2009).

170. *Id.* at *10.

171. Tobe v. City of Santa Ana, 892 P.2d 1145, 1165 (Cal. 1995).

accommodations available for its exercise.[172] The court analyzed the U.S. Supreme Court's right to travel cases and concluded that they apply only to direct burdens.[173] It noted:

> Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible.[174]

The court did not doubt that an anti-camping ordinance might have the effect of deterring travel by persons who cannot afford other accommodations, but is held that a nondiscriminatory ordinance "is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel."[175] Courts that have considered both authorities have followed the reasoning of the California Supreme Court in *Tobe* rather than *Pottinger*.[176]

III. RE-EVALUATION OF *POTTINGER* UNDER *SAENZ*

Pottinger does not appear to have involved either visitation equality or immigration equality.[177] Claims were made that Miami had indirectly infringed on homeless persons' right to travel by denying them the right to engage in life-sustaining activities in public.[178] However, no complaint was made that non-resident or newly immigrated homeless persons had been treated differently than long domiciled homeless persons.[179] Visitation equality claims are limited under *Saenz* to those involving unequal treatment of citizens from other States devoid of some substantial

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172. *Id.*

173. *Id.* at 1162–63.

174. *Id.* at 1163.

175. *Id.* at 1164. *But see id.* at 1181–82 (Mosk, J., dissenting) (asserting that the primary purpose for enforcing the ordinance at issue in that case was to drive the homeless out of public areas and concluding that its impact therefore imposed a direct burden on the right to travel).

176. *See* Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1109–11 (E.D. Cal. 2012); Nishi v. Cty. of Marin, No. C11-0438 PJH, 2012 WL 566408, at *4–5 (N.D. Cal. Feb. 21, 2012); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996); Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 671–72 (Cal. Ct. App. 2015).

177. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1578–83 (S.D. Fla. 1992).

178. *Id.* at 1578.

179. *See id.* at 1555 (summarizing complaint), 1559–60 (explaining findings regarding arrests and mishandling of homeless persons' property), 1566–73 (explaining conclusions regarding arrests and property seizures).

reason for the discrimination.[180] Immigration equality claims are limited under *Saenz* to situations where newly arrived citizens are treated differently than established residents.[181]

The court in *Pottinger* did not have the benefit of the later decided opinion in *Saenz*, but *Saenz* does undermine *Pottinger's* reliance on immigration equality decisions.[182] The court in *Anderson* was unpersuaded by *Pottinger's* reliance on the immigration equality decision in *Memorial Hospital* absent a travel or residency restriction.[183] All travelers have human needs. It does not, however, follow that the right to travel guarantees that all essential needs will be furnished.[184] A stationary homeless person has the same need for shelter and a place to eat, drink, and sleep as an itinerant homeless person. However, a stationary person's pursuit of those necessities does not involve travel. Free ingress and egress, traveler equality, and migratory equality are not implicated.[185] Similarly, an itinerant person's right to travel is not directly impaired if the traveler is afforded free mobility and is treated no differently than an existing resident when visiting or moving to a new State.[186] The right to travel does not require that a traveler be given benefits superior to those provided to established residents.[187] The "travel" right departs from its

180. *See* Saenz v. Roe, 526 U.S. 489, 501–02 (1999).

181. *See id.* at 502–04.

182. *See Pottinger*, 810 F. Supp. at 1579–80 (first applying Shapiro v. Thompson, 394 U.S. 618 (1969), then applying Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250 (1974)); *see also* Roulette v. City of Seattle, 850 F. Supp. 1442, 1447 (W.D. Wash. 1994) ("[R]ight to travel cases involving durational residency requirements as a prerequisite to receiving public benefits and those involving other barriers to interstate travel are factually inapposite."), *aff'd* 97 F.3d 300 (9th Cir. 1996).

183. Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *9 (D. Or. Jul. 31, 2009); *see also* Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 672 (Cal. Ct. App. 2015) ("[T]he cases cited in *Pottinger* involved the grant or denial of benefits based on past residency or duration of residency laws that barred or expressly regulated travel.").

184. Tobe v. City of Santa Ana, 892 P.2d 1145, 1165 (Cal. 1995) ("[A] constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right."); *see also* Nishi v. Cty. of Marin, No. C11-0438 PJH, 2012 WL 566408, at *4 (N.D. Cal. Feb. 21, 2012) ("Though the right to travel is deemed vital to the concept of a democratic society, it is not so broad that it requires a state or governmental entity to provide its citizens with the means to enjoy that right."); *Allen*, 183 Cal. Rptr. 3d at 671 (a "City has no constitutional obligation to provide homeless persons with accommodations to facilitate their exercise of the right to travel.").

185. *See Saenz*, 526 U.S. at 500–04.

186. *See id.*; Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993).

187. Califano v. Torres, 435 U.S. 1, 4–5 (1977); *cf.* Slaughter-House Cases, 83 U.S. 36, 77 (1872) (holding that the Comity Clause guaranties "neither more nor less" than equal treatment); Livingston v. Van Inghen, 9 Johns. 507, 577 (1812) (opinion of Kent, C.J.) ("The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . . means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights."), *overruled by* N. River Steamboat Co. v.

purpose when used merely as a vessel to constitutionalize a concern having no direct affiliation with an actual travel disability.[188]

Pottinger did not, however, rely solely upon immigration equality cases. The court additionally cited and applied *Edwards* and other free passage authorities.[189] It explained that Miami's enforcement policies effectively banned homeless individuals from public areas and denied them anywhere that they could legally go, and wrote that this also "has the effect of preventing homeless people from coming into the City."[190] It could be maintained that *Saenz* also limited the scope of the right to free passage, because *Saenz* discussed only a right to entry and use of highways and other instrumentalities essential for interstate travel.[191] However, the Court expressly declined to further explicate upon the source of that particular aspect of the right to travel or its scope, because it was not at issue in *Saenz*.[192]

The Supreme Court in *Memorial Hospital* avoided deciding whether the right to interstate travel includes intrastate movement.[193] It later held in *Bray v. Alexandria Women's Health Clinic*[194] that "a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them."[195] It may be argued based upon *Bray* that the intrastate movement is a State right that is not included in

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Livingston, 3 Cow. 182 (1825); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 61 (New-York: O. Halsted 1827) (stating that citizens who remove from one state to another "are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other."); THOMAS SERGEANT, CONSTITUTIONAL LAW. BEING A COLLECTION OF POINTS ARISING UPON THE CONSTITUTION AND JURISPRUDENCE OF THE UNITED STATES WHICH HAVE BEEN SETTLED BY JUDICIAL DECISION AND PRACTICE 385 (Philadelphia, Abraham Small 1822) (writing that the Comity Clause had been held to mean "only, that citizens of other States shall have *equal* rights with the citizens of a particular State, and not that they shall have different, or greater rights.").

188. *See* Crandall v. Nevada, 73 U.S. 35, 43–44 (1867) (asserting that the purpose behind the right is to protect and promote the union of the States into one nation); Passenger Cases, 48 U.S. 283, 460–62 (1849) (Grier, J., concurring) (same), 492, (Taney, C.J., dissenting) (same); *see also* Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 923–24 (1986) (O'Connor, J., dissenting) (same); United States v. Guest, 383 U.S. 745, 767 (1966) (Harlan, J., concurring in part and dissenting in part) ("[T]he right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union.").

189. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1579–80 (S.D. Fla. 1992).

190. *Id.* at 1581.

191. *See* Saenz v. Roe, 526 U.S. 489, 500–01; *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993).

192. *Saenz*, 526 U.S. at 489, 501.

193. *See* Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 255–56 (1974).

194. 506 U.S. 263 (1993).

195. *Id.* at 277. *But see* Edwards v. California, 314 U.S. 160, 180–81 (1941) (Douglas, J., concurring).

the right to interstate travel.[196] If characterized as an attribute of state citizenship, any right of intrastate movement might have to rely solely upon a State to provide and protect it absent discriminatory treatment of non-residents.[197] In that case, the federal remedy for non-discriminatory State curtailment of such right would depend upon whether a restriction is repugnant to the principles of free government secured by the Constitution.[198]

With the exception of *Bray*, Supreme Court free passage cases indicate that something more than interstate ingress and egress is protected by the right to travel. The Court wrote in *Crandall* the right includes free access to seaports, federal courts, and other federal offices located throughout the several States.[199] Access to those facilities obviously depends upon an ability to move freely within a State after entry. The Court in *United States v. Guest*[200] similarly held that acts committed in the vicinity of Athens, Georgia to intimidate minority citizens from using highways violated their right to freely travel.[201] The intimidation in that case consisted of criminal activities committed distant from a border that did not stop entry but instead targeted movement of minority citizens within the State.[202] *Saenz* also suggests that the right to interstate travel protects at least free intrastate use of highways and other instrumentalities of interstate commerce.[203]

The Supreme Court has recognized a federal right to free intrastate movement in other settings. The Court invalidated a vagrancy ordinance for vagueness in *Papachristou v. City of Jacksonville*,[204] because it both failed to give adequate notice regarding what conduct was forbidden and encouraged arbitrary arrests and convictions.[205] It acknowledged that there might be walkers, strollers, wanderers, loafers, and loiterers who were up to no good, but it explained:

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned

196. *See Bray*, 506 U.S. at 277.

197. *See* United States v. Wheeler, 254 U.S. 281, 293–99 (1920); Slaughter-House Cases, 83 U.S. 36, 74–75 (1872).

198. *See Wheeler*, 254 U.S. at 299.

199. Crandall v. Nevada, 73 U.S. 35, 44 (1867); *cf.* Kent v. Dulles, 357 U.S. 116, 126 (1958) ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.").

200. 383 U.S. 745 (1966).

201. *See id.* at 757–59.

202. *See id.* at 747–48 n.1. *But cf.*, Griffin v. Breckenridge, 403 U.S. 88, 105–06 (1970) (emphasizing the proximity of the harassment to a state border).

203. Saenz v. Roe, 526 U.S. 489, 500–01 (1999).

204. 405 U.S. 156 (1972).

205. *Id.* at 162.

> in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[206]

Justice Stevens wrote for a plurality in *City of Chicago v. Morales*[207] that "freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[208] The plurality further elaborated:

> We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. . . . Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" . . . or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[209]

The Court similarly invalidated a statute for vagueness in *Kolender v. Lawson*[210] that required persons reasonably suspected of having committed crimes to present credible and reliable identification upon demand by a police officer.[211] It expressed concern that the statute allowed someone, who the police think suspicious, but against whom they lack probable cause of having committed a crime, to "continue to walk the public streets 'only at the whim of any police officer' who happens to stop that individual. . . ."[212] The Court additionally commented that the statute, therefore, "implicates consideration of the constitutional right to freedom of movement."[213]

Free interstate passage has been described as a "virtually unqualified" right.[214] The Supreme Court wrote in *Twining* that "among the rights and

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206. *Id.* at 164.

207. 527 U.S. 41 (1999).

208. *Id.* at 53 (plurality opinion).

209. *Id.* at 53–54 (citations omitted).

210. 461 U.S. 352 (1983).

211. *Id.* at 355–58.

212. *Id.* at 358 (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).

213. *Id.*

214. Califano v. Torres, 435 U.S. 1, 4 n.6 (1977). *But see* Jones v. Helms, 452 U.S. 412, 419 (1981) (recognizing exceptions); Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) (same).

privileges of National citizenship recognized by this court are the right to pass freely from State to State."[215] The free passage aspect of the right to travel was grounded by *Crandall* in the correlative right that citizens have to those the federal government has to unobstructed transportation throughout the various States.[216] The right would, however, be potentially meaningless if it protected only entry and exit but not some forms of travel within a State. The right to freely access seaports, federal courts, and other federal offices mentioned in *Crandall* could easily be frustrated if the constitutional protection afforded travel stopped at State borders.[217] A non-discriminatory law barring all residents and non-residents alike from entering a non-highway area surrounding a federal courthouse could be considered a purely intrastate restriction under *Bray*, but it would directly interfere with the ability of a United States citizen to freely travel to a constitutionally guaranteed forum to seek redress against a State that he or she was visiting.[218]

Whether framed as interstate or intrastate interference, a restriction should nonetheless have to directly burden travel to implicate the free passage aspect of the right.[219] The Supreme Court held in *Guest* that the right to travel is protected under the Civil Rights Act of 1964 against a conspiracy to violate it, but only to the extent that "the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right."[220] The *Guest* Court further explained that a conspiracy to rob a traveler would not, itself, be sufficient.[221] The Supreme Court similarly

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215. Twining v. New Jersey, 211 U.S. 78, 96–97 (1908), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2–6 (1964); *see also* Griffin v. Breckenridge, 403 U.S. 88, 106 (1970).

216. Crandall v. Nevada, 73 U.S. 35, 43–44 (1867); *see also* United States v. Guest, 383 U.S. 745, 757–58 (1966); Passenger Cases, 48 U.S. 283, 460–62 (Grier, J., concurring), 492 (Taney, C.J., dissenting) (1849).

217. *See generally Crandall*, 73 U.S. 44; Passenger Cases, 48 U.S. 492 (Taney, C.J., dissenting); *Edwards*, 314 U.S. at 178–79 (Douglas, J., concurring) (asserting that the right to pass and repass through the various States protects more than just an ability to access federal offices).

218. *See Crandall*, 73 U.S. at 44 (opining that citizens of the United States have "a right to free access to . . . the courts of justice in the several States . . . ."); *Passenger Cases*, 48 U.S. at 492 (Taney, C.J., dissenting) (opining that the right to sue in a federal court sitting in another state is one of the various provisions of the Constitution which "prove that it intended to secure the freest intercourse between the citizens of the different States."); *see also* U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to controversies "between a state and citizens of another state. . . ."); *see generally* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (describing a "purely intrastate restriction").

219. Tobe v. City of Santa Ana, 892 P.2d 1145, 1163–64 (Cal. 1995); *see also* Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1109–11 (E.D. Cal. 2012).

220. *Guest*, 383 U.S. at 760.

221. *Id.*

held in *Bray* that a concerted effort to block access to abortion clinics only incidentally affected the right to travel of women seeking abortions, because the effort was not aimed at travel and was instead motivated by opposition to abortion without regard to interstate travel.[222] *Guest* and *Bray* are arguably limited by context because the civil rights statutes under which travel claims were evaluated required specific intent and thereby statutorily disabled indirect violations.[223] However, the Supreme Court indicated outside the context of civil rights statutes in *Wheeler* that only a direct burden implicates the right to travel.[224] In addition, the Court in *Williams* held a tax that only "incidentally and remotely" affected freedom of egress from a State was permissible.[225]

Supreme Court cases have identified two types of restrictions that might unconstitutionally burden free passage: (1) de jure restrictions, and (2) de facto restrictions. *Edwards* and *Crandall* invalidated legal restrictions imposed directly upon exercise of the right to travel.[226] *Edwards* involved a statute that made it illegal to bring an indigent person into a State.[227] *Crandall* involved a tax upon travel activities.[228] *Guest* and *Griffin v. Breckenridge*[229] condemned situations where exercise of the right was factually impaired by intimidation and harassment.[230] *Griffin* dealt with allegations that conspirators "intended to drive out-of-state civil rights workers from the State, or that they meant to deter [minority citizens] from associating with such persons."[231] *Guest* addressed allegations that minority citizens were intimidated from using highways and other transportation instrumentalities by shootings, beatings, killings, threats, and other acts of violence; and it held that such harassment implicated the right to travel.[232]

The dividing line between direct and incidental burdens is not entirely clear from Supreme Court cases, but it seems to focus on the extent to which a restriction handicaps the ability to move between States or use interstate travel facilities. *Crandall* invalidated a tax that did not entirely

222. *Bray*, 506 U.S. at 274–76.

223. *Id.*; *Guest*, 383 U.S. at 760.

224. *See* United States v. Wheeler, 254 U.S. 281, 299 (1920) (distinguishing *Crandall* on the basis that the statute at issue "in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions . . ."). *But cf.* Edwards v. California, 314 U.S. 160, 178–79 (1941) (Douglas, J., concurring) (criticizing *Wheeler's* analysis of *Crandall*).

225. Williams v. Fears, 179 U.S. 270, 274–75 (1900).

226. *Edwards*, 314 U.S. at 172–74; Crandall v. Nevada, 73 U.S. 35, 43–49 (1867).

227. *Edwards*, 314 U.S. at 171.

228. *Crandall*, 73 U.S. at 36.

229. 403 U.S. 88 (1970).

230. *Id.* at 105–06 (1970); United States v. Guest, 383 U.S. 745, 757–59 (1966).

231. *Griffin*, 403 U.S. at 106.

232. *Guest*, 383 U.S. at 747–48 n.1, 757–59

bar entry or exit due to fear that any allowance of state regulatory authority could lead to imposition of other more oppressive taxes that might totally prevent or seriously burden free travel.[233] However, the Court later upheld a tax upon emigrant agents in *Williams*, because it only incidentally and remotely affected free passage.[234] The Court appears to draw a distinction between a direct tax upon entry and exit that made travel in *Crandall* dependent upon the "pleasure of a state" and a tax on recruiters who encouraged people in *Williams* to exercise their right to travel and work out-of-state, because that indirect occupation tax left the actual traveler "free to come and go at pleasure."[235]

Bray held that efforts to block entry to an abortion clinic used by a substantial number of interstate travelers did not violate their right to free passage because it impacted only the immediate vicinity around the clinics and restricted only movement within the state.[236] *Guest* distinguished between purely local travel and local use of interstate travel facilities.[237] *Griffin* held that efforts intended to drive out-of-state civil rights workers from a State implicate the right to interstate travel.[238] However, *Guest* indicated that efforts to compel residents to move out of a state would not directly involve the right of interstate travel.[239] These somewhat contradictory rulings can be reconciled by identifying the traveler and the particular travel activity at issue. *Griffin* and *Guest* advise that free passage protects unimpaired use of highways and other instrumentalities of interstate travel.[240] *Guest* and *Bray* likewise suggest that it does not protect purely localized travel.[241] *Griffin* indicates that attempts to drive away out-of-state travelers directly involve free passage, while *Guest* implies that efforts to expel non-traveling residents do not.[242]

Pottinger did not expressly address the impact of Miami's anti-homeless campaign on interstate travelers or the use of travel facilities.[243] The court did, however, conclude that the harassment of homeless persons was pervasive and purposeful.[244] The Court determined, based upon arrest records and internal Miami Police Department memoranda,

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

234. Williams v. Fears, 179 U.S. 270, 274–75 (1900).

235. *Id.* at 275; *Crandall*, 73 U.S. at 44.

236. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 276–77 (1993).

237. *Guest*, 383 U.S. at 757 n.13 (omitting consideration of local public facilities from its interstate travel discussion, and instead considering interference with the use of streets and highways only insofar as they were used in interstate commerce).

238. Griffin v. Breckenridge, 403 U.S. 88, 106 (1970).

239. *Guest*, 383 U.S. at 759 n.16.

240. *See Griffin*, 403 U.S. at 105–06; *Guest*, 383 U.S. at 757–59.

241. *See Bray*, 506 U.S. at 276–77; *Guest*, 383 U.S. at 757 n.13.

242. *See Griffin*, 403 U.S. at 106; *Guest*, 383 U.S. at 759 n.16.

243. *See generally* Pottinger v. City of Miami, 810 F. Supp. 1551, 1578–83 (S.D. Fla. 1992).

244. *See id.* at 1566–68.

"that the City's primary purpose was to keep the homeless moving in order to 'sanitize' the parks and streets" and to "drive them from public areas."[245] While not as extreme, the conduct in *Pottinger* was therefore analogous to the harassment in *Griffin* and *Guest* that implicated the right to travel.[246] In addition, *Pottinger* concluded that the campaign effectively prevented homeless people from coming into Miami.[247] Therefore, *Pottinger* appears consistent with *Saenz* at least insofar as the harassment deterred or expelled interstate travelers or deprived the use of interstate transportation facilities, and such impacts can be inferred from the sweeping nature of the enforcement activity directed against homeless persons in *Pottinger*.[248]

Saenz speaks about obstacles to entry that directly impair free interstate movement, but nowhere does it overtly limit those to restrictions specifically targeted at travel.[249] The California Supreme Court in *Tobe* left open the possibility that there may be some actions short of imposing a direct barrier which violate the right to travel.[250] Other courts have likewise distinguished *Pottinger* on the basis that *Pottinger* dealt with concerted action so widespread that it effectively banned homeless people from all public areas and left them nowhere they could legally go.[251] The Washington State Court of Appeals indicated in *City of Seattle v. McConahy*[252] that laws might violate the right to travel if they make it impossible for homeless persons to live in a city.[253] Sweeping restrictions that purposefully prevent homeless persons from coming into a city by making it impossible for them to be there should therefore still fall within the ambit of the free passage aspect of the right to travel, because they are a no less effective obstacle to the interstate travel of homeless persons than a physical barrier that denies entry.

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245. *Id.* at 1567, 1581.

246. *See Griffin*, 403 U.S. at 106 (finding that efforts to harass and drive away visiting civil rights workers implicated their right to travel); *Guest*, 383 U.S. at 757–60 (finding that intimidation and harassment meant to prevent minorities from using interstate highways implicated the right to travel).

247. *Pottinger*, 810 F. Supp. at 1581.

248. *See* Saenz v. Roe, 526 U.S. 489, 500–01 (1999); *Pottinger*, 810 F. Supp. at 1566–68 (discussing arrest records).

249. *Saenz*, 526 U.S. at 500–01.

250. Tobe v. City of Santa Ana, 892 P.2d 1145, 1164 (Cal. 1995).

251. *See* Nishi v. County of Marin, No. C11-0438 PJH, 2012 WL 566408, at *5 (N.D. Cal. Feb. 21, 2012); Roulette v. City of Seattle, 850 F. Supp. 1442, 1448 (W.D. Wash. 1994), *aff'd*, 97 F.3d 300 (9th Cir. 1996); Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 672 (Cal. Ct. App. 2015).

252. 937 P.2d 1133 (Wash. Ct. App. 1997).

253. *Id.* at 1141.

IV. CONCLUSION

The U.S. Supreme Court has long recognized that the Constitution protects an unenumerated personal right to interstate travel.[254] This right prevents states from refusing entry to impoverished persons.[255] It also prohibits states from treating recently immigrated indigent persons differently than established residents.[256]

The U.S. District Court for the Southern District of Florida in *Pottinger v. City of Miami* held that the right to travel protects a person's ability to migrate and pursue the basic necessities of life.[257] It concluded that the right is implicated when the policies and practices of a city make it impossible for a homeless person to live there.[258] Many courts have, however, disagreed with *Pottinger* on the applicability of the right to travel.[259] The California Supreme Court wrote in *Tobe v. City of Santa Ana* that the right to travel does not include a right to live or stay where one will.[260] It concluded that the right to travel is implicated only by a direct burden upon its exercise.[261]

The Supreme Court significantly changed the framework for analyzing right to travel claims in *Saenz v. Roe*.[262] It wrote that the right to travel includes at least three different components: (1) free passage, (2) visitation equality, and (3) immigration equality.[263] Free passage protects the right of persons to enter and exit States and to use highway facilities and other interstate transportation facilities.[264] Visitation equality ensures that someone who travels in a State outside the visitor's home won't be treated differently than an in-State resident absent some substantial reason for the discrimination beyond the mere fact that the visitor is not a resident.[265] Immigration equality protects the right of bona fide newly immigrated citizens to be treated the same as longer established residents of a State.[266]

Laws and enforcement policies that make it difficult for a homeless

254. Crandall v. Nevada, 73 U.S. 35, 44 (1867).

255. Edwards v. California, 314 U.S. 160, 173–74 (1941).

256. *See* Saenz v. Roe, 526 U.S. 489, 502–07 (1999); Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 254, 264, 266, 269 (1974); Shapiro v. Thompson, 394 U.S. 618, 627, 629–33, 638 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

257. Pottinger v. City of Miami, 810 F. Supp. 1551, 1580–81 (S.D. Fla. 1992).

258. *Id.*

259. Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1110–11 (E.D. Cal. 2012).

260. Tobe v. City of Santa Ana, 892 P.2d 1145, 1165 (Cal. 1995); *see also* Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996).

261. *Tobe*, 892 P.2d at 1161–63.

262. Saenz v. Roe, 526 U.S. 489, 500–07 (1999).

263. *Id.* at 500.

264. *See id.* at 500–01.

265. *Id.* at 501–02.

266. *Id.* at 502–07.

person to live in a city likely do not implicate either visitation equality or immigration equality if all homeless persons are treated the same.[267] Visitation equality is implicated under *Saenz* only when citizens from other States are treated less favorably than citizens of a State.[268] Immigration equality is implicated under *Saenz* only when newly arrived citizens are treated differently than established residents.[269] Neither would, therefore, require a State or governmental subdivision provide a benefit to accommodate homeless persons that is equally denied to all.[270]

Saenz appears to limit the scope of the free passage to interstate travel.[271] The Supreme Court held a few years earlier in *Bray v. Alexandria Women's Health Clinic* the right to interstate travel is not implicated by a purely intrastate restriction unless it is discriminatorily applied against travelers from other States.[272] The Court in *Saenz* indicated that free passage protects only against erection of obstacles that directly impair free interstate movement.[273] Therefore, free passage arguably does not secure a person's ability to stay in a place and protects only a traveler's right to move.[274]

Saenz did not however fully discuss the scope of the free passage component to the right to travel because it was not at issue in that case.[275] Earlier cases indicate that free passage encompasses more than just unimpeded ingress to and egress from a State.[276] The Supreme Court has indicated in other contexts that the Constitution protects some types of intrastate movement.[277] In addition, the Court has held that some intrastate barriers to free movement violate the right to interstate travel.[278] It is therefore conceivable that sweeping restrictions which make it impossible to live in a city implicate the right to travel if they purposefully and effectively prevent homeless persons from coming into a city.[279] A welcome mat is meaningless when the interior of a house is plastered with "no trespassing" signs. The right to travel must at least

267. *See id.* at 502–04.

268. *See id.* at 501–02.

269. *See id.* at 502–04.

270. Tobe v. City of Santa Ana, 892 P.2d 1145, 1163–65 (Cal. 1995).

271. *Saenz*, 526 U.S. at 500–01.

272. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993). *But see* Edwards v. California, 314 U.S. 160, 180–81 (1941) (Douglas, J., concurring).

273. *See Saenz*, 526 U.S. at 501.

274. Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996).

275. *Saenz*, 526 U.S. at 501.

276. *See, e.g.*, Crandall v. Nevada, 73 U.S. 35, 44 (1867).

277. *See* City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999) (plurality opinion); Kolender v. Lawson, 461 U.S. 352, 358 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

278. *See* United States v. Guest, 383 U.S. 745, 757–60 (1966) (intimidation and harassment committed within a State).

279. *See* City of Seattle v. McConahy, 937 P.2d 1133, 1141 (Wash. Ct. App. 1997).

minimally protect the presence of a homeless traveler in the location to which he or she has traveled. In the words of Justice Robert Jackson, unless "citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[280]

280. Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).