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International Travel and the Constitution

Jeffrey D. Kahn

Southern Methodist University, Dedman School of Law

Author ORCID Identifier:

 <https://orcid.org/0000-0002-8857-5647>

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INTERNATIONAL TRAVEL AND THE CONSTITUTION

Jeffrey Kahn^{*}

This Article makes the case for the fundamental right of U.S. citizens to leave their country and return home again. Surprisingly, Americans do not enjoy such a fundamental right. Under current U.S. Supreme Court precedents, the right to travel abroad is merely an aspect of liberty that may be restricted within the bounds of due process. The controversial No Fly List is one such result. Anyone whose name appears on this government-run database (or one of several variations on it) may find his or her air travel prohibited or subject to varying levels of restriction. Although the so-called War on Terror raises new concerns about a right-to-travel case law developed during the Cold War, no one has yet made the case for stronger constitutional protection for international travel.

The Article begins with an in-depth case study (based on interviews and primary sources) of two citizens who were recently denied permission to return to the United States for more than five months. The Article proceeds to explain the origins of weak support for foreign travel and then advances an unconventional source for its heightened protection. Whereas most unenumerated fundamental rights seek their foundation in the substantive due process guarantees of the Fifth and Fourteenth Amendments, I advance a more straightforward textual source: the Citizenship Clause of the Fourteenth Amendment. After developing the historical and theoretical support for my argument, I examine the policy implications of strict judicial scrutiny of travel restrictions, including the No Fly List, which are intended to combat terrorism in a globalized world.

* Assistant Professor of Law, Southern Methodist University, Dedman School of Law. B.A., Yale, 1994; M.Phil., Oxford, 1996; D.Phil., Oxford, 1999; J.D., University of Michigan Law School, 2002. Aspects of this Article were presented at the 2008 AALS National Conference in New York City; the Eleventh Annual Law, Culture & the Humanities Conference at UC Berkeley School of Law; the 2008 National Security Law Junior Faculty Workshop at Wake Forest University School of Law; the 2008 Law & Society Association Conference in Montreal; the Fourth Annual Gloucester Summer Legal Conference in Gloucester, England; and at faculty forums at SMU Dedman School of Law, University of Minnesota Law School, Texas Wesleyan University School of Law, and Villanova University School of Law. I thank Lackland M. Bloom Jr., Dale Carpenter, and William V. Dorsaneo III for their helpful and encouraging comments. Lynn Murray, Head of Research Services at the Underwood Law Library, provided invaluable help. I am also grateful for the research assistance of Richelle Blanchard Campbell, Vaniecy S. Nwigwe, and Jonathan M. Whalen, and for financial support from the SMU Dedman School of Law.

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INTRODUCTION

“What began in an alarmed concern for the country’s safety concludes in routines of unmitigated gall.”

—Louis L. Jaffe¹

What do Justice William O. Douglas, W.E.B. DuBois, and Arthur Miller have in common? Each was denied a passport on the grounds that his travel abroad was, in the official parlance of the 1950s, “not in the interests of the

1. Louis L. Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFF. 17, 28 (1956).

United States.”² The U.S. Department of State prevented their travel to protect America from a “world-wide Communist revolutionary movement, the purpose of which is by treachery, deceit, espionage, and sabotage to establish a Communist totalitarian dictatorship in countries throughout the world.”³ These passport denials were part of the first wave of targeted peacetime travel restrictions in the name of national security.

The second wave is upon us, and it is a tsunami compared to the first. Consider the sheer number of Americans traveling abroad. In 2006, more than 39 million Americans traveled to foreign countries aboard commercial air carriers.⁴ The State Department issued 12.1 million new passports that year, an “all-time record.”⁵ By comparison, the State Department issued and renewed a mere 20,320 passports in 1914, 203,174 in 1930, and almost 560,000 in 1956.⁶

Consider next the technological changes that have revolutionized travel security. The U.S. government currently operates numerous terrorist watchlists, including the so-called No Fly List.⁷ These massive computerized databases are accessible to authorized agents worldwide and searchable almost instantaneously. The addition of a name to the No Fly List is the digital equivalent of ripping up a passport; the international traveler is effectively prevented from departing from or returning to the United States.⁸

2. THE AUTOBIOGRAPHY OF W.E.B. DUBOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 3 (Henry Louis Gates, Jr. ed., 2007); see also Letter From William O. Douglas to Robert Daniel Murphy, Deputy Sec’y of State (June 19, 1959), reprinted in THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 270–71 (Melvin I. Urofsky ed., 1987); MARTIN GOTTFRIED, ARTHUR MILLER: HIS LIFE AND WORK 236 (2003).

3. See *Department Policy on Issuance of Passports*, 26 DEP’T ST. BULL. 919, 919 (1952) (basing policy on congressional findings in the Internal Security Act of 1950).

4. OFFICE OF TRAVEL & TOURISM INDUS., INT’L TRADE ADMIN., U.S. DEP’T OF COMMERCE, PRELIMINARY U.S. CITIZEN AIR TRAFFIC TO OVERSEAS REGIONS, CANADA & MEXICO 2006, at 1 (2007), <http://www.tinet.ita.doc.gov/view/m-2006-O-001/index.html>.

5. *Security of International Travel Documents: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Judiciary Comm.*, 110th Cong. 116 (May 2, 2007) (Written Statement of Andrew Simkin, Director, Office of Fraud Prevention Programs, Bureau of Consular Affairs, Department of State).

6. Roderic L. O’Connor, *The Bureau of Security and Consular Affairs and the Problem of Passport Restrictions*, 37 DEP’T ST. BULL. 604, 604 (1957); Graham H. Stuart, *Safeguarding the State Through Passport Control*, 12 DEP’T ST. BULL. 1066, 1066 (1945).

7. See AUDIT DIV., U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, at i (2007), <http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf> [hereinafter DOJ AUDIT REPORT].

8. See 49 U.S.C. § 114(h)(3)(A)–(B) (Supp. 2005) (authorizing watchlists to identify individuals “who may be a threat to civil aviation or national security” and to “prevent [such] individual[s] from boarding an aircraft”). Similar provisions govern maritime vessels. See 8 U.S.C. § 1221(a) (Supp. 2005); 19 C.F.R. § 4.7b(b) (2008).

Even the traveler whose name is not on any list now journeys abroad at the pleasure of the U.S. government, as if on parole from ordinary residence in the United States. Under a new Department of Homeland Security rule, all travelers now require the federal government's express prior permission to board any aircraft or maritime vessel that will enter or leave the United States.⁹

Both the enormous number of citizens abroad and the powerful new tools used to monitor or stop their travel are products of globalization in a digital age. In the fight against twenty-first century terrorism, however, one constant remains unchanged from the Red Scare of the 1950s: a long-felt tension between a citizen's desire to travel abroad and the state's interests in foreign affairs and national security. Should the individual citizen's freedom of movement trump those state interests? Should U.S. citizens be entitled to the unhindered use of their travel documents, or are their passports more analogous to licenses granted at the state's discretion? Restated more abstractly, should American citizenship be understood to convey a fundamental right to depart and reenter the United States at will?

The doctrinal answer, at least, is a resounding no to all three questions. Unlike the right to interstate travel within the United States, which is "virtually unqualified," the U.S. Supreme Court has repeatedly held that foreign travel is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment."¹⁰ The state may restrict foreign travel "within the bounds of due process," a process that almost invariably ends in a balancing test in which the citizen's interest is outweighed by countervailing state concerns.¹¹ The Supreme Court has held that such state control is natural because a passport holder should not "exploit the sponsorship of his travels by the United States."¹² The D.C. Circuit sitting en banc put the point more bluntly: "The Secretary may preclude potential matches from the international tinderbox."¹³

This Article rejects the premise that when a citizen selects a foreign itinerary, that travel is "sponsored" by the United States. With few clear exceptions, weighing the citizen's travel interest against foreign policy interests lacks constitutional legitimacy because it equates the citizen of a democratic republic with the subject of a monarchy or an undemocratic

9. See Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels, 72 FED. REG. 48,320 (Aug. 23, 2007) (codified Feb. 19, 2008, at 19 C.F.R. pts. 4 and 122) [hereinafter *Advance Transmission of Manifests*].

10. *Califano v. Gautier Torres*, 435 U.S. 1, 5 n.6 (1978) (per curiam).

11. *Id.*

12. *Haig v. Agee*, 453 U.S. 280, 309 (1981).

13. *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957) (en banc), *rev'd on other grounds sub nom.* *Kent v. Dulles*, 357 U.S. 116 (1958).

dictatorship. Unlike those civic creatures, the American citizen has no obligation to advance the state's interests through his actions. The state cannot treat its citizens as if they were "potential matches" that might set alight its foreign policy. So long as the citizen's actions are not treasonous, immediately dangerous, or contrary to some contractual obligation made to the state, a citizen's travel (like a citizen's speech) is none of the state's business. I therefore advance two related arguments. First, international travel should be considered a fundamental right protected by strict judicial scrutiny. Second, the most appropriate textual, historical, and theoretical source for that fundamental right is the Citizenship Clause of Section 1 of the Fourteenth Amendment.¹⁴

The Article proceeds as follows. Part I presents the recent odyssey of two citizens kept from returning home by their government. This case study is presented in close detail based on public sources, legal filings, and personal interviews with some of the participants. It is an excellent vehicle to examine the effect of very different constitutional protections for domestic and foreign travel because it attaches human faces to complex and abstract principles. This disharmony has real consequences for an increasing number of U.S. citizens in a shrinking world defined by the twin strains of globalization and terrorism.

The legal reasoning behind this itinerary-based distinction is parsed in Part II. Part II.A focuses on domestic travel, which unlike international travel, enjoys considerable constitutional protection against state actions that would impede it. Strangely, this security did not emerge because courts deemed domestic travel to have inherent constitutional value. Rather, domestic travel has been protected primarily because of its *contingent* benefits. That is, interstate travel was protected in order to protect other constitutional interests deemed valuable such as interstate commerce or federalism—not travel as such.

The much lesser protection accorded travel *outside* the United States is examined in Part II.B. That lesser protection is easier to understand in the light of heightened protection for domestic travel: Foreign travel secures few if any of the valuables that domestic travel does. Foreign travel also seems to entangle issues of foreign affairs and national security that interstate travel does not.

Part II.C thus explores the statutory implications of denying foreign travel the same constitutional protection as domestic travel while justifying

14. Protection for unenumerated fundamental rights typically has been found in the substantive due process protected by the Fifth and Fourteenth Amendments. I take no position in this Article about that alternative source for this right.

its restriction on foreign policy grounds. The passport, for example, began as a temporary travel restriction limited to the worst crises of wartime, but gradually grew into a permanent peacetime restriction. At the height of the Red Scare, a period comparable in many ways to the current so-called War on Terror, the passport could be used as a form of house arrest to keep suspect citizens under watch at home. This tendency toward mission creep, as new threats manifest themselves and new technologies emerge, is examined in the present day.

Part III then presents the argument that the right to depart and reenter the United States should be considered a fundamental right. The problem that I must address is that the reasons given to elevate domestic, interstate travel to the status of a fundamental right (explored in Part II.A) do not transfer well into an international travel context (considered in Part II.B). This problem is resolved by considering travel, both domestic and international, to be part of the “bundle of sticks” of citizenship that deserves protection on its own merits, not as a contingent protection for other rights or benefits. Thus, I do not argue that protection for the right to travel outside the United States comes from the substantive due process guarantees of the Fifth Amendment. Nor does it arise from the concomitant benefits it provides for other constitutional interests. Rather, I argue that it is part of the essence of what it means to be a citizen of the United States, a category of rights holders implicit throughout the U.S. Constitution and explicitly identified in the Citizenship Clause of the Fourteenth Amendment. A particularly pernicious aspect of minimizing protection for the right to travel abroad is the deference it gives to the executive branch to restrict a citizen’s foreign travel on grounds of foreign affairs and national security. I argue that such deference is generally wrong, because it strips away an essential element of what it means to be a citizen in a democratic republic.

One often hears the refrain that the Constitution “is not a suicide pact.”¹⁵ Since even a fundamental right may be infringed if such limitation is the least restrictive means necessary to achieve a compelling government interest, that is if it passes strict scrutiny, I readily concede that *some* national security reasons *should* result in curtailment of a citizen’s right to enter and leave the country. I therefore conclude Part III by comparing the present aspect-of-liberty regime with the fundamental-right approach I endorse, concluding that my

15. This phrase appears in a travel case, *Haig v. Agee*, 453 U.S. at 309–10, which cited to its use in a citizenship case, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Justice Jackson coined it in dissent in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

proposal would bring the United States into closer harmony with the meaning of citizenship in a democratic republic without sacrificing genuinely compelling national security interests.

The Article concludes with some cautionary reflections on how far arguments based on U.S. citizenship should extend in the context of globalization and counterterrorism. Citizenship is not a panacea for balancing civil liberties with security in a struggle against terrorism. Too much weight on protecting citizens qua citizens would erode the liberty that was wisely promised to persons by the Fifth and Fourteenth Amendments. In a world of sovereign nation-states, however, the right to return to one's country of citizenship, like the right to vote or hold public office, is a right peculiar to only those persons who are citizens. In a democratic republic (as opposed to a dictatorship, monarchy, or theocracy), the right of citizens to depart and return cannot be abridged on the grounds that such travel is not in the interest of the state. A democratic republic can rarely be said to have such an interest vis-à-vis its citizens.

I. THE CASE STUDY: "WHAT'S THE POINT OF BEING A CITIZEN?"

Muhammad Ismail was born in Pakistan.¹⁶ He is a naturalized U.S. citizen.¹⁷ His son, Jaber, was born in Lodi, California.¹⁸ Jaber is thus a U.S. citizen by birth. Neither father nor son holds dual citizenship.¹⁹ After four years abroad, father, son, and part of the Ismail family (mother, teenage daughter, and seven-year-old son) were returning to their home in Lodi. They had been living in Muhammad's childhood village in Pakistan in order for Jaber to study the Quran, an endeavor important to his parents.²⁰

On April 21, 2006, the family began their trip home. Without incident, they boarded an airplane in Islamabad for the first leg of their journey to the

16. Letter From Julia Harumi Mass, Staff Attorney, ACLU of N. Cal., to Office of Civil Rights & Civil Liberties, Dep't of Homeland Sec. 1 (Aug. 9, 2006) [hereinafter ACLU Complaint], available at http://www.aclunc.org/issues/government_surveillance/asset_upload_file848_3704.pdf.

17. *Id.*

18. *Id.*

19. Stella Richardson, *U.S. Citizens Allowed to Return Home After ACLU Files Complaint*, ACLU NEWS, Fall 2006, at 1, 8, available at http://www.aclunc.org/news/print_newsletters/asset_upload_file617_4008.pdf.

20. See Jeff Hood, *Hayats' Relatives Return Home After Five Months: Men Stuck Abroad When Names Turned Up on Fed's No-Fly List*, THE RECORD (Stockton, Cal.), Oct. 3, 2006; Daniel Pipes, *Right of Return*, JERUSALEM POST, Sept. 6, 2006, at 14; Press Release, ACLU of N. Cal., Statements From Jaber Ismail & Muhammad Ismail, Oct. 2, 2006, http://www.aclunc.org/news/press_releases/statements_from_jaber_ismail_and_muhammad_ismail.shtml.

United States, via Hong Kong.²¹ As they prepared to depart Hong Kong for the United States on a Korean Airlines flight, airport officials denied permission to board to Muhammad and Jaber Ismail, while permitting the rest of the family to board the aircraft.²² The Hong Kong officials stated that “no record” existed of Muhammad and Jaber Ismail in the United States and that their passports did not “come on” to their computers.²³ Unsuccessful attempts to persuade the authorities that Jaber and Muhammad were bona fide American citizens followed.²⁴ Faced with few options and extensive travel costs, the family divided: Mother and young children continued to the United States, while father and son returned to Pakistan.²⁵

The Hong Kong officials did not act on their own initiative. An order to refuse boarding to Muhammad and Jaber had come from the United States. Drew Parenti, Special Agent-in-Charge of the Sacramento Field Office of the Federal Bureau of Investigation (FBI), gave the order.²⁶ Although no U.S. government agency has ever publicly explained why the Ismail family was separated, or confirmed the conclusory explanation offered by Hong Kong officials on April 21, an FBI agent later told Jaber that an emergency contact Jaber had listed on his passport application—his uncle, Umer Hayat—had raised a red flag.²⁷ Special Agent Parenti was involved

21. ACLU Complaint, *supra* note 16, at 1.

22. See Demian Bulwa, *Lodi: Men OK'd to Return to U.S. From Pakistan*, S.F. CHRON., Sept. 13, 2006, at B5; Jeff Hood, *Two Lodi Men Stuck in Pakistan: Family Relation to Hayats Keeps Pair Exiled Until They Talk to FBI*, THE RECORD (Stockton, Cal.), Aug. 29, 2006 [hereinafter Hood, *Two Lodi Men*]; Hood, *supra* note 20. Another son, Usama, remained in California. Telephone Interview With Julia Harumi Mass, Staff Attorney, ACLU of N. Cal. (July 2, 2007) [hereinafter Mass Interview].

23. ACLU Complaint, *supra* note 16, at 1–2; Barclay Crawford, *Terror-Linked Pakistanis Bounced From Airport*, S. CHINA MORNING POST, Sept. 3, 2006, at 4.

24. See Richardson, *supra* note 19, at 8 (Jaber Ismail: “I showed them my birth certificate, my school ID, but they wouldn’t listen.”).

25. ACLU Complaint, *supra* note 16, at 2; Crawford, *supra* note 23, at 4.

26. Hood, *supra* note 20. According to Hood, this information came not from Parenti, but from the Ismail’s future attorney, Julia Harumi Mass of the ACLU of Northern California, who said Parenti “confirmed that he was behind the request to prevent the Ismails from returning unless they agreed to questioning.” *Id.* Through a spokeswoman, Parenti refused comment. *Id.* Ms. Mass confirmed to me that Mr. Parenti did tell her by phone on August 14, 2006, that the Ismails were prevented from returning home at his direction. Mass Interview, *supra* note 22. Mr. Parenti declined my written request to interview him. See Letter From Drew S. Parenti, Special Agent-in-Charge, FBI Sacramento Field Office (July 12, 2007) (on file with author).

27. ACLU Complaint, *supra* note 16, at 2; Crawford, *supra* note 23, at 4; Richard Gonzales, *NPR Morning Edition: U.S. Government Blocks Citizens’ Return Home* (NPR radio broadcast Sept. 12, 2006) (transcript available at 2006 WLNR 22951510, and audio file available at <http://www.npr.org/templates/story/story.php?storyId=6059911>) [hereinafter *NPR Morning Edition*] (Jaber Ismail: “[The FBI Agent at the American embassy in Islamabad] told me the reason that why we’re on the no-fly list and the reason was that in the emergency contact number, we wrote our uncle’s name, you know, Umer Hayat.”).

in an investigation of the Pakistani community in Lodi, California, which was suspected of harboring individuals and groups sympathetic to foreign terrorists.²⁸ Both Umer Hayat and his son, Hamid Hayat, had been arrested on terrorism-related charges in early June 2005, following their own return to the United States from Pakistan.²⁹ Both Hayats are U.S. citizens.³⁰ Hamid Hayat was charged with providing material support to terrorists in violation of the USA PATRIOT Act, and with three counts of making false statements about his activities.³¹ Specifically, the government alleged that “during a period of months” Hayat had sought “jihadist training at a training camp in Pakistan.”³² His father had been charged with two counts of making false statements, to wit, with lying to law enforcement officials about his son’s activities.³³ On April 21, 2006, the same day that the Ismails’ travel odyssey began, their then twenty-three-year-old cousin Hamid Hayat was awaiting the decision of a jury, then in its seventh day of deliberations.³⁴

None of this was known or could have been known by the Ismail family at the time their travel odyssey began. Indeed, Jaber’s older brother, Usama Ismail, later told a reporter that neither Jaber nor Muhammad knew very

28. See Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. TIMES, Apr. 27, 2007, at A1. Parenti joined the Sacramento Field Office approximately two weeks after the Hayats were arrested. See Press Release, Dep’t of Justice, Hamid Hayat Convicted of Terrorism Charges, Apr. 25, 2006, <http://sacramento.fbi.gov/dojpressrel/pressrel06/hamidhayat042506.htm>; PBS Frontline, *Interview With Drew Parenti*, Oct. 5, 2006, <http://www.pbs.org/wgbh/pages/frontline/enemywithin/lodi/response.html>. PBS Frontline dated the start of the Lodi investigation as sometime in December 2001. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/enemywithin/etc/script.html>).

29. See Minutes for Proceedings Held Before Magistrate Judge Peter A. Nowinski, U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. June 7, 2005).

30. See Second Superseding Indictment, U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. Jan. 26, 2006).

31. The charges alleged violations of 18 U.S.C. § 2339A and § 1001. See Second Superseding Indictment, *supra* note 30. A jury convicted Hayat on all four counts after twenty-one days of evidence and nine days of deliberation. See Verdict, U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. Apr. 25, 2006). He was sentenced to twenty-four years imprisonment on September 10, 2007. See Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. TIMES, Sept. 11, 2007, at A20.

32. Second Superseding Indictment, *supra* note 30, at 3.

33. *Id.* at 6–7. Umer Hayat’s trial ended in a mistrial due to a hung jury. Minutes for Proceedings Held Before Judge Garland E. Burrell Jr., U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. Apr. 25, 2006). He later pled guilty to a one-count information alleging a false statement to a customs official that he was returning to the U.S. carrying less than \$10,000. See Information, U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. May 31, 2006). He was sentenced to time served, fined \$3600 and ordered to pay a \$100 special assessment. See Minutes for Proceedings Held Before Judge Garland E. Burrell Jr., U.S. v. Hayat, No. 2:05-CR-00240-GEB (E.D. Cal. Aug. 25, 2006).

34. Minutes for Proceedings Held Before Judge Garland E. Burrell, Jr., U.S. v. Hayat, No. 2:05-00240 (E.D. Cal. Apr. 21, 2006); Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. TIMES, Oct. 2, 2006, at A10; Crawford, *supra* note 23, at 4.

much about the Hayat case because the family did not talk about the case on the telephone.³⁵ But the connection ran deeper than an incidental reference on a passport application. During videotaped interviews with FBI agents in June 2005 that ultimately led to his arrest, Hayat had made reference to several relatives in Lodi, including Jaber and his older brother Usama, whom he speculated may have attended terrorist training camps in Pakistan.³⁶ When asked who had attended the camps, Hayat answered "I can't say 100 percent, but I have a lot of, you know, names in my head. . . . [Jaber Ismail] went, like, two years ago."³⁷ When asked if Jaber had attended the same camp as Hamid, he said "I'm not sure, but I'll say he went to a camp."³⁸

Muhammad and Jaber Ismail returned to Pakistan at their own expense, where they contacted the U.S. Embassy in Islamabad for guidance.³⁹ A consular official advised them to book a direct flight to the United States, suggesting that connecting flights had caused similar problems for other families.⁴⁰ Father and son took this advice about two weeks later, when their lost luggage finally arrived from Hong Kong.⁴¹ At the airport, however, a Pakistan International Airlines employee informed them that their names now appeared on the U.S. government's No Fly List. Permission to board the aircraft would be denied unless and until a clearance could be obtained from the U.S. Embassy. In a very real sense, the Ismails had been rendered stateless, "a condition deplored in the international community of democracies."⁴² They could neither return to their country nor remain in Pakistan without the continuing grace and consent of that government.

Between late June and early July 2006, the American Civil Liberties Union (ACLU) of Northern California was retained as counsel to the Ismails.⁴³ The staff attorney assigned to the case, Julia Harumi Mass, sent a letter of complaint on August 9, 2006, to the Office of Civil Rights and Civil

35. Hood, *Two Lodi Men*, *supra* note 22.

36. Archibold, *supra* note 34; Hood, *Two Lodi Men*, *supra* note 22.

37. Bulwa, *supra* note 22, at B5.

38. Demian Bulwa, *2 Lodi Residents Refused Entry Back Into U.S.*, S.F. CHRON., Aug. 26, 2006, at A1. Beyond his confessions, which Hayat's attorneys claimed were coerced and misleading, the government presented no evidence of his own or anyone else's attendance at any camps. Archibold, *supra* note 34; Amy Waldman, *Prophetic Justice*, ATLANTIC MONTHLY, Oct. 2006, available at <http://www.theatlantic.com/doc/200610/waldman-islam>. At least one source alleges that Hayat later changed his story. See Pipes, *supra* note 20.

39. ACLU Complaint, *supra* note 16, at 2.

40. *Id.*

41. *Id.*

42. *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

43. Mass Interview, *supra* note 22.

Liberties at the Department of Homeland Security (DHS). That complaint summarized the Ismails' experience as citizens seeking help from their embassy:

The following Monday, the Ismails went to the U.S. Embassy. The consular officer they spoke to told them he would contact them with information about how to proceed. Later that week, the Ismails were instructed to return to the Embassy. When they returned, Jaber was interrogated by two FBI agents. The FBI agents told him that he would need to submit to a polygraph test before he would be permitted to return to the United States. At the end of the interrogation, the Ismails were told to return the next day. However, the next morning one of the FBI agents called and cancelled the appointment. She said that she would call again for an interview. After three weeks, Jaber Ismail contacted the FBI agent to find out what was going on. After several more weeks passed, the FBI agent called Jaber Ismail and told him that he needed to submit to further interrogation in order to "clear up" the situation before he would be permitted to return to the United States.⁴⁴

The Ismails refused to participate in any further interrogations.⁴⁵ The Ismails' eldest son, Usama, recounted a telephone call he received in the United States from an FBI agent in Pakistan contemporaneous with his father's and brother's ordeal. According to Usama Ismail, the agent asked him to convince his brother Jaber to speak with the FBI agents at the embassy. Presciently, if saltily, Usama put his finger on at least one constitutional issue: "I said, 'You guys screwed my uncle over, and now you want to screw my brother over?' They're treating them like foreigners or something. What's the point of being a citizen?"⁴⁶

As the Ismails' story drew media attention, the FBI and DHS declined to comment on the actions apparently being conducted overseas with their knowledge, if not at their instigation.⁴⁷ The United States Attorney's Office in Sacramento acknowledged that FBI agents wanted to speak with Muhammad and Jaber Ismail.⁴⁸ McGregor Scott, then U.S. Attorney for the Eastern District of California, was the most candid, confirming that the Ismails were on the No

44. ACLU Complaint, *supra* note 16, at 2.

45. The ACLU Complaint alleges that "[t]he Ismails declined to participate in additional FBI interrogations without counsel." *Id.* at 2. This allegation was mistaken. Mass Interview, *supra* note 22. The Ismails only declined to continue talking to the FBI Agents at the Embassy. *Id.* During a telephone conversation on August 14, 2006, Mr. Parenti advised Ms. Mass that she could attend any questioning of her clients in Pakistan, but refused to provide information about interrogations underway while Ms. Mass remained in California. *Id.*

46. Hood, *Two Lodi Men*, *supra* note 22.

47. NPR *Morning Edition*, *supra* note 27.

48. Archibold, *supra* note 34.

Fly List.⁴⁹ Rather euphemistically he described the condition placed on their return: "They've been given the opportunity to meet with the FBI over there and answer a few questions, and they've declined to do that."⁵⁰

The ACLU's complaint requested for the Ismails a full investigation, an explanation for the government's actions, clearance to return to the United States, removal from the No Fly List, and compensation for damages incident to their delayed travel home.⁵¹ In addition, on August 9, 2006, Ms. Mass also filed Traveler Identification Verification Forms (TIVF) and identity documentation with the Transportation Security Administration (TSA), a component of DHS.

Communication by DHS directly to the Ismails' attorney was stilted and vague. Written acknowledgment from DHS dated August 29, 2006, confirmed receipt of the complaint.⁵² In early September, Ms. Mass made and received a series of phone calls to and from the DHS Office of Civil Rights and Civil Liberties. Ms. Mass describes the phone calls as "very cryptic."⁵³ During one call, Ms. Mass asked a DHS attorney whether her clients were precluded from entering the United States by any means of transport or route of travel, for instance by ship or over land, or if the travel ban merely extended to air travel.⁵⁴ DHS counsel declined to answer the question.⁵⁵ Ms. Mass received a call a few days later from a DHS representative who would only state that review of the complaint had been completed and that "changes have been made as appropriate."⁵⁶ Ms. Mass asked for more information, including

49. Bulwa, *supra* note 38. Mr. Scott twice declined written requests for interviews. See Letters From McGregor W. Scott, U.S. Attorney, E. Dist. of Cal., to Author (Aug. 15, 2007 and Sept. 24, 2007) (on file with author). The second letter followed an unexpected telephone conversation initiated by Mr. Scott on Aug. 28, 2007, and the submission to him of a written list of questions.

50. Archibold, *supra* note 34; Bulwa, *supra* note 38; Bulwa, *supra* note 22. According to Mr. Scott, this quotation is accurate. See Letter From McGregor W. Scott to Author, *supra* note 49 ("I did in fact say what he quoted me as saying: '[T]hey've been given the chance to meet with the FBI over there and answer a few questions, and they've declined to do that.'). Mr. Scott explained in his letter that "[t]his was a random press inquiry to which I gave an answer which was based on information provided to me by the FBI in a cursory briefing." *Id.*

51. ACLU Complaint, *supra* note 16, at 3.

52. Mass Interview, *supra* note 22; see also Letter From Timothy J. Keefer, Deputy Officer and Acting Chief Counsel, Office for Civil Rights and Civil Liberties, DHS, to Julia Harumi Mass, Staff Attorney, ACLU (Sept. 8, 2006) (on file with author).

53. Mass Interview, *supra* note 22.

54. *Id.* Ms. Mass asked because Special Agent Parenti had indicated in a telephone conversation that, although he was not certain, he believed that his order barred the Ismails from all return transport, not just aircraft. *Id.*

55. *Id.*

56. *Id.*

whether alternative means of transport home were possible.⁵⁷ The DHS representative declined to answer or even say whether that question had been investigated.⁵⁸ When Ms. Mass asked what the phrase “changes have been made as appropriate” actually meant for her clients, DHS counsel responded by asking whether the Ismails had recently tried flying again.⁵⁹ When Ms. Mass answered no, DHS counsel suggested that they might try flying again.⁶⁰

The phone calls were followed by a fax dated September 8, 2006, to Ms. Mass from the DHS Office of Civil Rights and Civil Liberties. The letter stated that “[w]here it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that Messrs. Ismail may have experienced as a result of TSA’s watch list screening process.”⁶¹ This language was virtually identical to responses to the TIVF submissions that were faxed to the Ismails.⁶²

The complaint, aggressive lawyering, and widespread media coverage ultimately paid off.⁶³ Speaking on condition of anonymity, a federal law enforcement official told the San Francisco Chronicle only that “There’s been a change,” and that the change was from DHS.⁶⁴ A DHS spokeswoman was willing to state on the record that the Office of Civil Rights and Civil

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Letter From Timothy J. Keefer to Julia Harumi Mass, *supra* note 52.

62. Letters From James G. Kennedy, Jr., Director, Office of Transp. Sec. Redress, TSA, to Muhammad Ismail and Jaber Ismail (Sept. 6, 2006) (on file with author).

63. On the face of the facts presented above, it would appear that the Ismails had a colorable claim for monetary damages for a variety of constitutional torts that would be governed under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). If the action were filed in the United States District Court for the Eastern District of California, the statute of limitations for such a claim would have run, at the latest, sometime in late May or June 2008, two years after the time when the Ismails knew or had reason to know of their constitutional injury (for example, when FBI agents in Pakistan placed unconstitutional conditions on their return home). See CAL. CIV. PROC. CODE § 335.1 (West 2003) (two-year statute of limitations); *Pesnell v. Arsenault*, 490 F.3d 1158, 1163 & n.3 (9th Cir. 2007) (noting that the forum law sets statute of limitations for a *Bivens* claim); *Western Center For Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000) (“A *Bivens* claim accrues when the plaintiff knows or has reason to know of the injury.”).

The Ismails have not filed a civil suit against Special Agent Parenti or other federal officials. Why? There may be many reasons why the Ismails declined to file suit, but two possible explanations stand out. First, it is not unreasonable to speculate that the Ismails may have negotiated a settlement agreement with the relevant federal officials or agencies. An alternative explanation might be that the Ismails were so traumatized by the episode (which followed the federal prosecution of two of their relatives on terrorism-related charges) that they harbor fears of retaliation for filing such a lawsuit. Regardless of the objective reasonableness of such a fear, it is not unreasonable to speculate that concerns about future travel might work a chilling effect on those who have suffered such an injury in the past.

64. Bulwa, *supra* note 22.

Liberties “did some research on the case and did make appropriate changes,” but declined to say what those changes were.⁶⁵

On October 1, 2006, Muhammed and Jaber Ismail returned home to the United States.⁶⁶ Said Jaber: “I never imagined that the country I was born in would stop me from coming home for five months and separate me from my family, especially when I was not even charged with a crime.”⁶⁷

* * *

This case study describes a harrowing odyssey that could happen to any American citizen under current transportation security and counterterrorism policies. The Ismails were shocked that their journey could be terminated so abruptly thousands of miles from home. The expense in time and money of this seizure (not to mention the emotional trauma of family separation) must have weighed heavily on the mind of the father, Muhammed Ismail. But it was the son, Jaber, a U.S. citizen by birth, whose increasing dismay captures the most shocking part of this story. In an instant, his American citizenship seemed to lose its value and its power. The Ismails were citizens locked out of their own country. When, as citizens, they sought the aid of their embassy, they quickly found themselves in need of a lawyer to protect them from the officials to whom they initially turned for help. Uncharged with any crime, their freedom to enter the United States was rendered no better than that of an alien, dependent on the caprice of unseen officials evaluating unconfirmed reports authored by unknown hands. “They’re treating them like foreigners or something,” one family member told a local newspaper, “What’s the point of being a citizen?”⁶⁸ What, indeed?

II. FREEDOM OF MOVEMENT AND THE CONSTITUTION

Whether foreign or domestic, “[n]othing in the Constitution expressly protects freedom of movement.”⁶⁹ In fact, the only explicit textual reference

65. *Id.*

66. Archibold, *supra* note 34.

67. Press Release, ACLU of N. Cal., Statement From Jaber Ismail (Oct. 2, 2006), http://www.aclunc.org/news/press_releases/statements_from_jaber_ismail_and_muhammad_ismail.shtml; see also *Inside the Madrassa* (CNN television broadcast, Sept. 12, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0609/12/cnr.04.html>) (“Because they said I have to do a lie detector test and I was thinking like, you know, I was born in the United States. Why do I have to take a lie detector test to enter my own country.”).

68. Hood, *Two Lodi Men*, *supra* note 22.

69. ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION* 162 (1956).

to a right of “free ingress and regress” in American constitutional history was found in the Articles of Confederation.⁷⁰ However, this clause was removed from the final draft of the Constitution without recorded debate.⁷¹

Some have read this absence as evidence that no such right was recognized, nor intended to be recognized, at the nation’s founding.⁷² Others have argued that the right to travel was considered so intrinsic to the life of a free citizen that (as the U.S. Congress had been given no power to abridge it) no explicit protection of it was deemed necessary.⁷³ This, of course, was Hamilton’s logic concerning a Bill of Rights.⁷⁴ Certainly, the importance of the right to enter and leave one’s own country was well known to the Framers, who could easily locate it in the common law of England and railed against its denial to the American Colonies.⁷⁵ Indeed, restriction of freedom of movement was one

70. ARTICLES OF CONFEDERATION art. IV, § 1.

71. See 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 121 (Max Farrand ed., 1937) (indexing references to what became Article IV, Section 2, in the Records, none of which provide substantive guidance). Joseph Story’s Commentaries shed no light on the change and, in fact, omit the passage “free ingress and regress to and from any other State.” See JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1805 (1851). Akhil Reed Amar suggests that this language was “pruned away” as “excess and confusing verbiage.” AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 251 (2005).

72. See, e.g., *Passport Denied: State Department Practice and Due Process*, 3 STAN. L. REV. 312, 315 (1951) (“The framers of the Constitution did not intend to include international travel as specifically within the term ‘liberty.’”).

73. See, e.g., AMAR, *supra* note 71, at 251 (“Not only were such rights sheltered by Article IV’s more general formulation, but they also found further refuge in the Constitution’s overall structure of sister states formed into a more perfect union, and in the negative implications of the Article I interstate-commerce clause: Congress, not states, would generally regulate who and what could cross state lines.”); CHAFEE, *supra* note 69, at 185–87; see also *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (“The right of ‘free ingress and regress to and from’ neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’” (footnote and citation omitted)); *United States v. Guest*, 383 U.S. 745, 764 (1966) (Harlan, J., concurring in part and dissenting in part) (“This right to ‘free ingress and regress’ was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. 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.”); *New York v. O’Neill*, 359 U.S. 1, 12 (1959) (Douglas, J., dissenting) (citing Chafee to argue that “the failure to make specific provision for this right in the Constitution must have been on the assumption that it was already included. For it is impossible to think that a right so deeply cherished in the Colonies was rejected outright.”).

74. See THE FEDERALIST NO. 84 (Alexander Hamilton).

75. See, e.g., Thomas Jefferson, A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth, May 1779, reprinted in 4 THE FOUNDERS’ CONSTITUTION 488 (Philip B. Kurland & Ralph Lerner, eds., 1987) (intending “to preserve to the citizens of this commonwealth, that natural right, which all men have of relinquishing the country, in which birth, or other accident may have thrown them, and, seeking subsistence and happiness wheresoever they may be able, or may hope to find them” and declaring that defined inhabitants of the Confederation “shall have free egress, and regress, to and from” the Commonwealth of Virginia).

of the “injuries and usurpations” listed in the Declaration of Independence.⁷⁶ Several early colonial charters and state bills of rights also referenced the right to exit or otherwise travel freely abroad.⁷⁷ Following independence, defense of the right of expatriation (arguably the most extreme form of freedom of movement) was a dominant theme of early American foreign policy.⁷⁸

In the absence of explicit textual support for a right to travel, the Supreme Court charted two separate doctrinal paths. The Court granted strong constitutional protections for interstate travel, but permitted restriction of foreign travel within the far less protective bounds of due process. The doctrinal history of each approach is discussed in Parts II.A and II.B, respectively.

Why the difference? Why the lesser protection for foreign travel? The answers lie, at least in part, in the Supreme Court’s very functionalist

76. “He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.” THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776); see also ROGERS M. SMITH, CIVIC IDEALS 53–54 (1997) (“The colonists were ordered to remain east of a Proclamation Line drawn along the crest of the Alleghenies. This restriction, culminating a long history of British restraints on colonial expansionism, was fiercely denounced by the colonists.”).

77. See CHAFEE, *supra* note 69, at 163–67, 176–81; THE LIBERTIES OF THE MASSACHUSETTS COLONIE IN NEW ENGLAND (1641), art. 17, available at <http://history.hanover.edu/texts/masslib.html> (“Every man of or within this Jurisdiction shall have free libertie, notwithstanding any Civill power to remove both himselfe, and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie.”); PA. CONST. OF 1776, Declaration of Rights, art. XV, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3081, 3084 (Francis Newton Thorpe ed., 1909) (“That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.”); VT. CONST. art. XVII (1777), available at http://avalon.law.yale.edu/18th_century/vt01.asp (“That all people have a natural and inherent right to emigrate from one State to another, that will receive them, or to form a new State in vacant countries, or in such countries as they can purchase[] whenever they think that thereby they can promote their own happiness.”); VT. CONST. art. XXI (1786), available at http://avalon.law.yale.edu/18th_century/vt02.asp (same).

78. See *Right of Expatriation*, 9 Op. Att’y Gen. 359 (1859) (“Here, in the United States, the thought of giving it up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world.”); see also Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853, 862 (1990) (“[I]n the first three-quarters of a century of the Republic a central concern of the Department of State was protection of naturalized American citizens abroad against claims of the state of their nativity to their services as soldiers or seamen.”); Charles E. Wyzanski, Jr., *Freedom to Travel*, ATLANTIC MONTHLY, Oct. 4, 1952, at 66, 67 (“[F]reedom of travel was in the nineteenth century a dominant theme in our foreign policy.”).

approach to protecting an implied right to domestic, interstate travel. Like foreign travel, travel between the states of the Union is not a right explicitly found in the Constitution. The Court nevertheless protected this right as a means of protecting other rights, powers, or designs more directly expressed in the Constitution. Thus, the freedom to travel between states has been given heightened protection because it functions to add value to the rights and freedoms identified more easily in the Constitution's text: associational freedoms, the participation of citizens in federal self-governance, and the pursuit of individual and national economic prosperity.

This functionalist approach transformed an intrinsic right of citizenship into a contingent right of citizenship. As a result, the Supreme Court has afforded heightened protection to the freedom of travel within the United States—where the “primary” rights that travel may strengthen are most clearly exercised—but not to travel outside the United States, where such contingent interests historically have seemed more difficult to find. These contingent arguments have had the unforeseen consequence of eroding the foundation to protect foreign travel. This consequence did not become fully apparent until more and more Americans began traveling abroad.

A. Freedom to Travel Inside the United States

Government attempts to restrict interstate travel have occupied the Supreme Court since the early part of the nineteenth century. It is a curiosity of this line of cases that the Court has never seemed troubled by its difficulty locating the source of a right to interstate travel in the Constitution.⁷⁹ Rather, the Court has journeyed among a variety of textual and structural arguments. As a result, this right has largely been upheld indirectly and contingently as a necessary corollary to the full functioning of other rights and interests, not as a right with an intrinsic value. These alternative sources of protection are examined below: the Privileges and Immunities Clause of Article IV; the Interstate Commerce Clause; structural principles of federalism; and the Privileges or Immunities Clause of the Fourteenth Amendment.

79. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (observing without explaining that “[w]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision,” before identifying four possible sources for rights to interstate and foreign travel).

1. The Privileges and Immunities Clause

The first argument that the Constitution protects a right to travel relied upon a belief prevalent among many judges in the early nineteenth century that certain natural rights, though unspecified in the Constitution, nevertheless limited the reach of the new government.⁸⁰ Thus, the right to interstate travel was first upheld through Article IV's Privileges and Immunities Clause.⁸¹ In *Corfield v. Coryell*,⁸² an early and important case that sought to discern the content of the Clause, Justice Washington described some of the "fundamental" rights "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."⁸³ Although he found it "more tedious than difficult" to name them, he began his list with 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."⁸⁴

This would have been an unexceptional textual argument had Justice Washington been interpreting Article IV of the Articles of Confederation.⁸⁵ But, as noted above, the "ingress and regress" clause was deleted from the Constitution.⁸⁶ State and federal judges were undeterred by this omission. Well into the era of the Chase Court, this phantom clause was cited for the right to interstate travel as one of the privileges and immunities referenced in the Constitution, often paraphrasing this original language of the Articles of Confederation.⁸⁷ Thus, unlike the majority of cases concerning interstate travel, which ultimately rested protection of the right on the need to protect other fundamental rights or national interests, the first references to free travel associated the right with citizenship. These pre-*Slaughter-House*

80. See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1252, 1336–38 (3d ed. 2000).

81. See U.S. CONST. art. IV, § 2, cl. 1.

82. 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823).

83. *Id.* at 551–52.

84. *Id.*

85. See ARTICLES OF CONFEDERATION art. IV, § 1 ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall [sic] free ingress and regress to and from any other State." (emphasis added)).

86. See *supra* note 71.

87. See, e.g., *Ward v. Maryland*, 79 U.S. 418, 430 (1870) ("[T]he [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) ("[I]t gives them the right of free ingress into other States, and egress from them . . .").

opinions defend that purpose for the Clause in strong terms: “No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this.”⁸⁸

These cases foundered on the lack of any textual support for such a notion and, in 1873, this exercise came to an abrupt end with Justice Miller’s opinion for the Court in *The Slaughter-House Cases*.⁸⁹ That case is most widely known for the narrow interpretation it gave to the Privileges or Immunities Clause of the Fourteenth Amendment (discussed *infra* Part II.A.4). But the case also sealed the fate of any further attempt to use the Privileges and Immunities Clause of Article IV as Justice Washington and others had used it: to find and protect natural rights or rights intrinsic to the concept of citizenship.

Writing for a narrow majority, Justice Miller initially seemed to take a very expansive approach, observing that although the Clause found in the Constitution is a much shortened form of that which appeared in the Articles of Confederation, “[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each.”⁹⁰ Had he stopped there, the right to travel would have found far greater security in this part of the Constitution, for it implied the Hamiltonian logic that the absence of the phrase protecting “ingress and regress” from the Constitution’s text was no great matter.⁹¹

But Justice Miller continued, rejecting the argument that the federal government protected these privileges and immunities in the last resort if a state should restrict the privileges of its own citizens and citizens of other states within its jurisdiction equally.⁹² With the exception of a few express limitations imposed on the states by the text of the Constitution (in Article I, Section 10), “and a few other restrictions,” Justice Miller held that “the entire domain of the privileges and immunities of citizens of the States, as

88. See, e.g., *Lemmon v. People*, 20 N.Y. 562, 607 (1860). Justice Denio observed that this clause “was inserted substantially as it stood in the Articles of Confederation,” *id.* at 608, glossing over the deletion of the travel-related language to assert that “any law which should attempt to deny [citizens] free ingress or egress would be void.” *Id.* at 610. This gloss is particularly odd given that Justice Denio observes later in his opinion that the exception of “paupers and vagabonds” from the provision of citizenship in Article IV of the Articles of Confederation “was omitted in the corresponding provision of the Constitution.” *Id.* at 611.

89. 83 U.S. 36 (1872).

90. *Id.* at 75.

91. Justice Miller, citing *Corfield*, explained that “[i]n the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.” *Id.*

92. See *id.* at 77.

above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.”⁹³

The limited restriction placed on states by this Golden Rule theory of the Clause—that the state could only do unto others as the state would do unto its own citizens—would seem to destroy any protection the Clause could afford to a right to travel. If a state chose to close its borders to ingress by citizens from other states, under this reading, it could do so if the closure equally applied to its own citizens’ regress across those same borders. What is more, this reading seems to belie the assertion a few paragraphs earlier that the essential purpose of the Clause was the same as that found in the Articles of Confederation, which quite explicitly did provide for a right of “free ingress and regress” into and out of states.⁹⁴

Justice Miller’s phrase, “and a few other restrictions,” however, left him some maneuverability to protect this particular privilege and immunity (which the Court had already identified).⁹⁵ Citing his own opinion in *Crandall v. Nevada*,⁹⁶ Justice Miller described rights of citizens to come to the seat of government and to access the nation’s seaports as protected by “implied guarantees” of the Constitution. These rights, he said, owed their existence to “the Federal government, its National character, its Constitution, or its laws.”⁹⁷

In preserving this right, however, Justice Miller did a two-step evasion of the Privileges and Immunities Clause as the source for it. First, Justice Miller referenced *Crandall* for protection of a right to travel, but that case did not rely on the Privileges and Immunities Clause.⁹⁸ Protection of such a right apparently fell into Justice Miller’s category of “a few other restrictions” on State sovereignty, in this case the national character and federal structure of the country’s government. Second, Justice Miller distinguished the Privileges and Immunities Clause in Article IV from the then new Privileges or Immunities Clause of the Fourteenth Amendment and held that neither worked as a broad check on a state’s broad legislative jurisdiction over its citizens. Indeed, in a move caught by Justice Bradley, one of the dissenters, Justice Miller misquoted Article IV, Section 2 to read “The citizens of each State shall be entitled to all the privileges and immunities of citizens of

93. *Id.*

94. *See supra* note 85.

95. *See Ward v. Maryland*, 79 U.S. 418, 430 (1870).

96. 73 U.S. (6 Wall.) 35 (1867).

97. *Slaughter-House*, 83 U.S. at 79. For a discussion of *Crandall v. Nevada*, see *infra* text accompanying notes 115–128.

98. *See infra* Part II.A.3.

[rather than in] the several States,”⁹⁹ and then concluded his discussion of the lack of federal protection for privileges implied by Article IV, which he held accrued as a result of state citizenship, with a refusal to define what was indeed protected by Section 1 of the Fourteenth Amendment.¹⁰⁰

Thus, Justice Miller preserved some federal protection for a right to interstate travel under very limited circumstances. Not for another 126 years, in *Saenz v. Roe*,¹⁰¹ would the Court partially revive this definitional argument (discussed *infra* Part II.A.4). Until then, the right to travel lacked an independent textual source for even that small component. Instead, the right to travel was largely defended through consequentialist reasoning and contingent argument. The strongest set of cases in that line rested on the Interstate Commerce Clause.

2. The Interstate Commerce Clause

Cases in this category ground the right to engage in interstate travel on the need to protect the workings of the national economy. Thus, these cases are unabashedly consequentialist in their reasoning: The right to travel is protected against infringement by the states because it is essential to the promotion of a desirable consequence, interstate commerce. This argument also appears to contain an inherent limitation: It protects a citizen’s right to travel within the United States from interference by different states of the Union but does not protect the citizen from federal restrictions imposed on his interstate movement.¹⁰²

Ironically, the first Commerce Clause case to protect travel within the United States concerned foreigners. In *The Passenger Cases*,¹⁰³ an early Taney Court invalidated state laws that taxed passengers arriving in ports from foreign ships.¹⁰⁴ The tax was defended on a variety of grounds, including

99. *Slaughter-House*, 83 U.S. at 75. Justice Bradley ascribed to the natural rights view espoused by Justice Washington in *Corfield*, and quoted that case in the process of noting Justice Miller’s error: “It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens in a State; not of citizens of a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State.” *Id.* at 117–18. See also *TRIBE*, *supra* note 80, at 1306, on the effect, intended or not, of this misquotation.

100. *Slaughter-House*, 83 U.S. at 78–79.

101. 526 U.S. 489 (1999).

102. This argument was rejected in *Saenz v. Roe*, 526 U.S. 489. See discussion *infra* Part II.A.4.

103. 48 U.S. (7 How.) 283 (1849).

104. *Id.* The New York tax was assessed at a variable rate on all hands aboard foreign and domestic vessels. *Id.* at 283–84. Only the provision concerning foreign passengers was at issue. *Id.* at 298. The Massachusetts tax was limited to alien passengers. *Id.* at 286.

the general police power of the states to maintain quarantine and inspection laws, as well as to protect the public fisc from immigrating paupers and other undesirables.

In a splintered 5–4 decision, with each justice writing separately, the Interstate Commerce Clause provided the basis for the majority to hold that these state taxes were unconstitutional as applied to foreign passengers. Concern that such a tax could be extended from foreigners to citizens, or lead to higher rates or more frequent instances of taxation, drove the justices in the majority to conclude that states could not be left to regulate their own ports in that fashion without destroying the advantages of uniform regulation of commerce. That uniformity, protected by granting exclusive power over interstate and foreign commerce to the federal government, was a novelty of the Constitution that the Articles of Confederation lacked.¹⁰⁵

Justice Grier found the foreseeable commercial consequences of such divisive state taxes intolerable and in conflict with the Constitution. But it was a conflict he saw with Congress' plenary power to regulate interstate commerce, not a conflict with a citizen's right (let alone a foreigner's) to move freely within national borders.¹⁰⁶ Thus, states could not tax passengers (whether citizens or aliens) for their travel into or among the states of the Union. The unconstitutionality of such state laws was not premised on violation of any right to travel. Rather, it was an infringement on the rights of people to engage in commerce and, indeed, to be part of the stream of commerce themselves.¹⁰⁷ Travel was seen as a concomitant aspect of commerce, and therefore perceived to require only derivative protection under the Constitution's protection of interstate commerce. Perhaps that is unsurprising in an era when few had the financial means to engage in travel for travel's sake.

Roughly eighty years later, the Great Depression and Dust Bowl led to "the spectacle of large segments of our population constantly on the move," and to the "anti-Okie" legislation that was at issue in *Edwards v. California*.¹⁰⁸ California sought to stem the flow of indigent migrants into their state by criminalizing the transport of such nonresidents into the state, lest they become public charges.

As in *The Passenger Cases*, the Court considered multiple theories for the unconstitutionality of the state statute, including conflict with the

105. *The Passenger Cases*, 48 U.S. at 405 (McLean, J.); *id.* at 444–45 (Catron, J.); *id.* at 460–61 (Grier, J.).

106. *Id.* at 462 ("Commerce, as defined by this court, means something more than traffic,—it is intercourse . . .") (Grier, J.) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824)).

107. See, e.g., *The Passenger Cases*, 48 U.S. at 402 (McLean, J.).

108. *Edwards v. California*, 314 U.S. 160, 173 (1941).

structural principles of federalism and freedom to exercise political pressure, before settling on the Interstate Commerce Clause as the source of the constitutional injury.¹⁰⁹ Again, the advantages of exclusive federal regulation of interstate commerce were seen to be at risk if states followed California's "open invitation to retaliatory measures" by sealing themselves off from national economic crises. The Court reaffirmed that transportation of persons was a form of commerce, with only the secondary and contingent protection of travel that reversed the conviction of Fred Edwards for transporting his destitute brother-in-law out of the Dust Bowl.¹¹⁰

3. The Structure of Federal Union

The right to travel within the United States has also been recognized to occupy "a position fundamental to the concept of our Federal Union."¹¹¹ Internal borders within a federal state necessarily serve different functions than the borders that circumscribe the nation. Were the individual states of the Union free to police passage across those borders in the same way that nation-states traditionally enforced their frontiers, essential benefits of a federal union (as opposed to other forms of political association) would be lost. Thus, the right to travel found support in a structural principle of federalism that permeates the Constitution. Even when the right was found implied in a textual provision of the Constitution, the structural arguments have provided further support.¹¹²

An early and clear articulation of this approach came from Chief Justice Taney, dissenting in *The Passenger Cases*. Taney would have upheld the tax at issue as applied to foreigners, but not if the case had presented a U.S. citizen's claim. Although Taney could not find a right to interstate travel explicit in the Constitution, he found contingent protection for travel in the federal structure of the Union. In a lengthy passage concluding his opinion, he nominally reserved judgment on the rights of citizens to travel. It is worth quoting at length because it identifies several textual bases on which to ground arguments for a constitutional right to interstate travel:

Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access,

109. *Id.* at 174.

110. *Id.* at 172.

111. *United States v. Guest*, 383 U.S. 745, 757 (1966).

112. *See, e.g., United States v. Guest*, 383 U.S. 745, 767 (1966) (Harlan, J., dissenting in part); *Blake v. McClung*, 172 U.S. 239, 256–57 (1898); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. And the various provisions in the Constitution of the United States—such, for example, as the right to sue in a federal court sitting in another State, the right to pursue and reclaim one who has escaped from service, the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties—all prove that it intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the Federal government was formed, we are one people, with one common country.¹¹³

Justice Taney's reasoning remained as contingent as other arguments for free interstate movement. All of these clauses were merely indications of the Framers' intent "to secure the freest intercourse between the citizens of the different States." Were that not the desired consequence of federal union (for instance, and counterfactually, if the Framers had espoused a more confederal union), the "right to pass and repass through every part of it without interruption" would not necessarily be implied by the various rights Taney enumerated.¹¹⁴

Sometimes the Court has been more explicit in its structural analysis. Eighteen years after *The Passenger Cases*, the Court examined a tax on all passengers transiting by rail or coach through the State of Nevada.¹¹⁵ Relying first and foremost on the Court's opinion in *The Passenger Cases* (including Chief Justice Taney's dissent),¹¹⁶ Justice Miller's opinion for the Court held the statute unconstitutional, but not for infringing any particular federal power (although the Interstate Commerce Clause, Declare War Clause, and Imposts and Duties Clause were all considered).¹¹⁷ Rather, the capitation tax on passengers was held to interfere with the structure and exercise of federal

113. *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

114. *Id.*

115. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

116. Justice Miller quoted directly from that passage of Chief Justice Taney's dissent that is quoted, *supra* text accompanying note 113. See *Crandall*, 73 U.S. at 48–49.

117. *Crandall*, 73 U.S. at 41, 43–44. Professor Charles Black, in a famous series of lectures at Louisiana State University in 1968, observed that Justice Miller's majority opinion in *Crandall* implies that the Court only considered those textual arguments because counsel in the case "assumed that the decision had to go on the interpretation" of one textual provision or another. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15–16 (1969). "But we do not concede," Justice Miller wrote for seven members of the Court, "that the question before us is to be determined by the two clauses of the Constitution which we have been examining." *Id.* at 16 (quoting *Crandall*, 73 U.S. at 43).

government across a large territory by making essential conduct (such as transporting troops, assembling legislators, or summoning petitioners to federal courts or agencies) dependent on payment of a state tax. As a result, the felt national need for citizens to travel and participate in government, much more than the individual right of citizens to freedom of movement, drove him to invalidate the tax. As Justice Miller explained for the Court:

But if 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 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.¹¹⁸

Justice Miller's language of contingency and condition is unmistakable.¹¹⁹ He refers to "correlative rights,"¹²⁰ and does not refer to the citizen's right to travel except in the conditional tense.¹²¹ Justice Miller clearly viewed the right to travel, "[i]f the right . . . is one guaranteed to him by the Constitution,"¹²² as one based not on its value to the individual citizen but on its utility for the collective good of the nation. The taxing power of the state over passengers is held unconstitutional only because "its exercise has affected the functions of the Federal government," not the inalienable right of the citizen to travel.¹²³

Indeed, all of the references to the citizen are clearly intended to emphasize the importance of an open union of states in which the federal government "has a right," "demands . . . services," and "is entitled" to compel its citizens to travel to meet their obligations to it.¹²⁴ The correlative rights of a citizen to come to the seat of government are part of the smooth operations of government

118. *Crandall*, 73 U.S. at 44.

119. Dissenting in *United States v. Guest*, 383 U.S. 745, 765 (1966), Justice Harlan noted how Justice Miller had "found a correlative right of the citizen" to unimpeded interstate travel, only as "[a]ccompanying this need of the Federal Government." *But see* *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Crandall*, 73 U.S. 35, for the proposition that "among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state").

120. *Crandall*, 73 U.S. at 44.

121. *Id.* ("But if the government has these rights on her own account, the citizen also has correlative rights.")

122. *Id.* at 47. Professor Black perceived that the holding was based on "a reciprocal relation between the national government which might have need for its citizens to travel, and their right to travel." *See* BLACK, *supra* note 117, at 27.

123. *Crandall*, 73 U.S. at 44.

124. *Id.* at 44-45.

and valued for *that* reason. While the value of such travel to the citizen is obvious, this passage grounds the right itself in contingency, for if the states could tax citizens called to service by their government: “[T]he government itself may be overthrown by an obstruction to its exercise.”¹²⁵ Thus, the right to travel through states of the union is protected only because a federal union depends on such unimpeded internal channels. Prohibition on a tax on interstate travel was derived from the structural need for successful government, not from any intrinsic value the citizen might obtain in the freedom to roam.

Although Justice Miller refers in *Crandall* to this “right of passing through a State” as one “guaranteed” to the citizen of the United States by the Constitution, it is clear that Justice Miller was not foreshadowing an interpretation of the Privileges or Immunities Clause that would be adopted in *Saenz v. Roe* many years later.¹²⁶ Justice Miller repeated this argument in dicta in *The Slaughter-House Cases*. Citing directly to *Crandall v. Nevada*, he recited the “correlative rights” (although without labeling them as such) to travel to the seat of government, conduct business there, access seaports and federal offices and found them “protected by implied guarantees” of the Constitution.¹²⁷ Justice Miller wrote (again quoting Chief Justice Taney in *The Passenger Cases*) that these were “privileges and immunities of citizens of the United States which no State can abridge” because this right of citizenship enabled “all the great purposes for which the Federal government was established.”¹²⁸ No reference was made to the fact that Nevada’s capitation tax was not assessed on citizens, but on “every person leaving the State.”¹²⁹

125. *Id.* at 44. Explicit reference was made to the Civil War and a counterfactual asked whether the Union would have survived in the face of border states like Tennessee subjecting federal troop trains to a similar capitation tax. *Id.*

126. Nevertheless, Justice Douglas, concurring in *Edwards v. California* seventy-four years later, interpreted Justice Miller’s language to support his view that the right to travel was a right of national citizenship protected by the Fourteenth Amendment. *See Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring). Justice Douglas preferred to interpret the language of contingency that infused Miller’s analysis as “merely in illustration” of the dangers of allowing states to infringe this right, rather than as sources for the right itself. *Id.* After all, Douglas argued, there was “not a shred of evidence in the record” that any passengers conveyed by *Crandall* sought to engage in any such political acts or missions of state. *Id.* Justice Douglas thus argued that when the Fourteenth Amendment was adopted a year after *Crandall*, it had already been “squarely and authoritatively settled that the right to move freely from State to State was a right of national citizenship.” *Id.* at 179. But this is error, possible only by ignoring the steady and heavy emphasis throughout Justice Miller’s opinion on the derivative justifications for the right to travel.

127. *The Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

128. *Id.* at 78–79.

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

Thus the holding could not have been grounded on a right of citizenship without being fatally underinclusive.

Miller's emphasis on the relationship between the "rights," "demands" and "entitle[ments]" that the federal government could expect a federal union to facilitate over the "correlative rights" of citizens was meant to illustrate a fundamental element of the structural theory of a federal system: the necessity of open, internal borders. These benefit the citizen as much as the visitor, but are somewhat easier to illustrate through the citizen's relationship with the government than the visitor's. Indeed, the foreigner, as a person protected by the Fifth Amendment, is guaranteed the right to come to the seat of government and transact business when his or her life, liberty, or property interests are at issue. But to link a correlative right to travel to the advantages it accrues for the functions of the Federal government is a risky business. It diminishes the right with a contingency that is rightly absent from what might be termed free-standing rights found in the Constitution, such as the protection against suspension of the privilege of habeas corpus, prohibitions on bills of attainder and ex post facto laws, protections against conviction for treason, and the Bill of Rights itself.

Justice Miller's selective quotation of *Corfield v. Coryell* in his opinion in *The Slaughter-House Cases* supports this theory of his contingent view of the right to travel. Justice Washington had included "[t]he 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" as one of the privileges and immunities found in Article IV that were "more tedious than difficult" to enumerate. Indeed, Justice Washington asserted that this right numbered among those "in their nature, fundamental" and belonging "of right, to the citizens of all free governments."¹³⁰ In *The Slaughter-House Cases*, Justice Miller quotes from that same passage of *Corfield*, but ends his selective citation one sentence short of the reference to travel as a free-standing privilege and immunity!¹³¹

No reference to *Corfield* appears in Justice Miller's earlier opinion for the Court in *Crandall v. Nevada*. Nor would one expect it to appear, since Justice Miller found only a limited value to the correlative right to travel to the extent that it buttressed the effective administration of federal government. Justice Bradley, on the other hand, described in his dissenting opinion a "perfect" constitutional right to "go to and reside in any State" the citizen chooses,

130. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

131. *Slaughter-House*, 83 U.S. at 76.

which he found lodged in the Fourteenth Amendment's Citizenship Clause.¹³² Even more telling, Justice Bradley fully cited Judge Washington's argument in *Corfield*, including his reference to "[t]he 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."¹³³ The difference between Justice Miller's view of the right to travel and Justice Bradley's view is nothing short of the difference between a contingent right and an intrinsic, or fundamental, right.

4. The Privileges or Immunities Clause

Foreshadowing part of the Court's action fifty-eight years later in *Saenz v. Roe*, Justice Douglas stated his view in *Edwards v. California* that the right to travel was a fundamental right to be found in the Privileges or Immunities Clause of the Fourteenth Amendment.¹³⁴ Justice Douglas expressed his revulsion for the contingency implied by attachment to commerce: "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."¹³⁵ Justice Jackson, writing separately, also found the right to "enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence" to be a privilege of citizenship of the United States.¹³⁶

In *Saenz v. Roe*, the Court made a surprise return to the Fourteenth Amendment as a source for the right to interstate travel.¹³⁷ *Saenz* concerned a California law that capped the first twelve months of welfare benefits for new residents at the level of benefits that the applicant would be entitled to receive in the state of previous residence.¹³⁸ California's cost-savings measure had federal statutory approval.¹³⁹ The case seemed destined for decision

132. *Id.* at 112 (Bradley, J., dissenting).

133. *Id.* at 117 (Bradley, J., dissenting) (quoting *Corfield*, 6 Fed. Cas. at 551-52).

134. Eighteen years after *Edwards*, Justice Douglas would find his own international travel obstructed by the State Department. See Letter From William O. Douglas to Robert Daniel Murphy, Deputy Sec'y of State, *supra* note 2.

135. *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); see also BLACK, *supra* note 117, at 28-29 ("I should prefer to think of Edwards' right to travel, and of his brother-in-law's right to bring him into the state, as a consequence of his being one of the people in a unitary nation, to which, because of its nationhood, internal barriers to travel are unthinkable, rather than pretending that I have performed a warranted inference from a clause empowering Congress to regulate commerce among the several states.")

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

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

138. *Id.* at 492.

139. *Id.* at 493, 495.

on one or more of the standard, if ambiguous, approaches the Court had adopted to assess durational residency requirements in the past.¹⁴⁰

Writing for the Court, Justice Stevens sought more precision. He divided the right to travel into three components, each with different constitutional sources of protection. The first component was the “right to enter and leave another state,” for which the opinion cited *Edwards v. California* and *United States v. Guest*¹⁴¹ as precedents. Although those cases lodged the right to travel in the Interstate Commerce Clause, Justice Stevens concluded that for purposes of the case before the Court, “we need not identify the source of that particular right in the text of the Constitution.”¹⁴² The second component, the right “to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State,” the Court found firmly protected by the Privileges and Immunities Clause of Article IV, Section 2.¹⁴³

Saenz presented an issue concerning the third component, the right “to be treated like other citizens” when a traveler elects to settle in a new state.¹⁴⁴ The Court found protection for this component in Section 1 of the Fourteenth Amendment, relying on both the Citizenship Clause¹⁴⁵ and the Privileges or Immunities Clause.¹⁴⁶ That both clauses were employed should not be surprising given that the Court was deciding the constitutionality of a federal matching-grant program that provided a benefit (privilege) primarily intended for citizens of the United States framed in the context of the broader question of a constitutional right to travel.¹⁴⁷ The Citizenship Clause “expressly equates citizenship with residence,”¹⁴⁸ which the Court held to mean that this third component of the right to travel “embraces the citizen’s right to be treated equally in her new State of residence, [and thus] the discriminatory classification is itself a penalty.”¹⁴⁹

140. See *Green v. Anderson*, 811 F. Supp. 516, 518–21 (E.D. Cal. 1993) (citing case law on durational residency requirements to invalidate the program); *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998); see also discussion *infra* note 152.

141. 383 U.S. 745 (1966).

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

143. *Id.* at 500–01.

144. *Id.* at 502–03.

145. *Id.* at 506–07.

146. *Id.* at 503.

147. Title IV of the federal statute at issue, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 and 42 U.S.C.), tightened restrictions on welfare and other benefits for noncitizens.

148. *Id.* at 505.

149. *Saenz*, 526 U.S. at 506.

Referencing many of its durational residency opinions,¹⁵⁰ the Court added something new: It held that federal approval of the short-term discrimination against new state residents made no difference to the constitutionality of the state's program and, in fact, that federal assent was itself unconstitutional. The Court reasoned that Congress' acquiescence violated the Citizenship Clause: "[T]he protection afforded to the citizen by the Citizenship Clause . . . is a limitation on the powers of the National Government as well as the States."¹⁵¹ Although made in the context of interstate travel, this conclusion supports my argument (developed *infra* Part III) that the Citizenship Clause is a better source of protection for international travel than Fifth Amendment Due Process guarantees.

* * *

The right to interstate travel, long defended for the contingent value it added to other constitutional interests, became a fundamental, albeit unenumerated, right sometimes to be found through the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment.¹⁵² How did

150. See discussion *infra* note 152.

151. *Saenz*, 526 U.S. at 507–08.

152. It should be noted here that ambiguity about the constitutional source of the right to travel did not prevent, and may have facilitated, constitutional protection under the fundamental interests branch of equal protection analysis. Since these cases are not concerned with where the right is found, they are of little value to the analysis presented in this article. The typical case concerned durational residency requirements for state benefits. See *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (applying equal protection analysis to residency requirement while conceding that “we have not felt impelled to locate this right [to travel] definitively in any particular constitutional provision”); *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring) (“[F]requent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary.”); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) (noting that the “right of interstate travel has repeatedly been recognized as a basic constitutional freedom” without seeking its constitutional source); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (“We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”).

Likewise, judges hearing cases on intrastate travel also have not tarried long searching for the source of that supposed right as these judges grappled with the level of scrutiny to be applied to assess equal protection claims alleging its violation. See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003). But see *Dickerson v. City of Gretna*, No. 05-6667, 2007 WL 1098787, at *3 (E.D. La. Mar. 30, 2007) (declining to find a fundamental right to intrastate travel, citing controlling Fifth Circuit precedent, and therefore dismissing a travel-based cause of action by putative class of plaintiffs alleging unconstitutional interference with their attempted flight from New Orleans through Gretna following Hurricane Katrina), *leave to appeal from interlocutory order denied*, No. 07-19 (5th Cir. June 4, 2007); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (“[T]he Supreme Court specifically refused to ascribe the source of the right to travel to a particular constitutional provision, but relied on ‘our constitutional concepts of personal liberty.’ It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.” (internal citations omitted)).

this happen? When did this come to pass? The most straightforward statement of this seemingly new (or renewed) constitutional fact was made by Justice Stewart, concurring in *Shapiro v. Thompson*¹⁵³:

The Court today does *not* “pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection” To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. . . . This constitutional right . . . is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . [I]t is a virtually unconditional personal right, guaranteed by the Constitution to us all.¹⁵⁴

In his short concurrence, Justice Stewart responded to the provocative dissent of Justice Harlan, summarizing much but explaining little, laying claim to the new ground like an explorer, but without describing how he or his brethren arrived there. Thus, the right “finds constitutional protection that is quite independent of the Fourteenth Amendment.”¹⁵⁵ This is undoubtedly true, and Stewart’s citation here to *The Passenger Cases* is meant to confirm it.

The Court has evaded conclusive statement of where in the Constitution the right to interstate travel can or should be found. In fact, it can and has been found in many places in the text as well as in the structure of the document as a whole. State action that has been judged to abridge the right of a particular class to travel must pass strict scrutiny to avoid violating the Equal Protection Clause. Or travel restrictions may violate the Interstate Commerce Clause, or the Privileges and Immunities Clause, or principles of federalism, or the Fourteenth Amendment, or some combination of them all. Notwithstanding federal plenary authority over interstate commerce and the unique position of the federal legislature as a body representing the interests of all citizens, *Saenz* instructs that the Citizenship Clause prohibits Congress from complicity in such action by states.

Interstate travel enjoys robust constitutional health against restrictions by the States. But what if the federal government seeks to restrict foreign travel? Part II.B explores the much weaker protection of international travel.

153. 394 U.S. 618 (1969).

154. *Id.* at 642–43 (Stewart, J., concurring) (citations and footnotes omitted).

155. *Id.* at 643.

B. Freedom to Travel Outside the United States

American citizens have a fundamental right to interstate travel that is based on its importance to the life of the individual and the life of the nation. One might expect similar defenses of the right to travel abroad. As the Supreme Court explained in its first substantial case on the question:

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.¹⁵⁶

Nevertheless, international travel has not enjoyed the same protection. At its most supportive, the Supreme Court has assumed that the right to travel abroad must have some limited protection under the liberty prong of the Due Process Clause of the Fifth Amendment.¹⁵⁷ Until recently, the typical case involving a right to international travel was brought to compel the issuance of a passport. These cases were litigated in the context of the Cold War. In many ways, these cases resonate—in both the fears they articulate and the deference they advocate to executive authority—with cases catalyzed by the so-called War on Terror.

In Part II.B.1, I explain why, stripped of the contingent benefits that a right to interstate travel promotes, the right to foreign travel has been considered in a lesser light. In Part II.B.2, I criticize the gloss placed on these cases by the separation of powers doctrine and arguments for the curtailment of foreign travel based on deference to the executive branch in foreign affairs.

1. The Origins and Operation of “Aspect Of Liberty” Analysis

Cases concerning international travel are judged differently than cases involving domestic itineraries. Part II.B.1.a explains why the case law split in two: Past rationales for protecting freedom of movement within the nation’s borders proved ill-suited to cases of freedom of movement abroad. Part II.B.1.b explains how the Supreme Court crafted a new approach to international travel in light of this divergence. The Supreme Court’s international travel

156. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

157. *See, e.g., Haig v. Agee*, 453 U.S. 280, 306 (1981) (“The 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. Aznavorian*, 439 U.S. 170, 176 (1978) (“The ‘right’ of international travel has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment.” (quoting *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978))).

case law developed at the height of the Cold War, which was a significant influence on its new analytical framework.

a. The Inapplicability of the Interstate Travel Cases

The Supreme Court's analytical approach to domestic travel weakened its appreciation for the right to foreign travel. As explored above, the freedom to engage in interstate travel was routinely upheld not for any intrinsic value accorded to it, but as a necessary correlate to other constitutional interests. However, as discussed below, few of these interests are advanced by foreign travel. Thus, a right to foreign travel was left without clear foundation and appeared to be deserving of less protection under the Constitution.

The Court's first foray into protecting a right to interstate travel, through the Privileges and Immunities Clause of Article IV had no logical application to foreign travel. That Clause was viewed as a means of promoting harmony between the states by requiring the equal treatment of visitors from one state in another. With the waning influence of Justice Washington's natural law approach, the protection it offered shrank. For the citizen interested in travel outside of the United States, the Clause offered no support.

Early interstate commerce analysis worked against protection for foreign travel. In *The Passenger Cases*¹⁵⁸ and again in *Edwards v. California*,¹⁵⁹ the Court prohibited the states from infringing on the power given to Congress to regulate commerce among the several states. But, at least before *Saenz v. Roe*,¹⁶⁰ these cases gave no protection against restriction of interstate travel by the federal government itself. Indeed, the same would be the case for any attempt to ground protection for foreign travel in the foreign commerce clause. Justice Black observed as much in *Aptheker v. Secretary of State*,¹⁶¹ emphasizing that his concurring vote was not based "on the ground that the Due Process Clause of the Fifth Amendment, standing alone, confers on all our people a constitutional liberty to travel abroad at will."¹⁶² Rather, he explained, "[w]ithout reference to other constitutional provisions, Congress has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations."¹⁶³ Congress was quick to take up the opportunity to regulate foreign travel as foreign

158. 48 U.S. (7 How.) 283 (1849).

159. 314 U.S. 160 (1941).

160. 526 U.S. 489 (1999).

161. 378 U.S. 500 (1964).

162. *Id.* at 518 (Black, J., concurring).

163. *Id.*

commerce. Under legislation passed in 1803, masters of merchant vessels were required to deposit lists identifying the ship's company of seamen to receive clearance to depart on a foreign voyage and could forfeit a substantial bond for failure to return with the same crew.¹⁶⁴ One might consider this the precursor to new rules requiring federal clearance for international passengers on commercial aircraft and maritime vessels.¹⁶⁵

Structural arguments from the nature of federal union present the same problem for foreign travel. In *Crandall v. Nevada*,¹⁶⁶ the Court articulated the need to prevent states from infringing a right to travel to the seat of government, to a court house, or a seaport. The temptation of states to do so was only made possible by a federal form of government. Obviously, that argument has no traction in the context of travel across international borders. Once the traveler reaches those seaports, this logic says nothing about the federal authority to limit his foreign travel.

Professor Charles Black's groundbreaking analysis of the decision's structural arguments might at first glance suggest a more hopeful reading. Professor Black argued that the Court had based its holding "on a reciprocal relation between the national government which might have need for its citizens to travel, and their right to travel."¹⁶⁷ Surely the federal (if not state and local) government might have a similar need for its citizens to travel abroad—to promote an informed citizenry, for example, or to extend commerce or to expand the arts and sciences.

But these might be called luxuries for the state, as compared to necessities, such as travel to vote, seek access to courts, and petition at the seat of government for a redress of grievances. That is why a structural argument like the one advanced in *Crandall*—just like textual arguments from the Commerce Clause—is shaky ground on which to base a fundamental right to foreign travel. As I argue in Part III, the right to international travel is not really a reciprocal right at all, but one that citizens qua citizens need to keep their status from descending into something less than citizenship—to become a subject or, worse, an object of the state's hegemony.

164. Act of Feb. 28, 1803, ch. 9, 2 Stat. 203.

165. See text accompanying *supra* note 9.

166. 73 U.S. (6 Wall.) 35 (1867).

167. See BLACK, *supra* note 117, at 27. Black observes that this reasoning can easily be extended beyond the rights of citizens to all inhabitants "in a unitary nation" to travel unrestricted by internal barriers. *Id.* at 28–29.

b. Evolution of the Balancing Test

The Supreme Court issued its first opinion on the right to travel abroad in 1958 in *Kent v. Dulles*.¹⁶⁸ In *Kent*, the Secretary of State had denied passports to the petitioners due to their alleged Communist Party sympathies and affiliations. The Court held that Congress had not delegated the Secretary such authority. Writing for the 5–4 majority, Justice Douglas cited both to *Crandall* and to *Edwards* for the general proposition that “[f]reedom of movement is basic in our scheme of values.”¹⁶⁹

Protection for the right to foreign travel was off to a shaky start. Neither of these two cases, of course, concerned travel abroad. *Crandall* based protection for interstate travel on the structural framework of federal union. *Edwards* upheld its protection under the Interstate Commerce Clause. And neither case conditioned state restrictions on interstate travel on the outcome of a balancing test between the citizen’s need to travel and the state’s interests. Nevertheless, the *Kent* Court opened the door to weighing these separate interests in the context of foreign travel. The Court found the right to foreign travel to be “part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.”¹⁷⁰ Just how much a part of liberty, and the “extent to which it can be curtailed,” the Court found unnecessary to decide, since the case turned on the statutory question of how much discretion Congress had granted the Secretary of State to make passport decisions under the Immigration and Nationality Act of 1952.¹⁷¹

The first case to assess the constitutionality of a statutory restriction on the right to travel came six years later, in *Aptheker v. Secretary of State*.¹⁷² At issue was Section 6 of the Subversive Activities Control Act of 1950, which made it unlawful for any member of a suspect class of Communist organizations to apply for, use, or attempt to use a U.S. passport.¹⁷³

Echoing its analysis in *Kent v. Dulles*, the Court observed that freedom of travel is a constitutionally protected liberty guaranteed by the Fifth Amendment.¹⁷⁴ Although the Court held that Section 6 violated appellants’

168. 357 U.S. 116 (1958).

169. *Id.* at 126.

170. *Id.* at 125.

171. Act of June 27, 1952, 66 Stat. 190 (codified at 8 U.S.C. § 1185(b) (2006)). This Act, for the first time in American history, required a valid passport for transit across a United States border in time of peace. *Kent*, 357 U.S. at 127. The gradual expansion of travel controls is discussed *infra* Part II.C.1.

172. 378 U.S. 500 (1964).

173. Subversive Activities Control Act of 1950, 64 Stat. 993, § 6, codified at 50 U.S.C. § 785 (repealed 1993).

174. *Aptheker*, 378 U.S. at 505–06.

Fifth Amendment liberty by “too broadly and indiscriminately restrict[ing] the right to travel,” the opinion says little about what the parameters of that protected liberty interest, in fact, were.¹⁷⁵ That analysis was left to the dissenters, who found that Congress only needed (and clearly had articulated) a rational basis to find that a worldwide Communist conspiracy threatened national security, that foreign travel was essential to the advancement of that conspiracy’s goals, and therefore that the restraint Congress had placed on some citizens’ ability to travel was “outweighed by the dangers to our very existence.”¹⁷⁶ Criminalizing the attempt of a Communist-conspirator to obtain the travel documents necessary to further the conspiracy’s purpose was a “reasonably tailored” remedy.¹⁷⁷

Thus, although the Court commented that its earlier decision in *Kent* “did not examine the extent to which [the right to travel] can be curtailed,” the Court did not meaningfully fill that void in *Aptheker*.¹⁷⁸ The case had more to do with associational rights than with travel rights. The Court rejected the Act’s “irrebuttable presumption” that a passport would be used to further the unlawful aims of the illicit organization, which consequently criminalized innocent travel (such as “to read rare manuscripts in the Bodleian Library of Oxford University”).¹⁷⁹

The Court’s travel docket grew as the Congress and executive branch increasingly sought to thwart travel perceived to interfere with foreign policy goals. In *Zemel v. Rusk*,¹⁸⁰ decided less than a year after *Aptheker*, the Court upheld the sections of the Passport Act of 1926 used to prevent citizens from traveling to Cuba.¹⁸¹ The Court held that the legislation amounted to a grant of authority by Congress to the President to adopt so-called area restrictions on the issuance of passports.¹⁸² The Court’s assumptions were clearly on display: The regulatory scheme at issue was “designed and administered to promote the security of the Nation.”¹⁸³

175. The Court concluded that travel regulations “may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms”—in this case First Amendment associational freedoms. *Id.* at 508 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *id.* at 517.

176. 378 U.S. at 526–27 (Clark, J., dissenting, joined here by Harlan, J.).

177. *Id.*

178. *Id.* at 506 (internal quotations omitted).

179. *Id.* at 511–12.

180. 381 U.S. 1 (1965).

181. Act of July 3, 1926, ch.722, 44 Stat. 887 (codified at 22 U.S.C. § 211a (1958)) (“The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . .”).

182. *Zemel v. Rusk*, 381 U.S. 1, 7–8 (1965).

183. *Id.* at 7 n.4.

The Court sought to distinguish its analysis in *Kent v. Dulles*, which rejected passport restrictions based on the “character of the applicant” as unauthorized by Congress, from its acceptance in *Zemel* of executive branch authority to prohibit travel by Americans to Cuba. Such area restrictions, the Court argued, were not based on such individualized criteria but on “foreign policy considerations affecting all citizens.”¹⁸⁴ But the history of such area restrictions summarized by the Court belied any such clear-cut distinction between a passport regime driven by selective assessments of whose travel was deemed friendly to U.S. interests abroad and a purely geography-based policy. That history illustrated that such area restrictions were actually riddled with holes and exceptions based on individualized assessments by the executive branch of the perceived urgency for such travel.¹⁸⁵

Nevertheless, this false dichotomy infected the lower courts. Thus, when the D.C. Circuit was called to consider the appeal of a journalist whose application to renew his passport had been rejected on grounds of his repeated disregard for area restrictions placed on its use, the Court began its opinion by noting that

refusal of the passport rested in no part upon Worthy’s personal beliefs, writings or character. It was an application of the Secretary of State’s general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble spots.¹⁸⁶

The appellant had traveled extensively in China and Hungary, both of which were under area restrictions. The Court did not even consider that by lodging in the Secretary of State a power to waive those restrictions for reasons of urgency, exigency, or other exceptions to the rule, it was impossible to say whether a refusal to exercise that discretion was a function of a general policy about dangerous areas or an individualized assessment of this particular journalist’s “personal beliefs, writings or character.”

The D.C. Circuit in *Worthy* also fell prey to the conflation of the state’s discretion to refrain from issuing travel documents that adversely affected its foreign policy (such as undesired recognition of a foreign state or unwillingness

184. *Id.* at 13.

185. *Id.* at 8–12.

186. *Worthy v. Herter*, 270 F.2d 905, 907 (D.C. Cir. 1959). William Worthy’s loss in the D.C. Circuit did not immobilize him. His foreign escapades ultimately led to his conviction for violating the Immigration and Nationality Act, which made it a crime inter alia to willfully depart or enter the United States without a valid passport. This conviction was overturned by the Fifth Circuit Court of Appeals. See *Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964). This case is discussed *infra* note 362.

to extend the state's protection to travelers there) with the state's power to prohibit citizens from traveling to such places of their own accord. The appellate court did not avoid hyperbole in assessing the government's interests in denying a passport to visit Communist China or Warsaw Pact Hungary:

Unless almost the whole of our foreign policy and the titanic domestic burdens being presently borne by our people are devoid of factual foundation, there is presently in the world a deadlock of antagonistic forces, susceptible of erupting into a fatal cataclysm. The capacity of incidents arising from the conduct of individuals to ignite that conflagration is well proven. Worthy says the reasons averred by or available to the Secretary are insufficient to support the restriction of his passport. We hold they are ample.¹⁸⁷

By "ample," the court meant an ample demonstration of the executive branch power to conduct foreign affairs. A travel restriction was at least "an instrument of foreign policy" if not a foreign policy "in and of itself."¹⁸⁸ The court also evoked the Hostage Act, 22 U.S.C. § 1732, as grounds to keep citizens out of "trouble spots" or "danger zones" in which the President would be pressed to come to their rescue. The court then held that the "refusal of the Executive to accord Government approval for a citizen to travel in such a designated area [was] also a foreign affair."¹⁸⁹ The court reasoned:

History establishes that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power. This is a fact, not a theory. The nub of the problem at bar revolves about a fact, not a suppositious theorem. The acts of individuals do cause clashes; the prevention of such acts does prevent clashes. Such clashes, whether diplomatic or military, involve 'foreign affairs' . . . In foreign affairs, especially in the intimate posture of today's world of jets, radio, and atomic power, an individual's uninhibited yen to go and to inquire may be circumscribed. A blustering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil.¹⁹⁰

The court was confident that the President possessed the power to act in loco parentis for American citizens willing to risk danger abroad.¹⁹¹ What

187. *Worthy v. Herter*, 270 F.2d at 910.

188. *Id.*

189. *Id.* (internal quotations omitted).

190. *Id.* at 911.

191. *Id.* at 913.

is more, as the court had previously explained, citizens are “potential matches” in an “international tinderbox.”¹⁹²

In a sense, then, it was an easy case for the Supreme Court to hold that Philip Agee, a rogue ex-CIA operative who threatened to reveal the identities of secret agents abroad, could be deprived of his passport notwithstanding the absence of explicit statutory language conferring that power on the Secretary of State.¹⁹³ Agee’s conduct, though surprisingly not illegal at the time,¹⁹⁴ was deemed so extreme as to warrant revocation of his passport.¹⁹⁵

What the D.C. Circuit refused to acknowledge was that this was a predicament of the state’s own design. Were the state to permit the departure from its shores of individuals without a passport claiming to provide the protection of the state, such foreign policy interests would be far less implicated. And if a foreign power demanded recognition by the United States in the form of a passport requirement for entry into its territory, then U.S. refusal on foreign policy grounds would not infringe the travel rights of its citizens, whose inability to travel to such places would then be due to the demands of a foreign government.

Thus, the right to enter and leave the country was protected only by the requirements of Fifth Amendment due process.¹⁹⁶ The process due to someone whose travel abroad the state wished to restrict was described as “a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.”¹⁹⁷ Thus, in *Zemel v. Rusk*, restrictions on the right to travel to Cuba were upheld because the area restriction was held to be narrowly drawn¹⁹⁸ as well as urgently needed.¹⁹⁹

It is strange to consider that the right should be deemed one protected under the aegis of an Amendment not limited to citizens at all, but to any person within the jurisdiction of the United States. This may well be attributed to the fact that cases concerning international travel have almost always

192. *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957).

193. *Haig v. Agee*, 453 U.S. 280, 283–90 (1981).

194. *Id.* at 307. The Solicitor General explained that Agee’s conduct “may not be punishable, we’re not contending that it’s punishable here.” Transcript of Oral Argument, *Haig*, 453 U.S. 280 (No. 80-83).

195. Agee made good on his threat, publishing lists of hundreds of assertedly CIA personnel. The deaths of several CIA operatives overseas were attributed to Agee’s “thinly-veiled invitations to violence.” *Haig*, 453 U.S. at 285 n.7.

196. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Sec’y of State*, 378 U.S. 500, 505 (1964); *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

197. *Zemel*, 381 U.S. at 14.

198. *Id.* (“Cuba is the only area in the Western Hemisphere controlled by a Communist government.”).

199. *Id.* at 16 (upholding restrictions in light of “the Cuban missile crisis of October 1962 [which] preceded the filing of appellant’s complaint by less than two months”).

come to the court via the vehicle of a controversy over passports, the issuance of which has never been limited solely to U.S. citizens. But the result of locating protection under the more general procedural rights of all persons, rather than in a clause of the constitution that protects a citizen's rights has been to divert attention from the essential characteristics of the citizen of a democratic republic versus those of the subject, the serf, or the slave.

2. The Separation of Powers and Foreign Travel

The executive branch has long argued that its control of foreign travel is a natural and necessary extension of its constitutional authority over foreign affairs and national security. Indeed, the first Secretaries of State assumed the discretion to issue passports under their own signatures without any statutory authority at all.²⁰⁰ Thus, less than a month after the first Supreme Court opinion to challenge this authority of the Secretary of State to issue passports, President Eisenhower sent an urgent message to Congress seeking clear statutory authority to do so. He made clear in his message, however, that “[s]ince the earliest days of our Republic,” this authority derived first from the Executive’s responsibility to conduct foreign affairs, with only “additional statutory authority” supplied by Congress.²⁰¹

Congressional grants of authority to control travel, until recently, were explicitly linked to wartime necessity and automatically terminated upon the cessation of hostilities. Thus, late in the War of 1812, Congress forbid U.S. citizens from crossing into enemy held territory, or even lingering near the frontier, without a passport.²⁰² The Act contained a clause providing that it would continue in force “during the continuance of the present war between the United States and Great Britain, and no longer.”²⁰³ Likewise, after entering World War I, Congress granted the President the power “when the United States is at war” to make it unlawful for citizens to depart or enter, or attempt to depart or enter, the United States without a valid passport.²⁰⁴

The Supreme Court has frequently accepted with relatively little scrutiny the political branches’ assertion that restrictions on travel were

200. See, e.g., *Urretiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835). *But see* Act of February 28, 1803, 2 Stat. 203, 205 (restricting federal agents from knowingly granting a passport or other paper certifying an alien to be a citizen).

201. Dwight D. Eisenhower, Special Message to the Congress on the Need for Additional Passport Control Legislation (July 7, 1958), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=11120&st=passport&st1=control>.

202. Act of February 4, 1815, ch.31, §§ 10–11, 3 Stat. 195, 199–200.

203. *Id.*

204. Act of May 22, 1918, ch. 81, 40 Stat. 559.

necessary to protect national security. Thus, in *Zemel v. Rusk*, for example, the Court held that “the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.”²⁰⁵ That is true as far as it goes, but it blurs the distinction between the demand of a citizen for the protection of his government while abroad, and the right of the citizen to assume the risks of traveling even to places where his or her own government has urged him (on the grounds of his own safety or the government’s own preferences) not to go. While the former protection may well be within the discretion of the government to deny, the latter freedom should be left to the individual autonomy of the citizen, not as an assumed pawn on a geopolitical chessboard, but as a free citizen who chooses to come and go as he pleases.

The *Rusk* Court implied that because the President was required by the Hostage Act “to ‘use such means, not amounting to acts of war, as he may think necessary and proper’ to secure the release of an American citizen unjustly deprived of his liberty by a foreign government,” the citizen could not realistically claim that his travel was solely his own private affair.²⁰⁶ The prodigal citizen might entangle his government in dangerous, embarrassing or expensive diplomacy by stumbling into a dangerous country whose leaders were either eager to hold an American citizen for ransom or powerless to stop those who wished to do so. But the statute granted the President the discretion to use such means short of acts of war “as he may think necessary and proper” in that circumstance. It is entirely consonant with that Congressional directive for a President to find that when a citizen knowingly or recklessly travels into an area in which the Secretary of State has issued a warning not to travel, he or she does so at his or her own peril.²⁰⁷ Freedom is a two-way street.

Nevertheless, the view persisted that the decision whether to issue a passport should be left to the discretion of the executive branch official to whom the responsibility is delegated. This argument was based on the claim

205. *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

206. *Id.*

207. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 66 (D.D.C. 2004) (holding that the Hostage Act, 22 U.S.C. § 1732 (2000), did not create “any duty enforceable by a writ of mandamus”); *Redpath v. Kissinger*, 415 F. Supp. 566 (W.D. Tex. 1976), *aff’d*, 545 F.2d 167 (5th Cir. 1976) (holding that no writ of mandamus could issue under the Hostage Act to require further action by executive branch to aid citizen imprisoned in Mexico); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 393–94 (D.C. Cir. 1955) (“[The Secretary of State] was not under a legal duty to attempt through diplomatic processes to obtain Keefe’s release. Quite to the contrary, the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or direction in such matters.” (citing *Marbury v. Madison*, 5 U.S. 137 (1803))).

that the passport, which indicates the Secretary of State's request to foreign officials to assist the American traveler, is an aspect of foreign policy and national security. A judicial order to an executive official to issue a passport would violate the separation of powers because it would tread on this authority.²⁰⁸

C. Implications of Weak Protection for Foreign Travel

No set of restrictions have proven to be as pervasive, long-lasting, and malleable as the passport system. What began as a temporary limitation on travel in or to select geographic locations during a time of declared war based upon the specific, written findings of the President gradually changed into a permanent, peacetime regime regulating all travel, everywhere. Part II.C.1 examines the evolution of the passport from an optional letter of introduction to a control on all movement abroad with the strength of a license.

In the face of perceived new threats to national security, methods have emerged to control travel that surpass even the passport system. Part II.C.2 examines the emergence of the newest limitation: the No Fly List.

1. Mission Creep: From Temporary Wartime Measure to Permanent Peacetime Regime

From the moment of its creation, the U.S. government issued passports.²⁰⁹ These travel documents, however, would not be recognized by today's traveler.²¹⁰ Until the early twentieth century, international travel was indistinguishable as a matter of law from any other travel by Americans. With only a few exceptions, passports were not required for entry into most foreign states.²¹¹ This may be due to the small number of people who possessed the means to travel overseas; international travel was the province of the elite. As Professor Zechariah Chafee observed:

208. Interestingly enough, although the actual passport contains language entreating the assistance of foreign officials, the statutory definition of the passport nowhere references this function: "The term 'passport' means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country." 8 U.S.C. § 1101(a)(30) (2000).

209. U.S. DEP'T OF STATE, *THE AMERICAN PASSPORT: ITS HISTORY AND A DIGEST OF LAWS, RULINGS, AND REGULATIONS GOVERNING ITS ISSUANCE BY THE DEPARTMENT OF STATE* 77 (1898); Stuart, *supra* note 6, at 1066.

210. See Jaffe, *supra* note 1, at 17. See generally Kenneth Diplock, *Passports and Protection in International Law*, 32 *TRANSACTIONS GROTIUS SOC'Y* 42 (1947).

211. See Daniel A. Farber, *National Security, the Right to Travel, and the Court*, 1981 *SUP. CT. REV.* 263, 265; Reginald Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 *VA. L. REV.* 853, 863 (1954).

To jump on a steamer in Boston and go to Liverpool was as easy as boarding the night-boat for New York. During the horse and buggy age, in which I was happily brought up, a passport was unknown except for Baedeker's remark that it might help you get permission to look at a private collection of paintings. The only country which required passports was Czarist Russia, and few Americans wanted to visit that despotism domain.²¹²

The federal government even lacked monopoly control over the practice of issuing passports.²¹³ Only in 1856 did Congress, responding to the resulting chaos, pass the first statute authorizing the Secretary of State alone to issue passports.²¹⁴

Only in time of war did the United States attempt to restrict foreign travel by its citizens. Such restrictions were almost always imposed by act of Congress.²¹⁵ It is not surprising, therefore, that the executive branch "claimed unbridled discretion over the issuance of passports" during this time.²¹⁶ The need for regulation, after all, was minimal: Few people traveled abroad and the passport itself was really nothing more than a rather formal note of introduction, a convenience on occasion, but a necessity only in a few countries. In this milieu, in which passports were not required, the passport could be considered a genuine instrument of foreign affairs issued by one government to request the assistance or protection of another government for its itinerant citizens abroad.

a. The Travel Control Act

All that changed at the start of the "Short Twentieth Century."²¹⁷ Passports slowly became permanent requirements for international travel. At first, the pressure was external: European countries engulfed in World War I demanded that Americans present passports (still not required under U.S. law) for travel through their war-readied ports and war-wearied provinces.

Only late in the United States's participation in the Great War did Congress restrict the travel of citizens.²¹⁸ Congress was careful to limit executive discretion. First, the power was delegated by statute. Second, the delegated

212. CHAFEE, *supra* note 69, at 193.

213. *Zemel v. Rusk*, 381 U.S. 1, 31 (1965) (Goldberg, J., dissenting).

214. See Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60–61.

215. See Act of Feb. 4, 1815, ch. 27, § 10, 3 Stat. 195, 199–200.

216. Farber, *supra* note 211, at 265.

217. The term refers to "a coherent historical period," the years 1914–1991. ERIC HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991*, at 5 (1994); Farber, *supra* note 211, at 265 ("The Czars are dead, but many of their security measures live on. Passports have become obligatory throughout the free world.").

218. See Act of May 22, 1918, ch. 81, 40 Stat. 559.

power was accessible only when the United States was “at war.” Third, even in the midst of war, a presidential finding of an immediate threat to public safety was required. Only upon the publication of such proclamation did it become unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States without a valid passport.²¹⁹

The statute worked just as it was intended. President Woodrow Wilson issued a proclamation implementing these restrictions on August 8, 1918.²²⁰ With it came the first executive assertion of authority to prohibit travel determined to be “prejudicial to the interests of the United States.”²²¹ By executive order, the President established a system of travel controls over all persons seeking to enter or depart from the United States.²²² Unless and until the appropriate official was satisfied, *inter alia*, that the passport holder’s “departure or entry is not prejudicial to the interests of the United States,” the individual stayed put.²²³ Importantly, however, Congress made use of the sunset provision it had placed on these controls, passing a joint resolution in 1921 declaring that the Act and its implementing materials should be “construed and administered as if such war . . . terminated on the date when this resolution becomes effective.”²²⁴ The executive branch complied.²²⁵

Between 1921 and 1941, a citizen did not require a passport for exit from the United States.²²⁶ Six months before Pearl Harbor, Congress took the next step toward peacetime travel control. It amended the 1918 Act to change the requirement that there exist both a state of war and a presidential proclamation of the need to preserve public safety into the disjunctive. Now, either war or the existence of the national emergency that President Roosevelt had proclaimed would suffice to restrict travel with passport controls.²²⁷

After World War II, the circumstances permitting travel controls were broadened again. In 1952, the justification for travel controls was expanded to include either war or “*any* national emergency proclaimed by the President.”²²⁸ It was now unlawful—during times of national emergency proclaimed by the

219. *Id.* § 2.

220. Proclamation No. 65, 40 Stat. 1829 (1918).

221. *Id.* at 1831.

222. Exec. Order No. 2932 (Aug. 8, 1918), *reprinted in* 12 AM. J. INT’L L. SUPP. 331–43 (1918).

223. *Id.* § 37; *see also id.* §§ 11, 13, 36, 38.

224. Joint Congressional Resolution of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1360.

225. 32 Op. Att’y Gen. 493, 495 (1921) (“[I]t is clear that . . . [the Act] has been for the present rendered wholly inoperative by the Joint Resolution.”).

226. *See Jaffe, supra* note 1, at 17.

227. Act of June 21, 1941, ch. 210, 55 Stat. 252, 253. The penalties for willful violation were reduced to a \$5,000 maximum fine and up to five years imprisonment. *Id.* § 2.

228. McCarran Act, § 215(a), 66 Stat. 190 (1952) (codified at 8 U.S.C. § 1185 (2006)) (emphasis added).

President—for a citizen to depart from or enter, or attempt to depart from or enter, the United States without a valid passport.²²⁹ Finally, in 1978, all conditional language on the imposition of travel controls was struck out. Neither a state of war nor a presidentially proclaimed national emergency were necessary to initiate temporary travel controls. The controls were permanently installed for all peacetime travel:

Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.²³⁰

It is not hyperbole to say that “[o]ne of the first casualties of the Cold War was freedom of travel.”²³¹ The United States’ rise to power in the second half of the twentieth century corresponded with an almost complete inversion of the original meaning of a passport. The passport was no longer merely a document that provided evidence of the bearer’s identity and a request from either the bearer’s government or, in the case of enemy aliens or foreign diplomats, from the host government for safe passage through a sovereign jurisdiction. The passport became a license issued by a government permitting its own citizens to travel abroad: The passport ceased to be a document of identification and comity; it emerged as a device to restrict liberty to travel out of one’s own country and to monitor one’s citizens in foreign lands.²³²

b. The Passport Act

In 1926 Congress passed the Passport Act, which delegated authority to the Secretary of State to issue and validate passports.²³³ The statute simply granted the Secretary of State the power to grant and issue passports “under such rules as the President shall designate and prescribe.”²³⁴ This innocuous delegation lay dormant until the Red Scare.

In 1956, the Department of State revised these regulations: “In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a

229. *Id.*

230. Act of Oct. 7, 1978, Pub. L. 95-426, tit. VII, § 707(b), 92 Stat. 992, 993 (codified at 8 U.S.C. § 1185(b)). With this act, Congress also struck out all penalties for violating the control. *See id.* § 707(d).

231. Farber, *supra* note 211, at 263.

232. *See* *Aptheker v. Sec’y of State*, 378 U.S. 500, 507 (1964) (“The denial of a passport . . . is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel.”).

233. Act of July 3, 1926, ch. 772, 44 Stat. 887.

234. *Id.* § 1.

person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States."²³⁵

The 1978 Amendment to the 1926 Passport Act, however, added the sentence: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers."²³⁶ The amendment was described as having the purpose of achieving greater U.S. compliance with the Helsinki Final Act and to encourage other state signatories to the Final Act to do the same.²³⁷ Although the amendment was crafted as a negative with exceptions, the effect was to enlarge the circumstances in which the government could restrict travel. Whereas the 1918 and 1941 statutes had required that the United States be at war, the 1978 amendments added a restriction to any place "where armed hostilities are in progress."²³⁸ The amendment also added a paternalistic restriction wherever the health or safety of the traveler was in "imminent danger."²³⁹

* * *

For most of American history, travel abroad was as unencumbered as travel at home. Passports were optional. A relatively small volume of international travelers made regulation unnecessary. The hot and cold wars of the twentieth century, however, catalyzed legislation that slowly but surely transformed the very nature of travel in general and the passport in particular. The first travel restrictions were temporary and required explicit findings at the highest levels of government of the gravest threats to the nation in times of war. These limits all gradually gave way. Travel regulation became permanent and routinized, even in peacetime. The passport changed from an optional aid to the traveler abroad into a mandatory license to cross any international border.

These legal changes in part reflected twentieth-century changes in the mass movement of people that were catalyzed by innovations in the twinned

235. Passports Miscellaneous Amendments, 21 Fed. Reg. 336 (Jan. 17, 1956) (amending 22 C.F.R. § 51.136).

236. Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. 95-426, tit. I, § 124, 92 Stat. 971 (codified at 22 U.S.C. § 211a (2000)).

237. *Id.*

238. *Id.*

239. *Id.*

technologies of transportation and modern warfare. These legal developments themselves also catalyzed the development of new ways to monitor and control travel. The reinvention of the passport was the first innovation. Digitized databases and computerized counterterrorism watchlists represent the next generation of travel controls. This technological evolution is the subject of Part II.C.2.

2. Technology Creep: From the Red Scare to the War on Terror

The fear of communism that surged through the United States in the 1950s dramatically affected international travel, as the so-called War on Terror has today. A few examples suggest a pattern:

- In June 1950, the State Department issued a “stop notice” at all U.S. ports to prevent the international travel of the entertainer and civil rights activist Paul Robeson.²⁴⁰ He was denied a new passport on the ground that his foreign travel would not be “in the best interests” of the United States.²⁴¹ The Department of State later elaborated that “if Robeson spoke abroad against colonialism he would be a meddler in matters within the exclusive jurisdiction of the Secretary of State.”²⁴²
- In 1952, the eminent chemist Linus Pauling was denied a passport to attend scientific meetings at the Royal Society of London and receive an honorary degree in Toulouse.²⁴³ The State Department rejected his application because the “proposed travel would not be in the best interests of the United States.”²⁴⁴ His permission to travel was granted only following an angry speech by Senator Wayne Morse, international media coverage, and Pauling’s agreement to sign a statement that he was not and never had been a Communist.²⁴⁵
- In 1954, the playwright Arthur Miller was denied a passport to attend the Brussels opening of “The Crucible” because such travel “would not be

240. MARTIN BAUML DUBERMAN, PAUL ROBESON 388 (1988).

241. *Robeson Loses Passport Suit*, N.Y. TIMES, Apr. 13, 1951, at 12; Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 177 (1952).

242. Leon Hurwitz, *Judicial Control Over Passport Policy*, 20 CLEV. ST. L. REV. 271, 274 (1971). That explanation was in response to Robeson’s lawsuit to obtain a new passport. DUBERMAN, *supra* note 240, at 389. The complaint was dismissed. See *Robeson v. Acheson*, 198 F.2d 985 (1952).

243. Dr. Pauling described his efforts to obtain a passport on this and subsequent occasions in a 1977 interview for the PBS television program NOVA. See Linus Pauling, *Passport Problems*, LINUS PAULING AND THE RACE FOR DNA: A DOCUMENTARY HISTORY, available at <http://osulibrary.orst.edu/specialcollections/coll/pauling/dna/audio/nova4.html> (last visited Sept. 27, 2008).

244. Linus Pauling, *My Efforts to Obtain a Passport*, 8 BULL. ATOMIC SCIENTISTS 253 (1952). The denial preceded Pauling’s Nobel Prizes in Chemistry (1954) and Peace (1962).

245. *Id.* at 253–54, 256.

in the national interest.”²⁴⁶ Another passport application, pending while Miller was called to testify before the House Un-American Affairs Committee in 1956, was held up by “derogatory information” leading the State Department to request “an affidavit concerning past or present membership in the Communist party.”²⁴⁷ Miller was later convicted of contempt of Congress during this hearing ostensibly called to examine “the fraudulent procurement and misuse of American passports by persons in the service of the Communist conspiracy.”²⁴⁸

These cases demonstrate how the passport was used to deny citizens the right to travel abroad. But passport restrictions could also be used in a more nuanced way. That nuance was supplied by arguably the most powerful woman in Washington D.C., Ruth B. Shipley, the head of the State Department’s Passport Office.

a. The Extraordinary Mrs. Shipley

Ruth B. Shipley was the chief of the State Department’s Passport Division from 1928 to 1955.²⁴⁹ Franklin Delano Roosevelt called Ruth Shipley a “wonderful ogre.”²⁵⁰ This was meant as high praise.²⁵¹ At the height of her power, *Time* magazine called her “the most invulnerable, most unfirable, most feared and most admired career woman in Government.”²⁵² Here is her picture²⁵³:

246. GOTTFRIED, *supra* note 2, at 236; see also ENOCH BRATER, *ARTHUR MILLER: A PLAYWRIGHT’S LIFE AND WORKS* 66–67 (2005). When the Belgian audience exclaimed “author, author!” on opening night, it was the American Ambassador who appeared onstage. *Id.*; see also *Playwright Arthur Miller Refused Visa for a Visit to Brussels to See His Play*, N.Y. TIMES, Mar. 31, 1954, at 16.

247. Allen Drury, *Arthur Miller Admits Helping Communist-Front Groups in ‘40’s*, N.Y. TIMES, June 22, 1956, at 1. The link between application and testimony may have been quite direct. Martin Gottfried argues that Miller’s application “provided HUAC with an excuse to summon him to hearings. These were designed just for him and a few select others on ‘The Unauthorized Use of United States Passports.’” GOTTFRIED, *supra* note 2, at 286.

248. *Investigation of the Unauthorized Use of United States Passports—Part 4: Hearings Before the H. Comm. on Un-American Activities*, 84th Cong., 4655–91 (1956). Miller’s conviction was later unanimously reversed on procedural grounds. See *U.S. v. Miller*, 152 F. Supp. 781, 783 (1957), *judgment rev’d en banc*, 259 F.2d 187 (D.C. Cir. 1958).

249. See DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 246 (1978); Stuart, *supra* note 6, at 1070; Harold B. Hinton, *Guardian of American Passports*, N.Y. TIMES, Apr. 27, 1941, at SM21.

250. Sorry, Mrs. Shipley, TIME, Dec. 31, 1951, available at <http://www.time.com/time/magazine/article/0,9171,821956,00.html>.

251. *Id.* Secretary of State Cordell Hull listed her “[a]mong the important and capable, experienced and dependable officials I found in high position in the State Department.” CORDELL HULL, *I THE MEMOIRS OF CORDELL HULL* 181 (1948).

252. Sorry, Mrs. Shipley, *supra* note 250.

253. Photograph of Ruth B. Shipley by Don Menn CS/R, National Archives and Records Administration, College Park, Maryland, 59-SO-288, #1730-3.



The Passport Division had been delegated the unreviewable discretion to grant and revoke passports. Although equipped at its peak with a staff of ninety, Mrs. Shipley personally reviewed each application.²⁵⁴ Her word was law, and until 1958 her decisions were unreviewable in a court of law.²⁵⁵ Dean Acheson referred to Ruth Shipley's "Queendom of Passports" and noted her Division's "almost absolute power to decide who might leave and enter the country."²⁵⁶ The itineraries of Arthur Miller, Linus Pauling, Paul Robeson, and many others were all casualties of her discretion.²⁵⁷ Even the powerful Eleanor Dulles, whose personal accomplishments and family connections made her a force to be reckoned with in diplomatic Washington, was denied passports for her family to join her in post-war Austria to work for the U.S. military delegation stationed there in 1945. Mrs. Shipley felt that post-war Europe was no place for children. "The formidable Mrs. Shipley looked at her as if she was mad and said:

'Nothing doing, Mrs. Dulles. You can't take the children with you.'
 'I'm not going without my children,' Eleanor said.
 'Then you're not going,' said Mrs. Shipley."²⁵⁸

254. Hinton, *supra* note 249.

255. See *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958).

256. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 15–16 (1969); see also *No Final Action Taken*, N.Y. TIMES, Jan. 6, 1948, at 14.

257. See *supra* notes 2, 240–248; see also *Passports Again an Issue*, N.Y. TIMES, Apr. 11, 1948, at E9 (detailing the denial of a passport to Congressman Leo Isacson).

258. LEONARD MOSLEY, *DULLES: A BIOGRAPHY OF ELEANOR, ALLEN, AND JOHN FOSTER DULLES AND THEIR FAMILY NETWORK* 205 (1978). Eleanor Dulles did not mince words about her encounter with Mrs. Shipley: "She was a tartar and a despot. It was a harrowing experience." *Id.*

It took three months of pressure by the powerful Dulles clan, and the personal offers of both the British and Swiss ambassadors to provide visas on their official stationary (Shipley had confiscated Dulles' passport), before Mrs. Shipley accepted the inevitable.²⁵⁹ This was one of few recorded instances of successful opposition to Mrs. Shipley. More often, the hapless traveler found Shipley "completely immovable . . . once a decision has been reached, . . . [W]hen she has once said 'no,' the disappointed applicant might as well save himself further conversation."²⁶⁰

A blanket refusal to issue a passport was not the only arrow in Ruth Shipley's quiver.²⁶¹ As one contemporary State Department official observed, "The passport is an ideal device for the control of the movements of American citizens."²⁶² For example, restrictions could be placed on the length of time one could travel on a particular passport.²⁶³ Alternatively, limits could be placed on the use of the passport in particular places or for particular itineraries.²⁶⁴ On the basis of the Passport Act of 1926, the Secretary of State imposed travel restrictions in conformity with American foreign policy.²⁶⁵ Beginning in 1938, President Roosevelt issued an executive order expanding the discretion of the Secretary of State to impose area restrictions and expressly granting the power to cancel or withdraw passports used in defiance of those restrictions.²⁶⁶

The Cold War policy was summarized by Louis Jaffe in terms that resonate today:

Nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable routines of malefaction. It has

259. *Id.*

260. Hinton, *supra* note 249.

261. Shipley was quite aware of her power, as she ominously suggested in a sharp, public exchange with Senator Pat McCarran:

The bulk of the American traveling public are reputable, law-abiding citizens and are probably above the average in education, intelligence, and stability. The Department does not feel in view of its experience over many years that it is warranted in treating this large group of citizens as potentially subversive by establishing at this time procedures which would delay and hinder *bona fide* travelers in an effort to detect cases such as those mentioned by the Subcommittee.

Answer to Attack on Passport Operations, 26 DEPT ST. BULL. 110, 111 (1952) (first emphasis added).

262. Stuart, *supra* note 6, at 1067.

263. Act of July 3, 1926, ch. 772, § 2, 44 Stat. 887 (limiting the validity of a passport to two years, with a shorter period possible at the Secretary's discretion); *see also* Stuart, *supra* note 6, at 1069. Short time limits were a further control "to channelize the travel of persons proceedings abroad and to review their cases at regular intervals." *Id.*

264. Stuart, *supra* note 6, at 1069 (describing wartime restrictions on passports "for use to specific countries through which the bearer would travel en route to his ultimate destination").

265. *Zemel v. Rusk*, 381 U.S. 1, 8 n.5 (1965).

266. Exec. Order No. 7856, 3 Fed. Reg. 681, 687 (Mar. 31, 1938).

been simply one facet of our tactic of domestic security, and only incidentally a matter of foreign policy.²⁶⁷

At the start of the Cold War, as now in the so-called War on Terror, travel restrictions were deemed necessary in “this age of crisis,” a response by America and its allies “to a world in fear of atomic war and planned insurrection.”²⁶⁸

b. Digitizing Mrs. Shipley: The No Fly List

Ruth Shipley personally decided the fate of each American traveler based on her review of a file on her desk. Her word was law, in part, because it was *her* word: She took total responsibility for the decision to stop a citizen’s travel, meeting (and usually defeating) all opposition head on. There is much to dislike about lodging unreviewable discretion in a single government bureaucrat, a practice at the Passport Division that ended with *Kent v. Dulles*.²⁶⁹ In one sense, then, it seems that there can be no more Mrs. Shipleys.

But as the case study of the Ismails’ experience shows in Part I, much has changed. Had the Ismails sought to use their passports under Mrs. Shipley’s reign, they would at least have known who had ordered an end to their travels. But the Ismails had no idea who had stopped their travel in Hong Kong. The Hong Kong officials simply said that their passports did not “come on” to their computers. Not until their second attempt to return home from Pakistan weeks later did the Ismails learn that their names had been placed on the No Fly list, although they still did not know by whom or for what reason.

In short, Mrs. Shipley has been digitized in the form of computerized terrorist watchlists, including the No Fly List. After September 11, 2001, something more powerful than FDR’s “wonderful ogre” was created: a faceless, automated system that creates lists of citizens and noncitizens alike whose travel must be stopped by government agents who, in turn, attribute their decisions to a computer database compiled by other, unknown agents and faraway, anonymous analysts.²⁷⁰ These watchlists contain enormous amounts of information that can be accessed almost instantaneously to render judgments about the traveler in question. Under rules effective in February 2008, all citizens seeking to travel by air or sea in either direction across a United States border require the express preclearance of their names against those databases by government officials.²⁷¹

267. Jaffe, *supra* note 1, at 18.

268. Wyzanski, *supra* note 78, at 67.

269. *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

270. Aviation and Transportation Security Act of 2001, Pub. L. 107-71, § 101(a), 115 Stat. 597 (codified at 49 U.S.C. § 114, became law Nov. 19, 2001 (Supp. 2005)).

271. See Advance Transmission of Manifests, *supra* note 9.

At one time, as many as a dozen terrorist watchlists were compiled by the federal government.²⁷² But it was the No Fly List that quickly acquired public notoriety as it seemed to ensnare innocent citizens with obvious, prolonged, and sometimes quite frequent inconvenience.²⁷³ Since 2003, the No Fly List has been a part of an omnibus “Terrorist Screening Database” that is administered (although not completely controlled by) the FBI’s Terrorist Security Center.²⁷⁴ That TSC database, in turn, is generated partially from information collected by the “Terrorist Identities Datamart Environment,” which is the main government clearinghouse operated by the National Counterterrorism Center for all information obtained by the intelligence community for possible use in specialized agency databases and watchlists.²⁷⁵ Each database operates under different evidentiary standards, and the officials and analysts who administer one database may have little to say about (and less responsibility for) how other agencies utilize such information in their own databases and watchlists.²⁷⁶

Because the No Fly List was issued as a “security directive” under the authority of the Under Secretary of the TSA, it came into being with neither public notice nor comment.²⁷⁷ Its content continues to be protected from public disclosure.²⁷⁸ Attempts to uncover how names are added or removed from it have typically ended in failure,²⁷⁹ for the understandable reason that the publication of such information would tend to defeat the counterterrorism purpose for which it was created.²⁸⁰ Prior to a July 2006 review, the No Fly list had ballooned to

272. DOJ AUDIT REPORT, *supra* note 7, at i. See generally Daniel J. Steinbock, *Designating the Dangerous: From Blacklists to Watchlists*, 30 SEATTLE U. L. REV. 65, 85–87 (2006).

273. See, e.g., Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2150 (2006); Sharon Bradford Franklin & Sarah Holcomb, *Watching the Watchlists: Maintaining Security and Liberty in America*, 34 HUM. RTS. 18, 18 (2007).

274. DOJ AUDIT REPORT, *supra* note 7, at i.

275. Karen DeYoung, *Terror Database Has Quadrupled in Four Years; U.S. Watch Lists Are Drawn From Massive Clearinghouse*, WASH. POST, Mar. 25, 2007, at A1.

276. *Id.*

277. See 49 U.S.C. § 114(l)(2)(A) (Supp. 2005); see also *Gilmore v. Gonzales*, 435 F.3d 1125, 1131 n.4 (9th Cir. 2006) (noting that the No Fly List, as a security directive, was lawfully issued “without providing notice or an opportunity for comment in order to protect transportation security”).

278. See 49 C.F.R. § 1520.5(b)(2) (2007) (defining security directives as sensitive security information); 49 C.F.R. § 1520.9 (restricting disclosure of sensitive security information). At least one court has held that the Homeland Security Act of 2002, Pub. L. 107-296, § 1601(b), 116 Stat. 2135, 2312 (codified at 49 U.S.C. § 114(s)), created a privilege against civil discovery. See *Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 615 (N.D. Cal. 2004).

279. The typical approach is a Freedom of Information Act (FOIA) request and a civil suit for injunctive relief. The TSA has successfully argued that it is statutorily exempt from disclosing such information. See *Barnard v. Dep’t of Homeland Sec.*, 531 F. Supp. 2d 131 (D.D.C. 2008); *Tooley v. Bush*, No. 06-306-CKK, 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006); *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005).

280. Notwithstanding that trend, one federal court certified two classes of citizens and their families who sought to enjoin government policies related to the use of terrorist watchlists that the plaintiff class

contain 71,872 records.²⁸¹ Following a government audit, this number was trimmed to 34,230 records as of the end of January 2007.²⁸² The sheer volume of international travel combined with the processing power of computers creates incentives for government agencies to obtain sooner, and save longer, ever larger amounts of data about individual travelers.²⁸³

Mrs. Shipley, whose word was law and whose judgment was based on her personal review of a passport application, is no more. Responsibility for today's watchlists is not lodged in one person. Nor is the official who stops the unsuspecting citizen from traveling likely to know much more than the categorical order that appears on a computer screen. Mrs. Shipley drew her power from her exclusive discretion. The digital Mrs. Shipley draws power from the dispersal of authority to add a name to the No Fly List and the narrowing of opportunities to challenge the difficult-to-trace decision to stop a citizen from traveling.

III. THE CITIZEN'S FUNDAMENTAL RIGHT TO LEAVE AND RETURN HOME

Most unenumerated fundamental rights find their protection in the substantive due process or equal protection guarantees of the Fifth or Fourteenth Amendments.²⁸⁴ This Article takes no position whether a right to travel abroad should be found in those clauses. There is no need to search for it there because a more straightforward basis exists: citizenship. The right to depart from and reenter one's country should be viewed as an intrinsic part of what it means to be a citizen of our democratic republic. Because I recognize that this is a novel approach to protecting a fundamental right, I develop the argument in stages. In short, I argue that the civic status of citizenship carries with it certain inherent rights or protections beyond those privileges or immunities that a thoughtful

alleges to result in their repeated detention upon reentry to the United States. See *Rahman v. Chertoff*, 244 F.R.D. 443 (N.D. Ill. 2007). The District Court's certification decision was reversed and the case remanded on June 26, 2008. *Rahman v. Chertoff*, No. 07-3430, 2008 WL 2521669 (7th Cir. June 26, 2008). As of the date of this writing, the parties continue to spar over the defendants' assertion of the state-secrets privilege to refuse to acknowledge, *inter alia*, whether plaintiffs' names even appear on any government watchlists. See Civil Docket for Case # 1:05-cv-03761, available via ECF/PACER (last visited Oct. 13, 2008).

281. DOJ AUDIT REPORT, *supra* note 7, at xiii.

282. *Id.*

283. In July 2007, the Department of Homeland Security (DHS) and the European Union agreed to collect nineteen types of "passenger name record" data for every passenger on every transatlantic flight. John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT'L L. 866, 878-79 (2007).

284. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 792-93 (3d ed. 2006).

Congress may wish to add by statute. The citizen of a democratic republic is categorically different than the subject of a monarchy or a dictatorship. That is a proposition that has distinguished our republic since its founding. Citizens in a democratic republic are autonomous. Their actions abroad do not necessarily reflect the policies of their government. More importantly, such a government generally may not commandeer its citizens to service state policies abroad.

Part III.A sets forth the textual and historical premises for my argument, based predominantly on the Citizenship Clause of the Fourteenth Amendment. First, to be a citizen is to be something different than a subject. Second, the Citizenship Clause grants to American citizens certain rights that flow from that distinction. Because international travel cannot reasonably be claimed to have been foremost in the minds of Representative John Bingham and the Framers of the Fourteenth Amendment, Part III.B explains why such an interpretation is not too great a weight for the Citizenship Clause to bear.

A full statement of my argument follows after the statement of these premises. Whatever else it might entail, citizenship in a democratic republic means, at a minimum, the freedom to leave and return to the state without the encumbrance of responsibility to advance (or not retard) the state's foreign policy preferences.

Part III.C responds to the charge that the Constitution is not a suicide pact. It outlines the national security implications of accepting international travel as no less a right of citizens as the right to travel within the United States.

A. Citizenship in the Constitution

1. Citizens, Not Subjects

The meaning of citizenship in the United States was initially somewhat elusive.²⁸⁵ Notwithstanding that ambiguity, the Constitution makes frequent references to "a Citizen of the United States." U.S. citizenship is a requirement for election to federal offices.²⁸⁶ Naturalization, the power to create citizens, is the plenary and exclusive power of Congress.²⁸⁷ Citizens must be counted

285. BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* 198 (1998) (observing that the Federalists of the Revolutionary Era "avoided any effort to define national citizenship, let alone to give it priority [over state citizenship]," and that "Americans of their generation were profoundly uncertain whether the claims of national identity should trump more local commitments").

286. U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); *id.* art. I, § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 5 (President); *id.* amend. XII (Vice-President).

287. *Id.* art. I, § 8, cl. 4.

decennially.²⁸⁸ When voting, citizens possess special protections against racial, sexual, and (upon reaching majority) age discrimination that extend beyond any protection otherwise provided to “persons” by the Equal Protection Clause of the Fourteenth Amendment.²⁸⁹ Nor may citizens be subjected to any poll or other tax as a condition for voting for federal officials.²⁹⁰

The text of the Constitution provides some clues to what it means to be a citizen beyond these formal categories.²⁹¹ Most importantly, the Constitution distinguishes between citizens and subjects. Both the original Section 2 of Article III and the Eleventh Amendment mark the distinction between citizens and subjects of foreign states explicitly in their texts. Records and commentaries on the main body of the Constitution offer no guidance as to the reason for the distinction.²⁹² Farrand’s *Records of the Federal Convention of 1787* show that the phrase “citizens or subjects” in Article III, Section 2, evolved over several weeks from the more generic category of “foreigners.”²⁹³ Why does the Constitution make such a careful distinction? Why distinguish between types of foreigners?

That the Founding Fathers wished to make clear that a citizen is not a subject should come as no surprise. The Constitution recognizes a fact of eighteenth century life. Two radically different types of civic creatures roamed the earth: subjects of royal sovereigns and citizens of self-governing republics, the latter numbering only the United States and France after 1789.²⁹⁴ The nationals of both countries bought the change in nomenclature at the high price of revolution. But it was a change that mattered deeply to the citizens of the United States and the *citoyens* of the First French Republic.²⁹⁵ As Justice Scalia

288. *Id.* art. I, § 2, cl. 3. Until the passage of the Fourteenth Amendment, this decennial Enumeration was marred by the exclusion of untaxed Native Americans and the fractional counting of African-American slaves.

289. See *id.* amend. XV, amend. XIX, and amend. XVI, respectively.

290. *Id.* amend. XXIV.

291. The text can also impede. The Privileges and Immunities Clause, for example, applies to citizens and noncitizen residents alike. See *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978); *Zobel v. Williams*, 457 U.S. 55, 73 n.3 (1982) (O’Connor, J., concurring). It must be admitted that such instances cloud my reliance on the canon of constitutional interpretation, *infra* text accompanying note 308.

292. See 2 STORY, *supra* note 71, §§ 1638, 1697–1700, 1804–1806.

293. See Madison’s notes for May 29, June 15, and June 18, 1787 concerning the Randolph Resolutions (the Virginia Plan). 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 22, 244, 292. The first reference to “subjects or citizens of other countries” is in notes of the Committee of Detail from late July. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 147, 173.

294. Of course, serfs and slaves also toiled on earth (for they had no freedom to roam), which the Framers acknowledged in euphemistic terms. See, e.g., U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3.

295. For a brief discussion of the complicated relationship between the French Revolution, freedom of movement, and the passport, see JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 21–56 (2000).

noted with regard to the constitutional right of citizens, but not foreigners, to seek a writ of habeas corpus to contest their imprisonment outside the United States, “[t]he common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government.”²⁹⁶

The Constitution was conceived, after all, in the crucible of a struggle against injustices felt by colonial subjects of King George III. Antimonarchical sentiment was constitutionally embedded: “No Title of Nobility shall be granted by the United States.”²⁹⁷ The feeling is so strong that it is one of the few noneconomic prohibitions placed on the states, the first one, in fact, following immediately after the same restriction on federal legislative power.²⁹⁸ As a nation, we are constitutionally suspicious of officeholders who would accept any “present, Emolument, Office, or Title,” from any foreign state, but especially from any King or Prince, who are given special attention.²⁹⁹ Although the Guaranty Clause of Article IV has since been held to be nonjusticiable,³⁰⁰ a “republican form of government” was guaranteed to every state and defined at the time of the Founding against its despised alternative: monarchies and aristocracies.³⁰¹

The constitutional distinction between citizens and subjects, with an institutional aversion toward the latter, is an important premise for my argument that a right to foreign travel should be based in the Citizenship Clause. As discussed below in Part III.B, the subject was originally understood to require the monarch’s permission to depart the Realm. Likewise, citizens of nondemocratic regimes suffer considerable restrictions on their travel. The citizen of a country founded on republican *and* democratic principles, however, might well be expected to enjoy the fruits of that status.

296. *Boumediene v. Bush*, 128 S. Ct. 2229, 2306 (2008) (Scalia, J., dissenting).

297. U.S. CONST. art. I, § 9, cl. 8.

298. *Id.* § 10, cl. 1.

299. *Id.* § 9, cl. 8. The Founders also feared the imposition of a foreign-born monarch and, through the Natural-Born Citizen clause of Article II, § 2, sought to “anticipate all the ways that European aristocracy might one day try to pervert American democracy.” AMAR, *supra* note 71, at 165. Seeking to quell rising public anxiety about the same, some delegates to the Constitutional Convention even skirted the gag rule on their deliberations with the assurance published in a newspaper that “we never once thought of a king.” *Id.* (citing MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 173–75* (1913)). Professor Amar likewise interprets the thirty-five-year eligibility rule for the presidency as an inherently anti-aristocratic requirement. *Id.* at 163.

300. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

301. AMAR, *supra* note 71, at 277–80.

2. The Citizenship Clause

The complete meaning of the Citizenship Clause is as difficult to determine conclusively as the other references to citizenship in the Constitution. Section 1 of the Fourteenth Amendment in general, and the Citizenship Clause in particular, were “the subject of relatively little debate in Congress.”³⁰² It has never been interpreted by the Supreme Court.³⁰³ The text makes only two straightforward declarations.³⁰⁴ First, national citizenship is obtained by birthplace or naturalization of a person subject to U.S. jurisdiction. Second, state citizenship is a function of national citizenship. Because the *casus belli* for the Civil War were domestic concerns, the Reconstruction Amendments reflect those issues. Thus, the catalyst for the Citizenship Clause was to overturn *Dred Scott v. Sandford*.³⁰⁵

What does it mean to be a citizen of the United States? Section 1 implies that citizens of the United States may possess privileges or immunities that cannot be abridged by the states. Since *The Slaughter-House Cases*,³⁰⁶ however, these have been severely limited. But were there no Privileges or Immunities Clause at all, surely the Citizenship Clause would have meant something more than merely to overturn *Dred Scott*.³⁰⁷

Every clause in the Constitution is interpreted to have meaning.³⁰⁸ Thus, it is reasonable to expect a difference between whatever privileges or immunities of citizenship that Congress might establish (and that no state shall thereafter abridge) and a core concept of what citizenship is on its own terms. Thus, reliance on the Citizenship Clause does not depend on how broadly or narrowly the Privileges or Immunities Clause is interpreted. For whatever benefits

302. Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 269, 273–74 (1994).

303. Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 766 (2003). See generally Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2001).

304. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

305. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), held, inter alia, that black descendants of slaves could not be U.S. citizens.

306. 83 U.S. 36 (1872).

307. See James W. Fox Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & CIV. RTS. L. REV. 453, 454 (2004) (“But it is dangerous to see the Citizenship Clause as only about overruling *Dred Scott*; this would be to view it too narrowly and too legally.”).

308. See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”); see also *Prout v. Starr*, 188 U.S. 537, 544 (1903); *Hurtado v. California*, 110 U.S. 516, 534 (1884). But see discussion, *supra* note 291.

Congress might bestow as privileges or immunities of citizenship, at an irreducible minimum citizenship is something different than the status of a royal subject or a feudal serf or a slave.³⁰⁹

This approach to parsing the clauses of the Fourteenth Amendment is consistent with the political and legal philosophy of its drafters. As Daniel Farber and John Muench explain, the Framers of the Fourteenth Amendment held a theory of government that “was something of a compromise between natural law and legal positivism.”³¹⁰ The Framers “envisioned a body of inherent human rights protected by a social contract.”³¹¹ That view was reified as citizenship and protected by the Citizenship Clause. The Framers also recognized the power of legislatures to raise this baseline with their positivist enactments.³¹² That sentiment could be expressed by positive laws expanding or abridging the privileges or immunities of that citizenship (in the absence of proscription by either a supreme legislature or an inalienable natural right).³¹³

Exactly what those natural rights included, or not, is the source of endless debate among historians. But as Senator Lyman Trumbull of Illinois argued in a major speech opposing President Johnson’s veto of what would become the Civil Rights Act of 1866: “The right of American citizenship means something.”³¹⁴ Drawing from Blackstone and Chancellor Kent, he insisted on the “inalienable right, belonging to every citizen of the United States, as such, no matter where he may be. . . . American citizenship would be little worth if it did not carry protection with it.”³¹⁵ (By no strange coincidence, Senator Trumbull introduced a new bill just a few months after defeating Johnson’s veto, entitled “An Act Relating to the granting of passports.” The bill limited the issue of passports “only to citizens of the United States.”³¹⁶)

309. See, e.g., AMAR, *supra* note 71, at 382 (“Read alongside Article I’s prohibitions on both state and federal titles of nobility, the citizenship clause thus proclaimed an ideal of republican equality binding on state and federal governments alike.”).

310. Farber & Muench, *supra* note 302, at 235. Ironically, the authors imply as an aside that citizenship meant the right to travel abroad: “After the Civil Rights Act and the fourteenth amendment, citizenship would mean more than the right to an American passport when traveling abroad.” *Id.* at 277.

311. *Id.* at 235.

312. *Id.* at 235, 247, 252.

313. William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 196 (2002) (arguing that “privileges or immunities are rooted in other sources of positive law” and that “[r]eference to citizenship recognizes both the responsibility and the discretion vested with Congress”).

314. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866); see also Farber & Muench, *supra* note 302, at 268. Congressman Wilson similarly supported the Civil Rights Bill, pre-veto, arguing that the rights it protected were those held by “citizens of the United States, as such.” *Id.* at 265–66 (citing to CONG. GLOBE, 39th Cong., 1st Sess. 1117–18, 1294 (1866)).

315. CONG. GLOBE, 39th Cong., 1st Sess. 1757.

316. S. 306, 39th Cong. (1866).

Valuable contemporaneous understanding of what this citizenship “meant” is found in the debates over what became the Civil Rights Act of 1875.³¹⁷ The Act was entitled “An act to protect all citizens in their civil and legal rights,” and was defended on citizenship grounds, since the statute presented what would become known as the “state action” problem.³¹⁸ Thus, Senator Howe of Wisconsin stated among his reasons to support the bill that “it will shield from wanton indignity that great franchise in which we all have a common and priceless estate, American citizenship.”³¹⁹ His remarks were immediately followed by those of Senator Alcorn of Mississippi. Notwithstanding a past as a slave-owner and a brief turn as a Confederate general, Alcorn vigorously defended the Fourteenth Amendment. His defense of the 1875 Act included a link between citizenship and a right to travel:

Very well, the citizen has a right then to come here—to travel. That implies his right to free travel. . . . Are we told that it would be unconstitutional for Congress to interpose and say that he may travel, being a citizen of the United States, precisely as other people travel? If he cannot travel precisely as other people travel, where does the distinction stop? Under our theory of government, if the right of travel is guaranteed, where can you make the distinction?³²⁰

* * *

To summarize:

My first premise is that citizenship in a democratic republic is a status different from that of a subject of a monarchy or citizenship in an autocracy. (What that means for travel abroad is outlined below in Parts III.B.2 and III.C.) My second premise is that citizenship is a status that conveys rights that stand on their own bottom. That is, citizenship is an independent source of a core of rights beyond those privileges and immunities of citizenship that a legislature might additionally enact. This was the Framers’ understanding of the Fourteenth

317. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

318. See The Civil Rights Cases, 109 U.S. 3. Justice Harlan’s dissent argued that the Act was “appropriate legislation” enacted under Section 5 to enforce the provisions of the Fourteenth Amendment, including the Citizenship Clause. *Id.* at 46–47.

319. 2 CONG. REC. 4151 (1874).

320. 2 CONG. REC. app. 302, 304 (1874). Other prominent supporters of the bill followed suit. Senator Charles Sumner, for example, “whose persistence kept the idea of public accommodations rights in front of Congress, had advocated accommodations as a right of full citizenship since at least the 1860s.” Fox, *supra* note 307, at 476.

Amendment, at least some of whom even went so far as to include a right to travel among those inherent rights of the citizen of a free republic.

From these premises comes my argument that American citizenship is an independent and sufficient source for the fundamental right to travel abroad. The citizen whose travel is not treasonous, nor the source of imminent danger to others, is a free agent. The extent to which the state can inhibit the movement of its citizens should be limited by a finding that this is the least restrictive means of achieving a compelling government interest. In other words, because the state would violate a fundamental right to achieve its ends, strict scrutiny must be applied to the state's actions. Because the citizen is not a subject, the state cannot prohibit travel "not in the interests" of the state, for it generally lacks a compelling interest in requiring citizens to promote its foreign policy through their travels.

Others might seek protection for the right to foreign travel in the doctrine of substantive due process. It may well be found there, too. But I see this right in American citizenship. This is not too much weight for the Citizen Clause to bear. Commenting on the strain placed on the Due Process Clause of the Fourteenth Amendment by arguments for incorporating various rights found in the first eight amendments, Professor Black observed that such a burden need not necessarily fall only or always on the same text. The conclusion that some such federal protection is as essential to "a scheme of ordered liberty" (to use Justice Cardozo's famous phrase)³²¹ in state as well as federal government "could seemingly be derived quite as well from the relations of citizenship as from the phrase 'due process of law'."³²² As Professor Black argued in his structural interpretation:

Can it be that the man who is positively declared to be a citizen of the United States and of the state wherein he resides does not enjoy, by virtue of standing in that relationship, the right to live under a "scheme of ordered liberty"? That would seem to be the least possible domestic implication of the conferral of citizenship, unless one is prepared to say that all that relationship implies is the privilege of writing "citizen" after your name. If the due process clause only gets us, in some fields of its application, as far as a "scheme of ordered liberty," surely it would seem, in such fields, to get us no further than would a quite warrantable inference from the status of citizenship.³²³

My textual argument resonates with Professor Black's structural argument. It seems clear to me that Black's structural argument is sound both as a matter of history and as a matter of logic. But I argue it is not just the structure of the

321. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

322. BLACK, *supra* note 117, at 62.

323. *Id.* at 62-63.

Constitution that permits such an inference from the Citizenship Clause. Rather, I think there is also a strong textual argument that to be a citizen is to be endowed with certain rights that a serf, a monarchical subject, or the resident in an autocracy necessarily lacks.

The most recent case concerning travel and the Fourteenth Amendment, *Saenz v. Roe*,³²⁴ provides additional support for my argument, even though *Saenz* concerned the right to interstate travel. During oral argument, Solicitor General Waxman asserted that “interstate migration” was “both a right of national citizenship and a structural feature of the national union.”³²⁵ In other words, the U.S. government argued that interstate travel was a right integral to the meaning of national citizenship separate and apart from the structural requirements of open internal borders in a federal union. My argument makes the same definitional point about what it means to be a citizen, extended to the right to travel outside, not within, the nation’s borders.

* * *

The strict scrutiny that I advocate for restrictions on foreign travel has been urged by others to varying degrees. Justice Douglas held the strongest view of the right to travel. He considered freedom of movement, interstate and abroad, to be “kin to the right of assembly and to the right of association,” and as such subject to abridgment only in the narrowest of circumstances.³²⁶ With the sole exception of the need for serious curtailment of liberty in time of war, he considered there to be “no way to keep a citizen from traveling within or without the country, unless there is power to detain him” as a convicted criminal or if there were probable cause to issue an arrest warrant under the Fourth Amendment.³²⁷ Justice Douglas’ reference to criminal imprisonment is explored below in Part III.C.

More recently, Judge Andrew Kleinfeld of the Ninth Circuit Court of Appeals distilled the Supreme Court’s caselaw on the right to foreign travel to conclude that travel restrictions “must be justified by an important or compelling government interest and must be narrowly tailored to that end,” while travel bans “aimed at specific individuals or classes of individuals must be more narrowly tailored than bans aimed at specific countries.”³²⁸ Judge Kleinfeld’s conclusion sounds very much like strict scrutiny, although he is candid that the

324. 526 U.S. 489 (1999).

325. Transcript of Oral Argument at 24, *Saenz*, 526 U.S. 489 (No. 98-97). A similar point was made in the Government’s Brief.

326. *Aptheker v. Sec’y of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

327. *Id.*

328. *Eunique v. Powell*, 302 F.3d 971, 981 (9th Cir. 2002) (Kleinfeld, J., dissenting).

Court “has not formally stated the constitutional test,” and in fact, “the principles that govern” such cases were “laid down . . . before [the Court] adopted the three pigeonholes now fashionable: rational basis, intermediate, and strict scrutiny.”³²⁹ He nevertheless concludes that national security and foreign affairs had been found to be compelling government interests, and that the means of achieving them may not “sweep unnecessarily broadly.”³³⁰ The clearest case for Judge Kleinfeld was the extreme conduct at issue in *Agee*, which he concludes stood for the proposition that travel restrictions should be upheld “when a person’s activities threaten national security or foreign policy.”³³¹

Although Judge Kleinfeld’s approach is tempting to advocates of stronger protection for the right to foreign travel because of its similarity to the strict scrutiny test I advocate below, it is unclear how it would be applied to a case more difficult than Philip Agee’s, which Justice Brennan viewed as “a prime example of the adage that ‘bad facts make bad law’.”³³² Would Judge Kleinfeld accept the premise that, in the interests of national security and foreign affairs, the government “may preclude potential matches from the international tinderbox”?³³³ The due process analysis in *Haig v. Agee* is predicated on the assumption that a citizen traveled under the “sponsorship” of the sovereign.³³⁴ Once that premise is accepted, and the meaning of citizenship is thus diluted, it is difficult to perceive what would not be a compelling interest of national security or foreign affairs. As explored below in Part III.C, citizenship complicates this analysis.

B. Citizenship and Freedom of Movement

The meaning I attribute to citizenship, defined so formalistically in Section 1 of the Fourteenth Amendment, accords with long-held understandings of that term. That is not to contend that the meaning of citizenship is settled.³³⁵ Many

329. *Id.* at 979, 981.

330. *Id.* at 981–82.

331. *Id.* at 981.

332. *Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting).

333. *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957), *rev’d on other grounds sub nom.* *Kent v. Dulles*, 357 U.S. 116 (1958). It seems reasonable to assume that Judge Kleinfeld, notwithstanding his strong support of foreign travel as “among the most important of all human rights,” *Eunique*, 302 F.3d at 979, would accept the premise “under controlling Supreme Court precedent. *Id.* (“[The Supreme] Court can revise its approach if it so decides, but we can’t.”).

334. *Haig*, 453 U.S. at 309.

335. For a brief survey of the contested meaning of citizenship, see Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 953–68 (2005); see also PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 352 (1994).

have debated the “subjective dimension” of citizenship, asking what criteria ought to define membership in the polity, or how citizenship should affect the establishment of “the good polity.”³³⁶

I do not pretend to have an exhaustive definition of the word citizen.³³⁷ But I do not think I must offer one. My argument does not require an opinion about who should be a citizen (although the inherent dangers of exclusion are worth noting, as I do in the Conclusion). Nor am I interested in how “good citizens” are created, what their responsibilities to the state ought to be, or how they should create the “good polity” through various forms of loyalty, participation, or self-restraint. My argument is not a normative one and my purpose is much more limited. I only ask whether such a state can treat its citizens as if they were agents to further national policies, in particular foreign policy.

I answer that question negatively. The state does not stand in such a relationship to the citizen. And the individual citizen is not ordinarily the servant of the goals of the collective in any affirmative way. That is, although the republic can obviously prohibit the citizen from criminal acts, perhaps even abroad, it cannot command allegiance to the foreign policies that its leaders have deemed to be wisest or best.³³⁸

Whatever else it may include or mean, at the very least, to be a citizen of a democratic republic such as the United States must mean that one is not to be treated as the subject of an undemocratic monarchy. Thus, notwithstanding the benevolent request found in every American passport, there is no “sponsorship of [the citizen’s] travels by the United States.”³³⁹ Official disapproval of the traveler or his noncriminal purposes in traveling does not entitle the state to restrict the

336. William B. Allen, *The Truth About Citizenship: An Outline*, 4 CARDOZO J. INT’L & COMP. L. 355, 355 (1996). See, for example, the scholarly work of Linda Bosniak, Kenneth Karst, Leti Volpp, and many others. Professor Volpp briefly discussed the Ismail’s case in an essay following the September 2006 conference “New Dimensions of Citizenship” at Fordham Law School. See Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579 (2007).

337. Implicit, however, in my argument is that the right to travel is an undifferentiable right of citizenship. That is, the right inheres in citizenship no matter how acquired, no matter where the citizen is resident, and without regard to dual citizenship. Concededly, even the text of the Constitution differentiates between types of citizens, only one category of which enjoy complete participatory rights in government. See U.S. CONST. art. II, § 1, cl. 5. Such a distinction may well have been more justifiable as a temporary provision at the birth of the nation than as a permanent impediment to equal citizenship. Some scholars have been more inclined than I to categorize citizenship within a framework based on national identity, especially in the context of counterterrorism. See, e.g., Tung Yin, *Enemies of the State: Rational Classification in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 903, 926–37 (2007). However, I think that such an exercise is too susceptible to abuse in an ever more globalized world, particularly during times of national crisis, to justify distinctions based on perceived national identity.

338. This would almost go without saying in a First Amendment context. See *infra* notes 348–350 and accompanying text.

339. *Haig v. Agee*, 453 U.S. 280, 309 (1981).

citizen as a “potential match[]” in the “international tinderbox.”³⁴⁰ This view is consonant with citizenship in a democracy. The history of the Founding and the early foreign policy concerns of the new republic suggest nothing less. These sources of support are now taken in turn.

1. Democracy

Freedom of movement broadly defined has long been accepted as a fundamental component of citizenship in a representative democracy.³⁴¹ Its restriction is “in conflict with the essential elements of a democracy—the freedom of the citizen to gather information and to associate with whomever he wants.”³⁴² To borrow the title of one of the classics of American social science, Albert O. Hirschman’s *Exit, Voice, and Loyalty* concisely states the choices long considered the entitlement of a citizen in a democratic republic. The options are interdependent, and there may be an optimal but elusive balance to them, but a totalitarian regime is the clearest example of how the destruction of one option (for example, exit) can make dangerous the election of another (for example, voice).³⁴³

The right to travel abroad has been viewed as a right of free citizens since the Age of Athens, when Plato reports on the last days of Socrates. Contemplating the choice between certain death and escape from his (unjust) conviction and sentence, Socrates reflects on what the Laws would say to him were he to flee. In so doing, he notes a principle of ancient Athens:

[W]e openly proclaim this principle, that any Athenian, on attaining to manhood and seeing for himself the political organization of the state and us its laws, is permitted, if he is not satisfied with us, to take his property and go away wherever he likes. If any of you chooses to go to one of our colonies, supposing that he should not be satisfied with us and the state, or to emigrate to any other country, not one of us laws hinders or prevents him from going away wherever he likes, without any loss of property.³⁴⁴

340. *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957), *rev’d on other grounds sub nom.* *Kent v. Dulles*, 357 U.S. 116 (1958).

341. See, e.g., *Parker*, *supra* note 211, at 855–56; *Right of Expatriation*, 9 Op. Att’y Gen. 356, 358 (1859) (“Among writers on public law the preponderance in weight of authority, as well as the majority in numbers, concur with Cicero, who declares that the right of expatriation is the firmest foundation of human freedom, and with Bynkershoek, who utterly denies that the territory of a State is the prison of her people.”).

342. *Parker*, *supra* note 211, at 857.

343. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 83, 97 (1970).

344. PLATO, *Crito* 51d, *reprinted in THE COLLECTED DIALOGUES OF PLATO* 27, 36–37 (Edith Hamilton & Huntington Cairns eds., 1961). *But see* PLATO, *Laws* 949e–952d, *reprinted in THE COLLECTED DIALOGUES OF PLATO*, *supra*, at 1225, 1494–98 (discussing the severely statist

More specifically, freedom of movement has been recognized as intrinsic to the concept of human liberty that grounds American citizenship, one of the most sought-after intangible possessions on the planet. Justice Douglas considered freedom of movement “at home and abroad” to be:

the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.³⁴⁵

Alexander Bickel, although he likely would have rejected citizenship as a source for the right to travel, observed a “noble claustrophobia that is endemic to free men,” one which made freedom to travel abroad a right “jealously regarded” in the United States.³⁴⁶

The justification for restricting the foreign travel of citizens that has most resonated with the Supreme Court has been embedded in concerns of national security. The citizen is a “potential match” in the “international tinderbox,” and therefore should not expect that travel undertaken with the “sponsorship” of the state would be allowed when it contravenes foreign policy.³⁴⁷ That conclusion rests on the faulty premise that rights of citizenship must be exercised in conformity with the policy preferences of the state.

In the context of a democratic republic, such a premise is extraordinary. So long as the citizen’s actions are not treasonous, immediately dangerous, or contrary to some contractual obligation made to the state, a citizen’s travel is none of the state’s business. Consider if the right in question were not travel, but speech. Whether a citizen may publicly advocate war when the nation is at peace, or participate in a nonviolent peace protest when the nation is at war, or associate with foreigners to persuade them of the merits of peace or war, are all hypotheticals easily answered today: The state may not prohibit these acts.³⁴⁸ There is no such thing as seditious libel in a democratic

limitations on foreign travel, notwithstanding praise for its beneficial effects). Judge Kleinfeld references the Socratic dialogue, but not Laws, to emphasize the ancient origins of the right to foreign travel in his dissent in *Eunike v. Powell*, 302 F.3d 971, 979 (9th Cir. 2002), discussed *supra* text accompanying notes 328–334.

345. *Aptheker v. Sec’y of State*, 378 U.S. 500, 519, 520 (1964) (Douglas, J., concurring).

346. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 165 (1975). Bickel’s low opinion of citizenship is noted *infra* text accompanying note 422.

347. *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957), *rev’d on other grounds sub nom. Kent v. Dulles*, 357 U.S. 116 (1958); *Haig v. Agee*, 453 U.S. 280, 309 (1981).

348. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (extolling “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)

republic.³⁴⁹ That is because the state is presumed to lack the power to demand conformity between its citizens' preferences and the policy preferences of their elected government.³⁵⁰

A more extreme example than loss of a citizen's right to travel abroad may be useful to illustrate this point. Consider expatriation, the loss of citizenship itself. It was once believed that Congress had the power to deprive an American of citizenship for conduct "contrary to the interests of his own government."³⁵¹ In *Perez v. Brownell*,³⁵² that conduct was voting in a foreign election. The Court first noted how the growth in international travel had jeopardized the effective conduct of foreign relations:

Experience amply attests that in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. . . . The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government[.]³⁵³

The Court held that involuntary expatriation was within the implied foreign affairs powers of Congress. The decision, however, did not last long before it was explicitly overruled in *Afroyim v. Rusk*.³⁵⁴ Afroyim had engaged in the same conduct as Perez: He voted in a foreign election.³⁵⁵ But the Court held that both the Citizenship Clause and "[t]he very nature of our free government" prohibited involuntary expatriation.³⁵⁶

*Trop v. Dulles*³⁵⁷ was decided the same day as *Perez*. It relied not on Congress' implied foreign affairs power but on the much stronger, and explicit,

("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

349. CHEMERINSKY, *supra* note 284, at 923–24; *Sullivan*, 376 U.S. at 276.

350. There is, of course, a well-established "national security" exception to the general rule against prior restraints. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931). But publishing in time of war "the sailing dates of transports or the number and location of troops," *id.* at 716, is more akin to the treason or immediate dangerousness that would be permissible grounds for the state to obstruct the traveler's plans, while speech in the form of political protest is more comparable to a constitutional right to travel.

351. *Perez v. Brownell*, 356 U.S. 44, 59 (1958), *overruled by Afroyim v. Rusk*, 387 U.S. 253 (1967).

352. 356 U.S. 44.

353. *Id.* at 59.

354. *Afroyim*, 387 U.S. at 255–56.

355. Beys Afroyim's case began with a failed passport application. *Id.* at 254.

356. *Id.* at 262, 268.

357. 356 U.S. 86 (1958).

war power. Yet the Court reached the opposite conclusion.³⁵⁸ Congress had enacted a statute that subjected Army deserters to involuntary expatriation. The Court invalidated the law, holding that even if the death penalty may be imposed on a deserter, loss of citizenship was a penalty “more primitive than torture” and in violation of the Eighth Amendment.³⁵⁹ “Citizenship is not a license that expires upon misbehavior,” Chief Justice Warren wrote for the Court:

The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. . . . But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be.³⁶⁰

Return now to the right to travel. What is the effect of expatriation, but to force upon an individual a condition of statelessness “deplored in the international community of democracies”?³⁶¹ It is (as in the case of the *Ismails*, in Part I) to lock the erstwhile citizen out of the United States.³⁶² *Afroyim* did not reach, and *Trop* did not require, a judgment of whether travel could be regulated in the interests of avoiding an embarrassment to the nation’s foreign affairs

358. *Id.* at 93. Albert *Trop*, like petitioner in *Afroyim*, also began his case with an unsuccessful passport application. *Id.* at 88.

359. *Id.* at 92, 101.

360. *Id.* at 92–93.

361. *Id.* at 102.

362. Here the criminal case against William Worthy, briefly noted *supra* note 186, is instructive. Worthy willfully violated 8 U.S.C. § 1185(b), which at the time made it a crime punishable by up to five years imprisonment and a fine up to \$5000 to enter or depart the United States without a valid passport. *Worthy v. United States*, 328 F.2d 386, 389 (5th Cir. 1964). Worthy was charged with entering the United States without a valid passport (his passport renewal having been rejected after he refused to give his commitment to abide by various travel restrictions on it). *Id.* at 388, 389 n.1. The Court distinguished the crime of a citizen unlawfully departing from the United States (a crime with which Worthy was not charged) from the crime of a citizen unlawfully entering the United States. *Id.* at 393. The court reasoned that although the citizen can refrain from violating a departure prohibition and “continue to exercise all of the rights and privileges of citizenship[,]” the citizen cannot constitutionally “be required to choose between banishment or expatriation on the one hand or crossing the border on the other hand, being faced with criminal punishment and the loss of some of the rights and privileges of citizenship as a felon.” *Id.* at 393–94. The court reversed the judgment and sentence of the district court, concluding that “it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil.” *Id.* at 394.

By distinguishing between entry and departure, the court failed to accord the full complement of travel rights inherent in citizenship. A citizen does not “continue to exercise all of the rights and privileges of citizenship” if the state conditions departure on possession of a valid passport but then refuses to issue one to the citizen wishing to leave. Indeed, it is hard to imagine what value a right to return could have absent an equally unabridged right to exit. Consideration of the opposite travel sequence clarifies the point: Other than those cases in which the citizen seeks to cut all ties to home (for example, expatriation), the right to depart is nugatory without the assurance of an equally unabridged right to return. Exit and entry are almost always two sides of the same coin.

attributable to a rogue citizen's conduct abroad. But in *Haig v. Agee*, the Court held that citizen Agee's conduct abroad was so destructive of national security as to warrant passport revocation.³⁶³

The effect of passport revocation, placement on a No Fly List, or simply an order to prevent travel is the mirror image of expatriation. The Ismails were locked out, but they could equally have been forced to remain in the country, unable to leave for perceived greener fields abroad.³⁶⁴ The citizen who draws the ire of the state is locked within the confines of the state's borders, where the citizen can do no harm to the state's perceived interests abroad.

The premise that the citizen's actions must always advance the state's interests is more typically associated with nondemocratic, nonrepublican regimes.³⁶⁵ Thus, what citizenship should be construed to mean in a democratic constitutional republic may most easily be discerned by comparison to what it is not: a subject in a monarchy or some other form of autocracy.³⁶⁶ Only democracies can truly be said to have citizens.³⁶⁷ As William Allen explained: "The original British constitution wisely denominated all other political relationships as the relations between subjects and sovereigns-subjects, precisely because the persons comprehended in the description owe a loyalty and belong to their states in a condition of subjection (relations not based on consent) rather than command."³⁶⁸ For this negative case, I find support in history.

2. History

Travel restriction was once considered symptomatic of medieval times, when "a subject was prohibited from leaving the Realm without leave of the

363. *Haig v. Agee*, 453 U.S. 280, 307 (1981).

364. This was made clear in oral argument in *Haig v. Agee*. Solicitor General McCree was asked whether passport revocation had prejudiced Agee's ability to return to the United States. The unlikelihood that Agee would wish to return immediately occurred to the questioner. But what result if he did? Replied General McCree: "He would not get out again." Transcript of Oral Argument at 10, *Haig*, 453 U.S. 280 (No. 80-83). I believe the questioner's voice to be that of Justice Stevens, although this is not indicated on the transcript.

365. See, e.g., Parker, *supra* note 211, at 855-56 ("The totalitarian state typically demands that its subjects act at all times in the interest of the state. As a matter of fact, this attitude may be said to be the ultimate criterion of totalitarianism. Hence, under that form of rule the government has a right to expect that its subjects abroad will act always 'in the best interest' of their state, and consequently it is privileged to deny the right to go abroad to those not likely to be true agents for the totalitarian state.")

366. Phillippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . And Is Not*, 2 J. DEMOCRACY 75, 77 (Summer 1991) ("Citizens are the most distinctive element in democracies. All regimes have rulers and a public realm, but only to the extent that they are democratic do they have citizens.")

367. See Allen, *supra* note 336, at 368.

368. *Id.* at 355.

Crown, since to do so would deprive the King of the subject's military or other feudal services.³⁶⁹ To deprive a citizen of the right to travel abroad because the state's interest is perceived to outweigh this liberty interest is, except in truly compelling circumstances, to change the citizen into a subject. This is a change that the Citizenship Clause forbids the state to make.

The history of the right to travel illustrates its emergence as a fundamental right of free citizens. This is a history on which American constitutional law draws. More recently, the history of American foreign policy, especially in the early days of the republic (when the rights of its citizens were challenged) and in the Short Twentieth Century (when American foreign policy sought to highlight the distinction between the freedom of the American citizen and the unfreedom of the Soviet citizen), illustrates the continued vitality of that idea. These issues are taken in turn.

Magna Carta was the first serious attempt to alter such a feudal relationship. It makes reference to the rights of foreign merchants who, in peacetime, could "enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs."³⁷⁰ Likewise, the Charter anticipates that "any man" may "leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm."³⁷¹ Restrictions on the comings and goings of subjects were viewed as statutory exceptions to this common law rule.³⁷² Thus, in Sir Matthew Hale's *Commentary on Fitzherbert's New Natura Brevium*, the "Writ de Securitate inveniend' quod

369. Diplock, *supra* note 210, at 44.

370. MAGNA CARTA, c. 41 (1215), available at http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html.

371. *Id.* at 42. This paragraph, among others, was omitted from the Charter of 1225 and later versions, but without apparent effect on the development of the common law on the matter. Admittedly, such a right waxes and wanes over the course of English legal history. Thus, for example, a statute enacted under Richard II provided for the forfeiture of all property of subjects (with a few exceptions, such as lords, selected merchants, and the king's soldiers) who "shall pass out of the said Realm without the King's special Licence." See 5 Rich. 2, Stat. 1, c. 2 (1381) (Eng.), reprinted in 2 STATUTES OF THE REALM 18 (1816). Although the statute was not repealed until 1606, see 4 Jac. 1, c. 1, § 4 (1606) (Eng.), reprinted in 4 STATUTES OF THE REALM 1135 (1819), Professor Baker observed that its force had weakened well before that time. See J.H. Baker, *Introduction*, 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER, at lxxv (1994). For example, Dyer reports the holding of a divided court in a 1570 case at Queen's Bench that the departure from the realm of a subject without the Queen's license, "solely with the intent that he might live there free from the laws of this realm . . . is not any offence or contempt, for it is a thing indifferent to depart the kingdom; and the purpose and cause, which is secret in the heart, is not examinable." 3 Dyer 296a, 73 Eng. Rep. 664 (Q.B.).

372. See, e.g., JOHN BEAMES, A BRIEF VIEW OF THE WRIT NE EXEAT REGNO, AS AN EQUITABLE PROCESS WITH THE RULES OF PRACTICE RELATING TO IT 3-7 (2d ed. 1824).

se non divertat ad partes exteras, sine Licentia Regis”³⁷³ is described as an exception to the common law, by which:

every Man may go out of the Realm to Merchandise, or on Pilgrimage, or for what other Cause he pleaseth, without the King’s Leave; and he shall not be punished for so doing; but because that every Man is of Right for to defend the King and his Realm, therefore the King as his Pleasure by his Writ may command a Man that he go not beyond the Seas, or out of the Realm, without License; and if he do the Contrary, he shall be punished for disobeying the King’s Command.³⁷⁴

Such a feudalistic notion of the individual as a mere subject obliged to do service to the sovereign was “obsolete by the time of Blackstone.”³⁷⁵ Likewise, the writ *Ne exeat Regno* (that is, “let him not leave the kingdom”), a surviving derivative of the earlier writ *de Securitate*, is admitted “to have been unknown to the ancient Common Law, which, in the freedom of its spirit, allowed every man to depart the Realm at his own pleasure.”³⁷⁶

Defense of the right to international travel was “a dominant theme” of American foreign policy in the first century of the Republic.³⁷⁷ The source of this policy was twofold. First, the young nation sought to protect Americans seeking to travel abroad.³⁷⁸ No less important to a nation built by immigrants, was protection of the rights of naturalized citizens who occasionally left American shores. A perpetual concern of the United States in its first century was the tendency of European states to assert claims to the indefeasible allegiance (and therefore claims to the property, military service, and the like) of former

373. The contracted title of this writ may well be fully entitled *de securitate inveniendâ ne exeat regnum quod se non divertat ad partes exteras, sine Licentia Regis*. See *Memorandum*, 2 Dyer 165b, 73 Eng. Rep. 361. I translate the Latin into modern English as “the writ of security contriving not to let him leave the kingdom who would separate himself to foreign parts without the King’s license.”

374. Anthony Fitz-Herbert, *THE NEW NATURA BREVIVM WITH SIR MATTHEW HALE’S COMMENTARY* 192 (7th ed. 1730) (1534); see also *SIR MATTHEW HALE’S THE PREROGATIVES OF THE KING* 270, 296 (D.E.C. Yale ed., 1976) (1660).

375. Diplock, *supra* note 210, at 44; see also WILLIAM BLACKSTONE, 1 *COMMENTARIES* *256 (“By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king’s leave; provided he is under no injunction of staying at home: (which liberty was expressly declared in king John’s great charter, though left out in that of Henry III) . . .”).

376. BEAMES, *supra* note 372, at 1. Beames sets forth a prehistory to the writ that extends from an initial interest in restricting the intercourse between English clerics and the Holy See, and other political concerns (such as treasonous subjects), to one designed to prevent debtors from escaping their obligations to creditors. *Id.* at 12, 16 n.30, 19; see also 1 BLACKSTONE, *supra* note 375, at *265–66. The writ of *Ne exeat regno* was well-known in the early United States, see, e.g., *The Passenger Cases*, 48 U.S. (7 How.) 283, 357 (1849) (noting counsel’s argument that “All the states of the Union constantly enforce the writ of *ne exeat*.”), and, in fact, continues to be used in various forms in modern family law contexts. My thanks to my colleagues, Professors William Bridge, Joseph McKnight, and Joshua Tate, for this insight.

377. Wyzanski, *supra* note 78, at 67.

378. *Id.*

subjects who became naturalized U.S. citizens.³⁷⁹ Thus, Congress in 1868 declared that “the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.”³⁸⁰ As such, Congress announced the policy of the United States to provide at least an unfettered right to one-way travel: No officer of the United States could encumber the right to renounce attachments to one country in place of another.³⁸¹

Freedom of movement has been enshrined in the founding documents of the United Nations³⁸² and identified in numerous international human rights treaties.³⁸³ During the Cold War, the restrictions placed on the travel (internal and external) of Soviet and Warsaw Pact-country citizens were routinely held forth as sufficient evidence of unfreedom in those countries.³⁸⁴ In response to

379. James, *supra* note 78, at 861–71.

380. Act of July 27, 1868, ch. 249, 15 Stat. 223 (codified at 8 U.S.C. § 1481 (2006)).

381. *Id.* § 1.

382. See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 13, § 2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to leave any country, including his own, and to return to his country.”); International Covenant of Civil and Political Rights art. 12, § 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”). The United States ratified this treaty on June 8, 1992 and the treaty entered into force three months later. See 138 Cong. Rec. S4781-84 (daily ed. Apr. 2, 1992); U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. 45,934 (Aug. 31, 1993). Ratification by the United States was subject to a declaration that the provisions of this article are not self-executing. U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. at 45,942.

383. International Covenant of Civil and Political Rights, *supra* note 382, art. 12, § 2 (“Everyone shall be free to leave any country, including his own”); *id.* § 4 (“No one shall be arbitrarily deprived of the right to enter his own country.”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), Dec. 20, 1965, 660 U.N.T.S. 195 (“The right to leave any country, including one’s own, and to return to one’s country.”); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, *entered into force* May 2, 1968, Europ. T.S. No. 46, art. 2, § 2 (“Everyone shall be free to leave any country, including his own.”); *id.* at art. 3, § 2 (“No one shall be deprived of the right to enter the territory of the state of which he is a national.”).

384. See, for example, Correspondence Between Secretary of State Henry A. Kissinger and Senator Henry M. Jackson (Oct. 18, 1974), *reprinted* in Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT’L L. 382, 390–92 (1975), regarding a wide variety of punitive measures and restrictions used by the Soviet Union to discourage or prevent emigration. See also *Aptheker v. Sec’y of State*, 378 U.S. 500, 519 (1964) (Douglas, J., concurring) (“Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States.”); *Restrictions on International Travel: Hearing Before the Subcomms. on Int’l Econ. Policy & Trade, and on Int’l Operations, of the H. Comm. on Foreign Affairs*, 101st Cong. 1 (1990) (Statement of Rep. Sam Gejdenson, Chairman) (“One of the more remarkable benefits of the recent changes in Eastern Europe has been the newly found freedom of its citizens to travel. Barbed wire and brick wall have been torn down, guard dogs and border patrols have been removed, and the people are at long last able to have contact with the rest of the world.”).

emigration restrictions, Congress passed the so-called Jackson-Vanik Amendment to penalize the Soviet Union and other countries by denying “most favored nation” trading status until emigration taxes, restrictions on travel documents, and other impediments to the freedom to leave the country were lifted.³⁸⁵ Likewise, the Helsinki Final Act (through which the United States and others sought, *inter alia*, to put pressure on Soviet and Eastern Bloc restrictions on travel) expresses the intent of its signers “to facilitate wider travel by their citizens,” “gradually to simplify and to administer flexibly the procedures for exit and entry,” and “to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements.”³⁸⁶

C. Implications for the War on Terror

The Constitution “is not a suicide pact.”³⁸⁷ What would be the effect on national security if a citizen’s right to travel abroad could only be abridged by the least restrictive means necessary to achieve a compelling government purpose? Such judicial scrutiny has been described in the context of racial discrimination as “scrutiny that is strict in theory, but fatal in fact.”³⁸⁸ National security and foreign affairs are generally held to be compelling government interests. How does rejection of the justificatory premise that citizens are “potential matches” in an international tinderbox affect that conclusion?

The judicial branch is sometimes reluctant to scrutinize the conduct of foreign affairs by the political branches. But not all such assertions are the same, they are often fact dependent, and susceptible to judicial analysis. The Court has not shirked its duty to reconcile the exercise of national security or foreign affairs powers by the political branches with their effect on the fundamental rights of citizens.³⁸⁹ Evaluating restriction of a fundamental right of citizenship is in keeping with this tradition.

In general, strict judicial scrutiny of government interference with the foreign travel of its citizens should not result in a parade of horrors, even when

385. See Trade Act of 1974, Pub. L. No. 93-618, tit. IV, § 401(a)(1)–(3), 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2432 (2000)).

386. Conference on Security and Co-Operation in Europe, Final Act, Helsinki, Aug. 1, 1975, Co-Operation in Humanitarian and Other Fields, para. 1(d) Travel for Personal or Professional Reasons.

387. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

388. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

389. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (unanimously sustaining post-war rent controls, and reaching the delicate conclusion that “the war power does not necessarily end with the cessation of hostilities”).

citizenship is accorded the full value it deserves in a democratic republic. Strict scrutiny would not keep the state from preventing the travel of one who is “participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States.”³⁹⁰ These have long been grounds for travel restriction in the United States and they are unchanged by the standard of review. Nor does citizenship bear on assessing the clearly compelling nature of such traditional objectives of government.

Likewise, the prevention of epidemics through the spread of infectious disease—a growing concern in a globalized world—would surely be considered a compelling government interest that also has nothing to do with citizenship.³⁹¹ It is hard to imagine that quarantine regulations and customs controls would not pass constitutional muster fairly easily under this higher standard. Similarly, Philip Agee’s passport would still be revocable under this approach, so long as the determination was made on the particularized grounds of his extremely dangerous conduct (now a crime³⁹²), not on the grounds that his travel could be restricted because under the sponsorship of the state.

But these are easy cases. They are, in a sense, the run-of-the-mill concerns of a state in times of peace: flight from crime, spread of disease—conduct that is actually and imminently dangerous. Harder cases would undoubtedly present themselves in times of war or related national emergency, when even the citizen of a democratic republic may be obliged to take a much more direct role (and personal stake) in the nation’s foreign policy.

By their nature, these are fact-intensive inquiries. Compulsory military service is the most obvious example of what might be called an “easy” harder case. Could the citizen whose attempt to evade conscription by flight across the border successfully claim that his fundamental right to travel abroad had been unconstitutionally infringed? In a time of declared war, conscription (and prohibitions on its evasion) might well be the least restrictive means to achieve a very compelling government interest: military victory. That conclusion

390. *Haig v. Agee*, 453 U.S. 280, 290 (1981) (quoting *Kent v. Dulles*, 357 U.S. 116, 127 (1958)).

391. The case of Andrew Speaker, for example, led to calls for tighter restrictions on both departures and arrivals of all persons (including citizens) in the United States. See MAJORITY STAFF OF H. COMM. ON HOMELAND SEC., 110TH CONG., *THE 2007 XDR-TB INCIDENT: A BREAKDOWN AT THE INTERSECTION OF HOMELAND SECURITY AND PUBLIC HEALTH 1* (2007). Speaker was highly contagious with tuberculosis. *Id.* The Centers for Disease Control sought to prevent his return from Europe, and asked TSA to place his name on the No Fly List when Speaker disregarded requests not to travel. *Id.* at 15.

392. Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, § 601, 96 Stat. 122 (codified at 50 U.S.C. § 421 (2000)). Congress passed the Act as a direct response to Agee’s case. See Robert W. Bivins, *Silencing the Name Droppers: The Intelligence Identities Protection Act of 1982*, 36 U. FLA. L. REV. 841, 843–45 (1984).

might change. Has the draft continued well after peace has been declared?³⁹³ Is conscription riddled with exemptions and exceptions?

Likewise, area restrictions would present harder cases under closer scrutiny. In time of war, the exclusion of citizens from the theater of military operations would seem to be the least restrictive means of achieving the compelling government interest of achieving victory on the battlefield. But could such exclusion include accredited journalists? Citizen employees of organizations like the Red Cross or the United Nations? An economic embargo on nations in official disrepute, such as apartheid South Africa or Communist Cuba, presents a tougher case, but one that would not necessarily fall prey to a strict scrutiny “fatal in fact.”

Compare, for example, two cases regarding travel restrictions to Cuba. In *Zemel v. Rusk*,³⁹⁴ the Court upheld a State Department policy to grant exceptions to a general ban on travel to Cuba (prior to the economic embargo) to “persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.”³⁹⁵ Shortly after the Cuban Missile Crisis, Louis Zemel sought an exemption simply to satisfy his curiosity.³⁹⁶ The Court upheld the ban and denial of Zemel’s requested exemption as part of “foreign policy considerations affecting all citizens.”³⁹⁷ The *Rusk* Court was persuaded that the risk of damage to American foreign policy from an international incident caused by a bumbling American tourist was grave enough to uphold the Executive’s decision.³⁹⁸

Roughly twenty years later, in *Regan v. Wald*,³⁹⁹ the Court upheld a comprehensive economic embargo on Cuba.⁴⁰⁰ American policymakers prohibited most American travel there on the grounds that infusions of hard currency from travelers would weaken the embargo’s intended effect on the Cuban government. The travel ban was based on a general policy that made no distinction between travelers based on their political views or conduct in Cuba; dollars would weaken the embargo regardless of who spent them. The Court sustained the Executive’s decision “to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.”⁴⁰¹

393. See, e.g., *Woods*, 333 U.S. at 147 (Jackson, J., concurring) (“I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended.”).

394. 381 U.S. 1 (1965).

395. *Id.* at 3.

396. *Id.* at 3–4.

397. *Id.* at 13.

398. *Id.* at 14–15.

399. 468 U.S. 222 (1984).

400. *Id.* at 223.

401. *Id.* at 243.

Strict scrutiny of the fundamental right to travel envisioned in this Article would overrule *Rusk* but sustain *Regan*. *Rusk* confuses the difference between a citizen and a subject in a way that *Regan* does not. The individual citizen is not an extension of the state's foreign policy, even if that fact makes policymaking more difficult and unpredictable. The fear of adverse foreign policy implications expressed in *Rusk* is no different than the fear that once justified expatriation to penalize a citizen's vote in a foreign election:

The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy.⁴⁰²

This is undoubtedly true. But the risk of international incident does not compel the conclusion that citizens may only travel when the risk is acceptable to the state. For while "[t]he world must construe according to its wits," the republic cannot use its citizens as a monarch or a dictator would use his subjects.⁴⁰³ They are not instruments of foreign policy. That a citizen's travel is "not in the interests of the United States," therefore, is not, standing alone, a constitutional ground on which to restrict the citizen's travel.

Consider, finally, the effect of this textually based fundamental rights analysis on the operation of the No Fly List. Because much about the No Fly List is classified or sensitive security information, one must speculate about the criteria for its compilation. But it is clear that the No Fly List is intended to prevent travel abroad based on some assessment of the individual's future dangerousness. (Were the danger not future but immediate, such as a particular traveler's threat to a particular aircraft, then standard physical security measures would be engaged to thwart a crime.) Its application in the Ismail case study presented in Part I is illustrative.

The No Fly List has the effect of arresting travel in both a literal and metaphorical sense. Travel stops, and it does so because the citizen is either locked in the United States (and cannot get out) or locked out of the country (and cannot get in). Analogy to an enormous jail is not too extreme.⁴⁰⁴ The Ismails were essentially "locked out" of the United States, first by order of Special Agent Parenti of the FBI, and then by addition of their names to the No Fly

402. *Perez v. Brownell*, 356 U.S. 44, 59 (1958), *overruled by Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

403. ROBERT BOLT, *A MAN FOR ALL SEASONS* 152 (1960).

404. Comment, *supra* note 241, at 190 ("[T]he distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree."); *see also* Jaffe, *supra* note 1, at 18 ("Nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable routines of malefaction.").

List.⁴⁰⁵ The No Fly List, like the passport controls of Mrs. Shipley's era, can also work the inverse as imprisonment: national house arrest. Paul Robeson was similarly locked in when the State Department issued a "stop notice" at all U.S. ports to prevent his international travel.⁴⁰⁶ Simultaneously, FBI Director J. Edgar Hoover "sent out an 'urgent' teletype ordering FBI agents to locate Robeson's whereabouts."⁴⁰⁷ Immigration and customs officials were ordered "to endeavor to prevent his departure from the U.S."⁴⁰⁸ Almost two years later, Robeson still lived under this house arrest. To give a concert originally planned in Vancouver, Canada, he was forced to stand on the back of a flatbed truck pulled up to the edge of the U.S.-Canada border, with his audience standing in Canada.⁴⁰⁹

The jail analogy is apropos for another reason. Whether the result is de facto statelessness or nationwide house arrest, the denial of the right to travel begins to resemble regulatory detention on grounds of perceived future dangerousness. The constitutionality of indefinite detention on grounds of future dangerousness is determined by strict scrutiny.⁴¹⁰ The effective detention on grounds of future dangerousness that is the result of placement on the No Fly List cannot pass that test.

The seminal case on future dangerousness in the criminal context is *United States v. Salerno*.⁴¹¹ Although *Salerno* concerned the indefinite pretrial detention of an organized crime boss, oral argument began under the cloud of terrorism. Solicitor General Fried introduced his case with the hypothetical of a "member of a terrorist organization [who] has been indicted for blowing up an airliner for political reasons, and there is clear and persuasive evidence that he will do so again if not confined."⁴¹² This produced the first question, from Justice Scalia, who sought to complicate this terrorism hypothetical to test the breadth of the government's position that pre-trial detention would be appropriate in such a case. What if, Justice Scalia asked, the terrorist "isn't arrested for a past offense yet; he has just gone around saying, I am going to blow up an airline."⁴¹³ (Such a person would seem a strong candidate for placement on the No Fly List.) General Fried reassured Justice Scalia that unless the detention was "ancillary

405. See *supra* Part I.

406. DUBERMAN, *supra* note 240, at 388.

407. *Id.*

408. *Id.*

409. *Id.* at 399.

410. See *United States v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, the Court upheld 18 U.S.C. § 3142(e) of the Bail Reform Act of 1984, extending the state's power to detain competent adult citizens indefinitely upon a judicial finding of dangerousness that had only previously been enforced in time of active insurrection, on enemy aliens in time of war, the mentally incompetent, and juveniles. *Id.* at 748-49.

411. 481 U.S. 739.

412. Transcript of Oral Argument at 3, *Salerno*, 481 U.S. 739 (No. 86-87).

413. *Id.* at 4-5.

to . . . the normal working of the criminal process,” with all of the defendant’s rights and state’s burdens squarely in place, detention of the terrorist on grounds of future dangerousness would be impermissible.⁴¹⁴

In the context of criminal procedure, preventive detention for future dangerousness has only been upheld after the demonstration of a compelling government interest and the narrow tailoring of the detention to be the least restrictive means possible of achieving that interest.⁴¹⁵ Justice Souter, dissenting on the merits in *Demore v. Kim*,⁴¹⁶ described the “simple distillate” of the Court’s case law:

Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause . . . by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away. The cases, of course, would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand. Without any “full-blown adversary hearing” before detention, or heightened burden of proof, or other procedures to show the government’s interest in committing an individual, procedural rights would amount to nothing but mechanisms for testing group membership.⁴¹⁷

None of these requirements were met in the case of the Ismails. Nor is it easy to see how they could have been met without destroying the essential value of a No Fly List, which requires secrecy concerning the method of its composition and operation. If the Ismails were added to the No Fly List to explore concerns about their future dangerousness, and it is hard to imagine an alternative reason, this restriction on their travel could not pass strict scrutiny.⁴¹⁸

414. *Id.* at 5 (“This is not—this is not a free standing attempt to supplant or to have a predictive regime replace the normal criminal law.”).

415. *Salerno*, 481 U.S. at 749–50. This strict scrutiny was applied even though the Court declined to hold that liberty from such pretrial detention was a fundamental right. *Id.* at 751. It should be noted that the premise that the civilian criminal justice system is the appropriate analog for preventive detention in this context is a contested one. Even if the premise is accepted, criminal procedure in a post-9/11 age may be in flux. Robert Chesney and Jack Goldsmith discern a convergence of criminal and military justice approaches to detention in terrorism cases. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1079–1133 (2008).

416. 538 U.S. 510 (2003).

417. *Demore v. Kim*, 538 U.S. 510, 551–52 (2003) (citations omitted).

418. Under existing doctrines, of course, the confinement analogy is rejected and the citizen is only entitled to due process in restricting this “aspect of liberty.” What process is due would be determined under a *Mathews v. Eldridge* balancing test, weighing the private interest in travel, the state interest in its restrictions, the risk of error in applying the restriction, and the probable value of procedures to decrease that error. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It is likely that a Court applying the *Mathews* test

CONCLUSION

This Article makes this case for the fundamental right of U.S. citizens to leave their country and return home again. The disconnect analyzed in this Article between the “virtually unqualified” right of interstate travel and the much weaker protection accorded foreign travel was difficult to defend during the Cold War and is indefensible now during the so-called War on Terror.

Two arguments have been advanced. First, international travel should be considered a fundamental right protected by strict judicial scrutiny. Denial of the citizen’s right to leave his or her country and return home again should be permitted only when that restriction is the least restrictive means of accomplishing a compelling state interest. Second, the textual, historical, and philosophical foundation for that protection is to be found in the Fourteenth Amendment’s Citizenship Clause. In a digital age of mass travel and instant access to state-controlled terrorist watchlists and other computerized databases, it is the ancient concept of citizenship—not the twentieth-century doctrine of substantive due process—that is most suited to balancing freedom of movement with the genuine concerns of national security.

Without such constitutional protection, the citizen is quite literally caught coming and going. To prevent a citizen from leaving the United States because that travel is asserted to be contrary to the country’s foreign policy interests is to engage in a form of countrywide house arrest on grounds that sound uncomfortably close to preventive detention on the basis of future dangerousness (which itself has been held to require strict scrutiny). And to prevent a

would find the state’s interest in preventing terrorism much weightier than the modest value that precedent has attributed to travel abroad. It is difficult to believe that a pretermination hearing would be required.

This is notwithstanding the black box nature of the existing procedural safeguards available to the public, TSA’s “Travel Redress Inquiry Program” (TRIP). TRIP appears to have replaced the Office of Transportation Security Redress, which no longer appears on the DHS website or organizational chart. In the world of the digitized Mrs. Shipley, making a complaint is a trip down the rabbit hole in which the adjudicator of the complaint is anonymous, the standards for review are classified, and the watchlist’s actual managers are inaccessible. TSA describes TRIP as “a single point of contact” for traveler’s denied boarding. DHS Traveler Redress Inquiry Program (DHS TRIP), <http://www.tsa.gov/travelers/customer/redress/index.shtm> (last visited Sept. 29, 2008). However, TRIP provides only for the submission to TSA of a complaint form as “a way for travelers to *express concern* when they believe they have been incorrectly delayed, denied boarding,” or otherwise inconvenienced. Redress Procedures, FBI Terrorist Screening Center, <http://www.fbi.gov/terrorinfo/counterrorism/redress.htm> (last visited Sept. 29, 2008) (emphasis added). The submission is routed to unidentified “appropriate DHS components,” which “review the request and reach a determination about a traveler’s status.” DHS Traveler Redress Inquiry Program (DHS TRIP), http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm (last visited Sept. 29, 2008). In any event, the actual watchlist is administered not by TSA but by the Terrorist Screening Center, which “does not accept redress inquiries directly from the public.” Redress Procedures, *supra*. Redress cannot include notice that a name has been removed from the No Fly List because TSC “cannot confirm or deny whether an individual is on the . . . watchlist.” *Id.*

citizen from returning to the United States—the tragic example explored in this Article’s case study—is the equivalent of enforcing a temporary statelessness, for the hapless traveler cannot return to his own country and can only remain where he is with the continued grace and favor of the last country in which he finds himself stranded.

One cautionary note is worth sounding in conclusion. The analysis that supports the citizen’s right to travel abroad should not be extended very far. The temptation to do so to protect other unenumerated fundamental rights with the cloak of citizenship should be resisted. Citizenship is inherently exclusionary and has been since the Roman Empire, when the distinction between citizens and peregrines meant the application of one law, the *ius civile*, to Romans and another law, the *ius gentium*, to everyone else.⁴¹⁹ Such a legal system is the antithesis of an even older prescript: “Ye shall have one manner of law, as well for the stranger, as for one of your own country.”⁴²⁰ No less a personage than Congressman John Bingham, the greatest advocate for the privileges and immunities of national citizenship, feared “committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger,” basing his objection to the distinction both on the Constitution and “that higher law given by a voice out of heaven.”⁴²¹ Most fundamental rights are rightly understood to belong to all persons under the protection of the Constitution. Were the protections of the Bill of Rights available only to citizens, the very idea of America would be the smaller for it.

All that may be true and there still remain an essential place for citizenship in the American experiment. Alexander Bickel was wrong to call citizenship “at best a simple idea for a simple government.”⁴²² Citizenship is an essential concept that identifies the true stake holder in a society. The fundamental right to depart from and reenter *one’s own country* is a right that by its very nature is inextricably linked to citizenship in a democratic republic.

The ancient categories of us and them are especially alluring in times of perceived threats to national security. Almost by definition, the nation as a collective is threatened and turns inward. It is precisely at such times that the temptation must be resisted the most, if not out of a sense of justice then out of self-preservation. Calling up the history of the Palmer Raids, the Red Scare, and the immediate aftermath of September 11, David Cole has proved

419. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 57–59 (1962).

420. *Leviticus* 24:22 (King James); see also *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1974) (citing *Leviticus* in support of interstate travel).

421. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (objecting to an amendment to what would become the Civil Rights Act of 1866, invoking *Leviticus* 24:22).

422. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975).

the historical point that “what we do to foreign nationals today often paves the way for what will be done to American citizens tomorrow. The line between citizen and foreigner, so natural during wartime, is not only easy to exploit when restrictive measures are introduced, but also easy to breach when the government later finds it convenient to do so.”⁴²³

At the height of the Cold War, it was not uncommon to prevent Americans suspected of the wrong political views from foreign travel. The passport started as a temporary measure during wartime and is now a worldwide fixture of modern travel. Terrorist watch lists are proliferating, and the No Fly List appears to be on the same trajectory towards permanence as the passport. Citizenship is the concept that can and should block the institutionalization of what amounts to a virtually unreviewable power to determine future dangerousness by government officials empowered to confine a citizen inside of, or prevent a citizen from returning to, his or her own country. The Constitution grants no such power to the state to control its citizens in that way. Citizenship means something more than the equivalent of a green card holder who can vote.

423. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 5 (2003).