SUPREME COURT OF THE UNITED STATES

No. 98–97

RITA L. SAENZ, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS *v.* BRENDA ROE AND ANNA DOE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 17, 1999]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, dissenting.

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment– a Clause relied upon by this Court in only one other decision, *Colgate* v. *Harvey*, 296 U. S. 404 (1935), overruled five years later by *Madden* v. *Kentucky*, 309 U. S. 83 (1940). It uses this Clause to strike down what I believe is a reasonable measure falling under the head of a "good-faith residency requirement." Because I do not think any provision of the Constitution– and surely not a provision relied upon for only the second time since its enactment 130 years ago– requires this result, I dissent.

I

Much of the Court's opinion is unremarkable and sound. The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens. The state law in *Edwards* v. *California*, 314 U. S. 160 (1941), which prohibited the transport of any indigent person into Califor-

nia, was a classic barrier to travel or migration and the Court rightly struck it down. Indeed, for most of this country's history, what the Court today calls the first "component" of the right to travel, *ante,* at 10, was the entirety of this right. As Chief Justice Taney stated in his dissent in *the Passenger Cases*, 7 How. 283 (1849):

> "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbours is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." *Id.*, at 492.

See also *Crandall* v. *Nevada*, 6 Wall. 35, 44 (1868); *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 280–283 (1974) (REHNQUIST, J., dissenting) (collecting and discussing cases). The Court wisely holds that because Cal. Welf. & Inst. Code Ann. §11450.03 (West Supp. 1999) imposes no obstacle to respondents' entry into California, the statute does not infringe upon the right to travel. See *ante*, at 10. Thus, the traditional conception of the right to travel is simply not an issue in this case.

I also have no difficulty with aligning the right to travel with the protections afforded by the Privileges and Immunities Clause of Article IV, §2, to nonresidents who enter other States "intending to return home at the end of [their] journey." See *ante*, at 11. Nonresident visitors of other States should not be subject to discrimination solely because they live out of State. See *Paul* v. *Virginia*, 8 Wall. 168 (1869); *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978).

Like the traditional right-to-travel guarantees discussed above, however, this Clause has no application here, because respondents expressed a desire to stay in California and become citizens of that State. Respondents therefore plainly fall outside the protections of Article IV, §2.

Finally, I agree with the proposition that a "citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 16 Wall. 36, 80 (1873).

But I cannot see how the right to become a citizen of another State is a necessary "component" of the right to travel, or why the Court tries to marry these separate and distinct rights. A person is no longer "traveling" in any sense of the word when he finishes his journey to a State which he plans to make his home. Indeed, under the Court's logic, the protections of the Privileges or Immunities Clause recognized in this case come into play only when an individual *stops* traveling with the intent to remain and become a citizen of a new State. The right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a "component" of the other. Indeed, the same dicta from the *Slaughter-House Cases* quoted by the Court actually treats the right to become a citizen and the right to travel as separate and distinct rights under the Privileges or Immunities Clause of the Fourteenth Amendment. See *id.*, at 79–80.[1] At

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[1] The Court's decision in the *Slaughter-House Cases* only confirms my view that state infringement on the right to travel is limited to the kind of barrier established in *Edwards* v. *California*, 314 U. S. 160 (1941), and its discussion is worth quoting in full:

"But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

"One of these is well described in the case of *Crandall* v. *Nevada*[, 6

most, restrictions on an individual's right to become a citizen indirectly affect his calculus in deciding whether to exercise his right to travel in the first place, but such an attenuated and uncertain relationship is no ground for folding one right into the other.

No doubt the Court has, in the past 30 years, essentially conflated the right to travel with the right to equal state citizenship in striking down durational residence requirements similar to the one challenged here. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (striking down 1-year residence before receiving any welfare benefit); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972) (striking down 1-year residence before receiving the right to vote in state elections); *Maricopa County*, 415 U. S., at 280–283 (striking down 1-year county residence before receiving entitlement to nonemergency hospitalization or emergency care). These cases marked a sharp departure from the Court's prior right-to-travel cases because in none of them was travel itself prohibited. See *id.*, at 254–255 ("Whatever its ultimate scope . . . the right to travel was involved in only a limited sense in *Shapiro*"); *Shapiro*, *supra*, at 671–672 (Harlan, J., dissenting).

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Wall. 35 (1868)]. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, 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 the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;'* and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada.*" 16 Wall., at 79 (footnote omitted).

Instead, the Court in these cases held that restricting the provision of welfare benefits, votes, or certain medical benefits to new citizens for a limited time impermissibly "penalized" them under the Equal Protection Clause of the Fourteenth Amendment for having exercised their right to travel. See *Maricopa County, supra*, at 257. The Court thus settled for deciding what restrictions amounted to "deprivations of very important benefits and rights" that operated to indirectly "penalize" the right to travel. See *Attorney General of N. Y.* v. *Soto-Lopez*, 476 U. S. 898, 907 (1986) (plurality opinion). In other cases, the Court recognized that laws dividing new and old residents had little to do with the right to travel and merely triggered an inquiry into whether the resulting classification rationally furthered a legitimate government purpose. See *Zobel* v. *Williams*, 457 U. S. 55, 60, n. 6 (1982); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985).[2] While *Zobel* and *Hooper* reached the wrong result in my view, they at least put the Court on the proper track in identifying exactly what interests it was protecting; namely, the right of individuals not to be subject to unjustifiable classifications as opposed to infringements on the right to travel.

The Court today tries to clear much of the underbrush created by these prior right-to-travel cases, abandoning its effort to define what residence requirements deprive individuals of "important rights and benefits" or "penalize" the right to travel. See *ante*, at 14–15. Under its new analytical framework, a State, outside certain ill-defined circumstances, cannot classify its citizens by the length of

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[2] As Chief Justice Burger aptly stated in *Zobel:* "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." 457 U. S., at 60, n. 6.

their residence in the State without offending the Privileges or Immunities Clause of the Fourteenth Amendment. The Court thus departs from *Shapiro* and its progeny, and, while paying lipservice to the right to travel, the Court does little to explain how the right to travel is involved at all. Instead, as the Court's analysis clearly demonstrates, see *ante*, at 15–17, this case is only about respondents' right to immediately enjoy all the privileges of being a California citizen in relation to that State's ability to test the good-faith assertion of this right. The Court has thus come full circle by effectively disavowing the analysis of *Shapiro*, segregating the right to travel and the rights secured by Article IV from the right to become a citizen under the Privileges or Immunities Clause, and then testing the residence requirement here against this latter right. For all its misplaced efforts to fold the right to become a citizen into the right to travel, the Court has essentially returned to its original understanding of the right to travel.

II

In unearthing from its tomb the right to become a state citizen and to be treated equally in the new State of residence, however, the Court ignores a State's need to assure that only persons who establish a bona fide residence receive the benefits provided to current residents of the State. The *Slaughter-House* dicta at the core of the Court's analysis specifically conditions a United States citizen's right to "become a citizen of any state of the Union" and to enjoy the "same rights as other citizens of that State" on the establishment of a *"bona fide residence therein."* 16 Wall., at 80 (emphasis added). Even when redefining the right to travel in *Shapiro* and its progeny, the Court has "always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence

requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State." *Soto-Lopez, supra,* at 903, n. 3 (citing cases).

Thus, the Court has consistently recognized that while new citizens must have the same opportunity to enjoy the privileges of being a citizen of a State, the States retain the ability to use bona fide residence requirements to ferret out those who intend to take the privileges and run. As this Court explained in *Martinez* v. *Bynum*, 461 U. S. 321, 328–329 (1983): "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. . . . A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents." The *Martinez* Court explained that "residence" requires "both physical presence and an intention to remain," see *id.*, at 330, and approved a Texas law that restricted eligibility for tuition-free education to families who met this minimum definition of residence, *id.*, at 332–333.

While the physical presence element of a bona fide residence is easy to police, the subjective intent element is not. It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain. Hence, States employ objective criteria such as durational residence requirements to test a new resident's resolve to remain before these new citizens can enjoy certain in-state benefits. Recognizing the practical appeal of such criteria, this Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities. *Starns* v. *Malkerson*, 401 U. S. 985 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (upholding 1-year residence requirement for in-state tuition); *Sturgis*

v. *Washington*, 414 U. S. 1057, summarily aff'g 368 F. Supp. 38 (WD Wash. 1973) (same). The Court has declared: "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, *bona fide* residents of the State, but have come there solely for educational purposes, cannot take advantage of the in-state rates." See *Vlandis* v. *Kline*, 412 U. S. 441, 453–454 (1973). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts, see *Sosna* v. *Iowa*, 419 U. S. 393, 406–409 (1975), and in upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, see *Rosario* v. *Rockefeller*, 410 U. S. 752, 760–762 (1973).

If States can require individuals to reside in-state for a year before exercising the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections that all other state citizens enjoy, then States may surely do the same for welfare benefits. Indeed, there is no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university. The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California's standard of living and higher education system make both subsidies quite attractive. Durational residence requirements were upheld when used to regulate the provision of higher education subsidies, and the same deference should be given in the case of welfare payments. See *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

The Court today recognizes that States retain the ability to determine the bona fides of an individual's claim to residence, see *ante*, at 15, but then tries to avoid the issue. It asserts that because respondents' need for welfare benefits is unrelated to the length of time they have resided in California, it has "no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned." See *ibid.* But I do not understand how the absence of a link between need and length of residency bears on the State's ability to objectively test respondents' resolve to stay in California. There is no link between the need for an education or for a divorce and the length of residence, and yet States may use length of residence as an objective yardstick to channel their benefits to those whose intent to stay is legitimate.

In one respect, the State has a greater need to require a durational residence for welfare benefits than for college eligibility. The impact of a large number of new residents who immediately seek welfare payments will have a far greater impact on a State's operating budget than the impact of new residents seeking to attend a state university. In the case of the welfare recipients, a modest durational residence requirement to allow for the completion of an annual legislative budget cycle gives the State time to decide how to finance the increased obligations.

The Court tries to distinguish education and divorce benefits by contending that the welfare payment here will be consumed in California, while a college education or a divorce produces benefits that are "portable" and can be enjoyed after individuals return to their original domicile. *Ibid.* But this "you can't take it with you" distinction is more apparent than real, and offers little guidance to lower courts who must apply this rationale in the future. Welfare payments are a form of insurance, giving impoverished individuals and their families the means to meet

the demands of daily life while they receive the necessary training, education, and time to look for a job. The cash itself will no doubt be spent in California, but the benefits from receiving this income and having the opportunity to become employed or employable will stick with the welfare recipient if they stay in California or go back to their true domicile. Similarly, tuition subsidies are "consumed" in-state but the recipient takes the benefits of a college education with him wherever he goes. A welfare subsidy is thus as much an investment in human capital as is a tuition subsidy, and their attendant benefits are just as "portable."[3] More importantly, this foray into social economics demonstrates that the line drawn by the Court borders on the metaphysical, and requires lower courts to plumb the policies animating certain benefits like welfare to define their "essence" and hence their "portability." As this Court wisely recognized almost 30 years ago, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge*, *supra*, at 487.

I therefore believe that the durational residence requirement challenged here is a permissible exercise of the State's power to "assur[e] that services provided for its residents are enjoyed only by residents." *Martinez*, 461 U. S., at 328. The 1-year period established in §11450.03 is the same period this Court approved in *Starns* and *Sosa*. The requirement does not deprive welfare recipients of all benefits; indeed, the limitation has no effect whatsoever on a recipient's ability to enjoy the full 5-year period of welfare eligibility; to enjoy the full range of employment, training, and accompanying supportive services; or to take full advantage of health care benefits under Medicaid. See Brief for Petitioners 7–8, 27. This waiting pe-

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[3]The same analysis applies to divorce.

riod does not preclude new residents from all cash payments, but merely limits them to what they received in their prior State of residence. Moreover, as the Court recognizes, see *ante*, at 6, any pinch resulting from this limitation during the 1-year period is mitigated by other programs such as homeless assistance and an increase in food stamp allowance. The 1-year period thus permissibly balances the new resident's needs for subsistence with the State's need to ensure the bona fides of their claim to residence.

Finally, Congress' express approval in 42 U. S. C. §604(c) of durational residence requirements for welfare recipients like the one established by California only goes to show the reasonableness of a law like §11450.03. The National Legislature, where people from Mississippi as well as California are represented, has recognized the need to protect state resources in a time of experimentation and welfare reform. As States like California revamp their total welfare packages, see Brief for Petitioners 5–6, they should have the authority and flexibility to ensure that their new programs are not exploited. Congress has decided that it makes good welfare policy to give the States this power. California has reasonably exercised it through an objective, narrowly tailored residence requirement. I see nothing in the Constitution that should prevent the enforcement of that requirement.