When Welfare Reform Crosses the Line: A Look Behind the Scenes of *Saenz v. Roe* and California's Battle Over Durational Residency Requirements

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I. Introduction

On January 13th of this year, the United States Supreme Court heard oral argument in *Anderson v. Roe,* [1] a California case from the Ninth Circuit that held in the balance the survival of such Brennan-era doctrines as welfare rights and the constitutional right to travel on one side, and the limits of the Clinton Administration's Welfare Reform movement on the other.[2]

Specifically at issue was § 11450.03 of the California Welfare and Institutions Code, which established a durational residency requirement for the receipt of full welfare benefits.[3] Under the statute, bona fide California residents with less than twelve months residency in the state would not receive the California welfare grant amount but rather the typically smaller grant of their former state of residence.[4] In other words, a Texas mother with two children relocating to Los Angeles would receive only $188 in monthly welfare payments her first year of residence as opposed to $565, the California grant amount.[5]

California's statute posed a direct challenge to *Shapiro v. Thompson,* a landmark 1969 Supreme Court decision which struck down statutes from Connecticut, Pennsylvania and Washington D.C. imposing a one year residency requirement for the receipt of welfare benefits.[6] *Shapiro* announced that the right to travel, while not explicitly guaranteed in the Constitution, was nonetheless a fundamental substantive due process right. Therefore, the Court

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1. Anderson v. Roe, 966 F. Supp. 977 (E.D. Cal.1997), *aff'd,* 134 F.3d 1400 (9th Cir.1998) *cert. granted sub nom,* Finney v. Roe, 524 U.S. ___, 119 S. Ct. 31 (U.S. Sept. 29, 1998) (No. 98-97) (argued Jan. 13, 1999).

2. After Anderson v. Roe was argued, Rita L. Saenz replaced Eloise Anderson as the Director of California's Department of Social Services.

3. Relevant potions of § 11450.03 of the California Welfare and Institutions Code read as follows:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of § 11450, families that have resided in this state for less than 12 months shall be paid an amount . . . not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

4. Only three States in the contiguous United States pay higher AFDC grants than California: Connecticut, Massachusetts and Vermont. Alaska and Hawaii also have higher welfare benefits. AFDC Table of State Maximum Benefit Amounts By Family Size, Brief for Petitioner at *26a, Anderson v. Roe, (No. 98-97) 1998 WL 784602.

5. *Id.*

6. Shapiro v. Thompson, 394 U.S. 618, 622 (1969).

analyzed the statutes under strict scrutiny.[7] The Court held the one-year residency requirements constituted an impermissible penalty by burdening a person's right to migrate.[8] "[A]ny classification which serves to *penalize* the exercise of that right [to travel], unless shown to be necessary to promote a compelling government interest, is unconstitutional."[9]

Given the current makeup of the Supreme Court, many constitutional scholars and court watchers expected *Anderson* to be a closely decided matter. Indeed, many believed the Court's penchant for conservative judicial activism would win out and *Shapiro* and the right to travel would be relegated to the dustbin of Brennan decisions no longer constitutionally fashionable. However, in an astonishing 7-2 decision, Justice Stevens writing for the majority not only affirmed *Shapiro* and the right to travel but it also resurrected the Fourteenth Amendment's Privileges and Immunities Clause.[10]

The right to travel jurisprudence following *Shapiro* has been a confusing morass of often contradictory holdings.[11] In an area of law where few bright lines exist, determining impermissible burdens from legitimate State interests is often difficult. Within the right to travel line of cases, however, certain matters are well settled. For instance, a State may not erect legislative barriers to inhibit the migration of indigent persons.[12] The Court has also acknowledged that the State may permissibly impose some waiting periods without triggering equal

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7. *Id.* at 630.

8. *Id.* at 627.

9. *Id.* at 634 (emphasis added).

10. Saenz v. Roe, __ U.S. __, 119 S. Ct. 1518 (No. 98-97) (decided May 17, 1999) *affirming sub nom,* Anderson v. Roe, 966 F. Supp. 977 (E.D. Cal.1997), *aff'd,* 134 F.3d 1400 (9th Cir.1998).

11. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974) (While not a direct deterrent to interstate migration, the denial of free non-emergency medical care to individuals with less than twelve months residency in the county is an impermissible penalty); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (Tennessee one year residence requirement for voting violates the equal protection clause by burdening right to travel); Sosna v. Iowa, 419 U.S. 393, 410 (1975) (Iowa statute requiring one year waiting period for new residents wishing to file for divorce does not burden right to travel); Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 911-12 (1986) (While neither a "necessity of life" nor a direct deterrent on the right to travel, New York statute awarding civil service applicants armed service bonus points only if they entered the armed services while residing in New York violated constitutionally protected right to travel); Evansville-Vanderburgh Airport Authority v. Delta Airlines, 405 U.S. 707, 720 (1972) (A $1 per passenger tax imposed by the airport authority is not a burden on the right to travel); Zobel v. Williams 457 U.S. 55, 65 (1982) (Alaska bill distributing oil revenues to citizens based on length of residency is an unconstitutional burden on the right to travel); Hooper v. Bernalillo County Tax Assessor, 472 U.S. 612, 624 (1985) (New Mexico may favor Vietnam veterans over non-veterans, but it may not favor established resident veterans over new resident veterans by granting property tax exemption only to those veterans who established residency prior to May 8, 1976); Vlandis v. Kline, 412 U.S. 441, 452 (1973) (A permanent and irrebuttable presumption of non-residence as a basis for denying in-state resident tuition is forbidden by the Due Process Clause); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970) *aff'd,* 401 U.S. 985 (1971) (Durational residency requirement for lower in-state tuition at State universities is constitutionally permissible); and Martinez v. Bynum, 461 U.S. 321, 332 (1983) (Texas statute requiring persons to show they are bona fide residents prior to receiving free public education does not unconstitutionally burden right to travel).

12. *See* Edwards v. California, 314 U.S. 160, 177 (1941) (Striking down a California law that prohibited the transport of indigents into the State as violative of the Commerce Clause); Shapiro v. Thompson, *supra* note 6, at 631-32 ("[A] state may no more try to fence out those indigents who seek higher benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account.").

protection analysis[13] as long as the waiting periods do not deny a basic necessity of life.[14]

This note takes a behind-the-scenes look at the latest controversy surrounding the constitutionality of durational residency requirements. It will examine the history leading up to § 11450.03 of the California Welfare and Institutions Code as well as some of the key events and theories that paved the way for the most recent attack on welfare rights. Finally, this note will discuss briefly Supreme Court's decision in *Saenz v. Roe* and the surprising outcome of the durational residency requirement battle.

II. Setting the Stage

A. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*

In August of 1996, President Clinton made good on his promise to "end welfare as we know it" by signing into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[15] The PRWORA abolished the federal AFDC[16] program and replaced it with a program of State-administered block grants entitled Temporary Aid to Needy Families (TANF).[17] The objectives of the PRWORA were threefold. First, it shifted the program's focus from government maintenance of poor families to one of limited transitional assistance.[18] Second, it gave States significantly more discretion in shaping the contours of its welfare programs.[19] Under the PRWORA, each State now had the ability to identify needs, set policy priorities, institute incentives and sanctions, and create individualized models of how best to usher welfare recipients into the workplace.[20] Accordingly, States also had the authority to make allocative decisions as how best to make appropriate use of their block grants (e.g., States may decide to emphasize subsidies to businesses employing TANF recipients, transportation, or childcare assistance over direct cash aid to

13. In *Shapiro,* the Court wrote:

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

Id. at 638 n.21.

14. *Id.* at 627; *see also* Memorial Hospital v. Maricopa County, *supra* note 11, at 269.

15. Statement by President William J. Clinton upon signing H.R. 3734 [P.L. 104-193, Personal Responsibility and Work Reconciliation Act of 1996], 32 Weekly Comp. Pres. Doc. 1487 (August 22, 1996).

16. Aid to Families with Dependent Children.

17. 42 U.S.C. § 601 (1996). Although the federal AFDC program no longer exists, many States and welfare recipients continue to refer to their programs as "AFDC" either to avoid confusion or perhaps out of force of habit. Thus while erroneous, the terms TANF and AFDC are often used interchangeably.

18. *Id.*

19. 42 U.S.C. §§ 601, 604 (1996).

20. *Id.*

needy families). And finally, the PRWORA unequivocally disavowed any notion that needy persons had an entitlement to State-funded public assistance.[21]

Most significantly, the PRWORA created a total lifetime limit of five years on the receipt of welfare benefits.[22] Participants must now "earn" their welfare; the receipt of benefits is conditioned upon participants performing a minimum number of hours in an array of mandatory programs ranging from employment, job search/job readiness to community service, short-term vocational training, or GED instruction.[23] All TANF participants must either have a high school diploma, its equivalent, or must be working towards getting one.[24]

Under the rubric of encouraging "the formation and maintenance of two-parent families,"[25] TANF recipients must cooperate in establishing paternity or obtaining child support for dependent children and must assign certain support rights to the State.[26] Not only must a participant take responsibility for her actions, but she must also take responsibility for the actions of her children. Sanctions may be imposed upon any adult participant that fails to ensure that her minor children show up for school.[27]

Finally, and perhaps most significantly for the purposes of this discussion, the Act gave States the power to distinguish between bona fide new residents and older residents by permitting States to "treat interstate immigrants under the [TANF] rules of the former State."[28] Fourteen States followed the PRWORA's lead and established durational residency requirements.[29]

B. A Giant Sucking Sound to the West: The Welfare Magnet Theory

The principal rationale driving both § 604 (c) of the PRWORA and § 11450.03 of the California Welfare and Institutions Code is the belief that families living in low benefit paying States will move to a higher benefit paying

21. *Id.*
22. 42 U.S.C. § 608 (a) (7) (1996).
23. 42 U.S.C. § 607 (1996).
24. 42 U.S.C. § 604 (i) (1996).
25. 42 U.S.C. § 601 (a) (4) (1996).
26. 42 U.S.C. § 608 (a) (1996).
27. 42 U.S.C. § 604 (j) (1996).
28. 42 U.S.C. § 604 (c) reads:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

29. Brief of the National Governors' Association, National Association of Counties, Council of State Government, International City-County Management Association, U.S. Conference of Mayors, and National League of Cities as Amici Curiae Supporting Petitioners at *12, Anderson v. Roe, (No. 98-97), 1998 WL 789358 [hereinafter Brief of the National Governor's Association]. Presently, Connecticut, Georgia, Illinois, Iowa, Minnesota, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wisconsin had residency requirements similar to California's.

state solely in order to avail themselves of more generous welfare grants.[30] Under this "welfare magnet" theory, States providing higher welfare benefits relative to other States will experience an influx of migration.[31] The resulting increase of indigent migration will in turn place burdens on the State's financial resources.[32] States thus will be faced with the unpopular choice of either increasing taxes to pay for the additional services required to support the new indigent population or altering the welfare magnet's "polarity" by reducing the amount of benefits provided to the poor. According to the proponents of the welfare magnet theory, the "race to the bottom" doctrine reflected in the latter alternative is the natural result of failing to enact protectionist measures such as durational residency requirements.[33]

The problem with making law based on the welfare magnet theory is that most scholars think it is flat wrong.[34] Weighing in on the side of the petitioners, 40 scholars specializing in the areas of poverty studies and social welfare policy submitted an amicus brief asserting, "[r]ecent empirical studies disprove the welfare magnet myth . . . . Based on these comprehensive studies, leading scholars have concluded that there is no empirical support for the theory of welfare migration, and that past studies supporting the theory were flawed in their methodology."[35]

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30. Petitioner's Brief, *supra* note 4, at *8. Also, discussing the welfare magnet problem at a 1995 Senate Finance Committee Hearing on welfare reform, the Governor of Vermont, Howard Dean, gave the following testimony:

> I think that there is a problem that I wish this committee would address and we have not addressed as [sic] the Governors [sic] Association and that is the difference in benefits. I know Governor Thompson's state [Wisconsin] and my state are thought by some of our taxpayers to be welfare magnets and to a certain extent, that may be true. People are coming from other states nearby who have lower benefits and saying, "well, we get a better deal if we move to Vermont or we move to Wisconsin." I think that is a problem. We do not have policy on that and I think there ought to be some though [sic] put into that.

Verbatim Transcript, State's Perspective on Welfare Reform, Hearing of United States Senate Committee on Finance (March 3, 1995) 1995 WL 146470 (F.D.C.H.) at 81-83. *See also* PAUL PETERSON, THE PRICE OF FEDERALISM (1995), PAUL E. PETERSON & MARK C. ROMM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990) (using Wisconsin's AFDC Program as a case study in support of the welfare magnet theory) and Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 919 (1985).

31. Petitioner's Brief, *supra* note 4, at *8; Brief Amicus Curiae of the Institute for Justice in Support of Petitioners *25-*26, Anderson v. Roe, (No. 98-97) 1998 WL 784405 [hereinafter Brief of the Institute for Justice].

32. *Id.*

33. *Id. See also* Joint Appendix, Proposition 165 Ballot Pamphlet (Excerpts) at *33a, Anderson v. Roe, (No. 98-97) 1998 WL 906320; 1998 WL 784602 ("Higher taxes are driving jobs and taxpayers out of the state. WITHOUT IMMEDIATE REFORM, CALIFORNIA WILL HAVE MORE TAX USERS THAN TAXPAYERS BY 1993 .... Is that fair to your family? How much more in taxes can you afford?") (alteration in original).

34. *See* Brief of Social Scientists as Amici Curiae Supporting Respondents at *5, Anderson v. Roe, (No. 98-97) 1998 WL 847266 [hereinafter Brief of Social Scientists]; Declaration of Joel F. Handler, Richard C. Maxwell Professor at Law, UCLA Law School and UCLA School of Public Policy and Social Research ¶¶ 10, 11 (April 25, 1997) *cited in* Respondent's Brief at *116a-*117a, Anderson v. Roe, (No. 98-97) 1998 WL 847469 [hereinafter Handler Declaration]; Declaration of John Hartman, Assistant Professor of Sociology at Columbia University ¶ 49 (April 24, 1997) *cited in* Respondent's Brief at *144a [hereinafter Hartman Declaration].

35. Brief of Social Scientists, *supra* note 34, at *1, *10. Professors Peterson and Romm's research, upon which the State of California relied to support its position in *Roe v. Anderson* (Roe v.

Amici argue that most welfare recipients rely on benefits as a form of short-term emergency assistance.[36] Studies show that roughly 50% of all welfare recipients stay on welfare for less than twelve months, and 70% for less than two years.[37] Of the poor who do move out of State, they are overwhelmingly motivated by a desire to be closer to support networks (family or friends) or job opportunities and labor market considerations.[38] Receipt of higher welfare benefits is not a consideration of any meaningful statistical significance.[39] Indeed, most migrating families have little knowledge of welfare eligibility criteria or benefits paid by the State.[40] Finally, recent studies on the migration patterns of poor families reveal that "welfare recipients are no more likely, or perhaps even less likely, to relocate to a higher benefit State than non-recipients."[41]

Professor Handler's study of 48,192 poor women of childbearing age concluded that women who move out of State show no preference for States with high benefits.[42] In his study, the rate of women migrating from Texas (a low benefit state) to California (a high benefit state) was nearly identical to the migration rate of California women to Texas.[43] Similarly, poor women's migration choices do not seem to be influenced by wage differentials.[44] Women are just as likely to move to a State with low wages as they are a State with high wages.[45] Finally, when poor people do relocate to a high benefit State, they are

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Anderson, 966 F. Supp. 977, 983 (E.D. Cal. 1997)) has been heavily criticized by Professor Hartman for its reliance on aggregate data and "ecological inference":

> The logical pitfalls of this approach are obvious. The same outcome could be the result of any number of decisionmaking processes, some of them not even involving the behavior of poor people. For example, poverty rates may have increased because middle and upper income groups left for better opportunities elsewhere, opportunities not available to their less fortunate brethren. The fact that different processes operating at the individual level can produce identical outcomes in the aggregate has generally led social scientists to avoid the sort of argument the [sic] Peterson and Rom [sic] advance.

Hartman Declaration ¶ 14, *cited in* Respondent's Brief, *supra* note 34, at *125a.

36. *Id.* at *5.

37. H.R. Doc. No. 195-7 (1998), 1998 Green Book: Background Material and Data on Progress Within the Jurisdiction of the Committee on Ways and Means at 531-32 and Table 7-52, at 534 *cited in id.* at *6. Professor Handler estimates recipient voluntary termination rates to be even higher: 50% of welfare participants exit the program within one year and 75% within two years. Handler Declaration ¶ 7, *cited in* Respondent's Brief, *supra* note 34, at *115a.

38. Paul Voss et al., *Interstate Migration and Public Welfare: The Migration Decision Making of a Low Income Population*, *in* COMMUNITY, SOCIETY AND MIGRATION (P.C. Jobes et al. eds, 1993); Carole Roan Gresenz, An Empirical Investigation of the Role of AFDC Benefits in Location Choice (Labor and Populations Working Paper Series No. 97-05, 1997) *cited in* Brief of Social Scientists, supra note 34, at *8-*9.

39. *Id.* at *8; Handler Declaration ¶¶ 45, 49, *cited in* Respondent's Brief, *supra* note 34, at *142a, *144a.

40. Brief of Social Scientists, *supra* note 34, at *8.

41. *Id.* at *10.

42. Handler Declaration ¶ 28, *cited in* Respondent's Brief, *supra* note 34, *132a-*133a.

43. Handler Declaration ¶ 34, *cited in id.* at *138a. During the years of the sample (1982 - 1988), twenty respondents recently moved to California from Texas (0.6%). Twenty-one respondents (0.4%) moved *from* California to Texas.

44. Handler Declaration ¶ 37, *cited in id.* at *139a.

45. *Id.*

no more likely--indeed they are less likely--to apply for welfare benefits, than poor individuals already living in that State.[46]

While the welfare magnet theory makes for good political rhetoric, its scientific legitimacy is suspect at best, making the rationality of such legislation equally suspect. Section 11450.03 reveals the clear danger of permitting legislatures to engage in spurious and overly simplistic logic in order to support a politically popular policy that clearly discriminates against indigent families.

C. *"I thought the whole purpose of this was to discourage migration for higher welfare benefits."*[47]

Initially, California made several unsuccessful attempts to get a durational residency statute on its books.[48] Several bills introduced in the legislature failed before becoming law.[49] Similarly, a voter referendum to impose durational residency requirements also failed.[50] Despite these early legislative schemes to impose durational residency requirements, California went out of its way to distance itself from such previous efforts.[51] Indeed, California devoted an entire section of its Reply Brief to the matter: "Plaintiffs May Not Rely Upon Materials Regarding Proposition 165 to Support Their Arguments Regarding the Constitutionality of the Statute."[52] California made evidentiary and procedural arguments citing relevancy as to why such references should be prohibited.[53] Nonetheless, it begs the question: if these failed campaigns similarly endorsed two-tier welfare grants based on length of residency, an effort the petitioners clearly favored, then why go to such trouble to differentiate § 11450.03 from Prop. 165? The answer might lie in the fact that the former ballot initiatives plainly demonstrated the constitutionally impermissible motive of discouraging indigent families from moving to the State.[54]

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46. Handler Declaration ¶¶ 45, 49 *cited in id.* at *142a, *144a; Sanford Schram et al., *Without Cause or Effect: Reconsidering Welfare Migration as a Policy Problem*, 42 AM. J. POL. SCI. 210 (1998) *cited in* Brief of Social Scientists, *supra* note 34, at *11.

47. Comment by United States Supreme Court Justice During Oral Argument, United States Supreme Court Official Transcript of Oral Argument at *6-*7, Anderson v. Roe, (No. 98-97) (*argued* Jan. 13, 1999) 1999 WL 22762.

48. Respondent's Brief, *supra* note 34, at *5-*6.

49. *Id.*; Joint Appendix, California Assembly Floor Debate and Vote on SB 366 (Excerpts) (March 9, 1992) at *63a, *69a, Anderson v. Roe, (No. 98-97) 1998 WL 906320; 1998 WL 784602.

50. *Id.*

51. *See* Reply to Respondent's Brief on the Merits at*13-*16, Anderson v. Roe, (No. 98-97) 1998 WL 906320.

52. *Id.*

53. *Id.* at *13-*14. Because the previous voter and legislative schemes failed, Petitioners argue they are irrelevant to the instant statute. Further, because the exhibits submitted by respondents were not affidavits, transcribed pleadings, or in deposition form, they should not be considered by the Court.

54. *Shapiro* prohibits States from enacting legislative barriers to discourage the migration of indigents. ("[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."). Shapiro v. Thompson, *supra* note 6, at 631. *See* Joint Appendix, Proposition 165 Petition Materials (Excerpts) at *27a-*29a, Anderson v. Roe, (No. 98-97) 1998 WL 906320, 1998 WL 784602 [hereinafter Petition Materials]; Joint Appendix, Proposition 165 Campaign Materials (Excerpts) at *30a-*32a, Anderson v. Roe, (No. 98-97) 1998 WL 906320, 1998 WL 784602 [hereinafter Campaign Materials]; Ballot Pamphlet, *supra* note 33, at*33a-*35a; Joint Appendix, California Assembly Floor Debate and Vote on Senate Bill 366

1. Proposition 165

Proposition 165 was a 1992 voter referendum to amend the California Constitution.[55] Endorsed by both Pete Wilson and the Howard Jarvis Taxpayers' Association, one objective of Prop. 165 was to reduce the total California welfare budget by constitutionally legislating broad welfare reforms.[56]

Several of the changes proposed were: an across the board 10% reduction in cash AFDC grants;[57] a further 15% reduction in grant amounts to unemployed "able-bodied welfare recipients" after receiving benefits for six months;[58] a permanent cap on the size of the family grant to "discourage unwed welfare mothers from having additional children;"[59] conditioning receipt of aid to establishing paternity for children on the AFDC grant;[60] and durational residency requirements for new California residents.[61] The animus towards welfare recipients was clear, as was the inference that poor women are motivated to do just about anything in order to get a larger welfare check.

The proponents of Proposition 165 repeatedly and unambiguously identified deterring welfare migration as one of the primary goals of the initiative.[62] In a letter promoting Prop. 165, then-Governor of California Pete Wilson wrote, "[t]he Taxpayers [sic] Protection Act will: STOP out of state welfare recipients from moving to California just to increase their grants."[63] Other campaign literature similarly explained the objective behind durational residency requirements as "reduc[ing] any incentive to come to California solely for higher welfare benefits"[64] and "end[ing] California's status as a welfare magnet."[65]

Anticipating the passage of Prop. 165, Russell S. Could, Secretary of California's Health and Welfare Agency, wrote the U.S. Department of Health and Human Services requesting a waiver from federal AFDC guidelines as part of the California Welfare Reform demonstration project.[66] The letter, dated May 19, 1992, requested authorization to enact the welfare reform provisions

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(Excerpts) (March 9, 1992) at *63a-*74a, Anderson v. Roe, (No. 98-97) 1998 WL 906320, 1998 WL 784602.

55. Campaign Materials, *supra* note 54, at *30a; Ballot Pamphlet, *supra* note 33, at *35a.

56. *Id.*

57. Ballot Pamphlet, *supra* note 33, at *34a.

58. *Id.*

59. Petition Materials, *supra* note 54, at *28a. *See also* Campaign Materials, *supra* note 54, at *31a ("[W]elfare recipients will no longer receive cash bonuses when they have more children.").

60. Petition Materials, *supra* note 54, at *28a ([The Act will] "REQUIRE welfare mothers to identify the fathers of their children so that dead-beat fathers pay for their children instead of taxpayers.") (alteration in original); Campaign Materials, *supra* note 54, at *31a; Ballot Pamphlet, *supra* note 33, at *34a.

61. Petition Materials, *supra* note 54, at *28a.

62. *See* Petition Materials, *supra* note 54, at *27a-*29a; *Campaign Materials*, *supra* note 54, at *30a-*32a; Ballot Pamphlet, *supra* note 33, at *33a-*35a.

63. Petition Materials, *supra* note 54, at *28a (alteration in original).

64. Campaign Materials, *supra* note 54, at *31a.

65. Ballot Pamphlet, *supra* note 33, at *34a.

66. Joint Appendix, Proposition 165 Waiver Requests at *48a, Anderson v. Roe, (No. 98-97) 1998 WL 906320, 1998 WL 784602.

outlined in Proposition 165.[67] In making its argument for a two-tier benefits system based on length of residency, the Secretary identified the following objective: "[to] [r]educe the incentive for migration of families to California for the purpose of obtaining higher aid payments."[68] The Secretary hypothesized, "[i]f California's grant levels for incoming applicants are changed to the lesser of California's computed grant amount or the maximum aid payment of the State of prior residence, *the rate of relocation into California will be reduced.*"[69] While Proposition 165 was defeated at the polls, identical legislation calling for durational residency requirements was introduced by Pete Wilson, adopted, and signed into law.[70]

As noted *supra,* the State of California has gone out of its way to assert that § 11450.03 is not a redux of Prop. 165. Therefore, any attempt to rely on precursor legislation, in this case Prop. 165 or Senate Bill 366 is improper.[71] Respondents argue the true precursor legislation to § 11450.03 is Senate Bill 485.[72] Oddly enough, S.B. 485 discusses General Assistance (GA), a financial assistance program for indigent single adult men and women, not AFDC.[73] Neither does S.B. 485 mention durational residency requirements.[74] Irrespective, discriminatory intent is but one way to challenge the constitutionality of § 11450.03. As shall be discussed *infra,* regardless of the true precursor legislation or whether or not § 11450.03 facially discriminates against the right to travel, the statute could have been found unconstitutional if it penalized an individual's constitutional right to travel.[75]

2. A Wolf in Sheep's Clothing

After placing as much distance as possible between Prop. 165 and § 11450.03, California now claimed the two-tier TANF benefits program, despite its near identical language to Prop. 165, was nothing more than an attempt to administer public welfare assistance. Relying on *Dandridge v. Williams,*[76] a 1970 United States Supreme Court decision, California stated §

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67. *Id.*
68. *Id.*
69. *Id.* (emphasis added).
70. Respondent's Brief, *supra* note 34, at *6.
71. Reply to Respondent's Brief, *supra* note 51, at *13-*14.
72. *Id.*
73. CAL. WELF. & INST. CODE § 17000.5 (eff. Sept. 15, 1992) (West 1999).
74. *Id.*
75. Shapiro, *supra* note 6, at 634 ("[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling government interest, is unconstitutional.").
76. Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge*, the Court upheld a Maryland cap on welfare benefits setting a maximum benefit despite the family size. Characterizing the benefits cap as a rational allocative decision well within the realm of permissive administrative duties, the benefits scheme was held permissible:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

11450.03 was an "economic and social welfare decision" and therefore rational review should be applied.[77] Petitioners argued that the durational residency requirement, under rational review, is a fiscal decision permitted by *Dandridge*.[78] Therefore, the statutory scheme should be upheld as long as its rational.[79]

While Petitioners frequently cited the "economics and social welfare" language used by *Dandridge* to uphold the application of rational review, they glaringly overlooked another passage which clearly established the outer limits of *Dandridge* : "[a]lthough a State may adopt a maximum grant system in allocating its funds available for AFDC payments without violating the Act, it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."[80] Significantly, the Court affirmed *Shapiro* in a footnote-- despite the fact the durational residency requirement contemplated in *Shapiro* similarly fell within the ambit of "economics and social welfare."[81] The Court distinguished *Shapiro* as requiring strict scrutiny as the durational residency requirements inhibited an individual's right to travel.[82] Over the years the Supreme Court has stuck down similar statutes that penalized a person's right to travel. *See Memorial Hospital v. Maricopa County*[83] (The denial of free non-emergency medical care to individuals with less than twelve months residency in the county impermissibly penalizes the right to travel); *Zobel v. Williams* [84] (Alaska bill distributing oil revenues to citizens based on length of residency is an unconstitutional burden on the right to travel); *Hooper v. Bernalillo County Tax Assessor* [85] (New Mexico impermissibly favored established resident veterans over new resident veterans through preferential grant of property tax exemption); and *Attorney General of New York v. Soto-Lopez* [86] (New York statute awarding civil service applicants armed service bonus points only if they entered the armed services while residing in New York violated the constitutionally-protected right to travel).

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mathematical nicety or because in practice it results in some inequality.' (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

Dandridge, at 485.

77. *Id.*

78. Petitioner's Brief, *supra* note 4, at *12; Brief of the National Governors' Association, *supra* note 29, at *23; Brief for the Institute For Justice, *supra* note 31, at *25-*28; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at *12, Anderson v. Roe, (No. 98-97) 1998 WL 789357.

79. *Id.*

80. *Dandridge, supra* note 76, at 483.

81. *Id.* at 485 n.16. ("*Cf.* Shapiro v. Thompson where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel.") (citation omitted).

82. *Id.* at 485.

83. 415 U.S. 250, 269 (1974).

84. 457 U.S. 55, 65 (1982).

85. 472 U.S. 612, 624 (1985).

III. Taking Aim at California's Durational Residency Requirement

The million-dollar question was whether the Court would see beyond the sheep's wool or simply go along with Petitioner's assertion that, despite its idiot cousin Prop. 165, § 11450.03 really was "economics and social welfare" regulation. Oral argument offered the promising sign that at least one Justice might not have been persuaded. In response to Petitioner's[87] assertion that States have the right to allocate funds within its budgetary constraints, the Justice queried: "But I'm puzzled why you say . . . [the statute] does not impact the right to travel. I thought the whole purpose of this was to discourage migration for higher welfare benefits. I thought that was the objective of the statute."[88]

In a decision that surprised nearly everyone, the Supreme Court not only affirmed *Shapiro* by holding § 11450.03 impermissibly burdened the right to travel but also held congressional approval of durational residency requirements, via the Personal Responsibility and Work Opportunity Reconciliation Act, did not resuscitate the constitutionality of § 11450.03.[89] At the outset, the Court noted that the right to travel jurisprudence broadly embraces three distinct rights: "[i]t protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of the State."[90]

Perhaps even more astonishing, however, was the Court's announcement that the third prong of the right to travel, the prong triggered by § 11450.03, was protected by the Privileges and Immunities Clause of the Fourteenth Amendment.[91]

> [T]his third aspect of the right to travel--the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State . . . is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is clearly identified in the opening words of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[92]

86. 476 U.S. 898, 911-12 (1986).
87. Theodore Garelis, Deputy Attorney General of California arguing on behalf of Petitioners.
88. United States Supreme Court Official Transcript of Oral Argument, *supra* note 47, at *6-*7.
89. Saenz v. Roe, *supra* note 10.
90. *Id.* at 1525.
91. *Id.* at 1526.
92. *Id.* (footnotes omitted).

Thus absent a showing of compelling government interest, any classification that burdens a citizen's right to be treated equally in her new state of residence is an impermissible penalty on the right to travel.[93]

The Supreme Court further rejected California's argument that § 11450.03 was economics and social regulation noting, "the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens."[94] The Court observed that California could have realized the exact same savings projected by § 11450.03 by implementing an across-the-board TANF grant reduction of 72 cents per month for every beneficiary.[95] More importantly, however, the Court noted California's fiscal justification for two tiers of benefits, could equally be used to "permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past contributions of its citizens."[96]

Finally, the Court held that Congress may not authorize State legislatures to violate the Fourteenth Amendment.[97] Furthermore, Congress is "implicitly prohibited from passing legislation that purports to validate any such violation .... Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[98]

The two dissenters, Chief Justice Rehnquist and Justice Thomas would have upheld California's durational residency requirement. Justice Rehnquist opined the California statute was a reasonable mechanism for weeding out those individuals seeking higher welfare benefits from bona fide residents and thus "a permissible exercise of the State's power to assure that services provided for its residents are enjoyed only by its residents."[99] Justice Thomas on the other hand, offering an originalist analysis of the Privileges and Immunities Clause, felt the clause was intended to apply to "fundamental rights, rather than every public benefit established by positive law."[100] Accordingly, the majority's application of the Privileges and Immunities Clause to § 14450.03 was inapposite.[101]

IV. Conclusion

In one of the most surprising Supreme Court decisions of the season, the constitutional right to travel dodged a bullet and the Privileges and Immunities Clause, much like Lazarus, rose from its tomb. Simultaneously, durational residency requirements within the context of Clinton's welfare reform has been dealt a serious blow. For the defenders of civil rights, these are all good things.

93. *Id.* at 1519.
94. *Id.* at 1528.
95. Saenz v. Roe, *supra* note 10, at 1528.
96. *Id.* (citation omitted).
97. *Id.* at 1529.
98. *Id.*
99. *Id.* at 1534 (citation omitted).
100. Saenz v. Roe, *supra* note 10, at 1538.
101. *Id.*

California's § 11450.03 was fundamentally flawed legislation. To quote Justice Stevens:

> [c]itizens of the United States, whether rich or poor, have the right to choose to be citizens of the State wherein they reside. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not division."[102]

102. *Id.* at 1530 (citing Baldwin v. G.A.F. Seeliq, Inc., 294 U.S. 511, 523 (1935)).