

“If You Ain’t Got The Do, Re, Mi”: The Commerce Clause and State Residence Restrictions on Welfare

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’Cross the desert sands they rode,
Gettin’ out of that old dust bowl,
Thinkin’ they’re goin’ to a sugar bowl,
But here is what they find:

The police at the port of entry say,
“You’re number fourteen thousand for today;
But if you ain’t got the do, re, mi, folks,
If you ain’t got the do, re, mi,
You better go back to beautiful Texas,
Oklahoma, Kansas, Georgia, Tennessee.

California is the Garden of Eden,
A paradise to live in or to see,
But believe it or not, you won’t find it so hot,
If you ain’t got the do, re, mi.”

—Woody Guthrie¹

Few problems are as national in character as the persistence of widespread poverty in the United States.² And few problems so consistently provoke

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1. Woody Guthrie, *Do, Re, Mi* (1937). Guthrie’s song describes the plight of the “Okies” and other victims of the Depression-era economic collapse, who suffered under state policies that sought to bar immigration by poor people from other parts of the country. The California exclusion policy immortalized by Guthrie, and by John Steinbeck in *THE GRAPES OF WRATH* (1939), was struck down as violative of the Commerce Clause in *Edwards v. California*, 314 U.S. 160 (1941), discussed *infra* notes 64-68, 173-90 and accompanying text.

2. The idea that poverty is a national problem in need of a federal solution is of relatively recent vintage. Cf. GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* (1985) (tracing the development of the “idea of poverty” in the “moral imagination” of eighteenth-century England). It was not until the Great Depression that the federal government acknowledged the need for a federal approach to the problem of poverty. See FRANCES F. PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 45-79 (1971); EDWARD A. WILLIAMS, *FEDERAL AID FOR RELIEF* 7-15 (1939) (describing local patterns of relief in the period up to 1929). Since that time, however, the status of poverty as a national concern has been routinely recognized by policymakers, academics and analysts. See, e.g., HELEN I. CLARKE, *SOCIAL LEGISLATION* 480-86 (1940) (noting national character of poverty, relief programs, and migration of poor people); ROBERT S. McELVAINE, *THE GREAT DEPRESSION* 344-349 (1984) (drawing parallels between national character of Great Depression and economic downturns of the 1980s); KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* (1990) (tracing

parochial and isolationist responses from states and localities.³ The economic downturn of the late 1980s and early 1990s provides a case in point. In 1992, the number of Americans living below the official poverty line climbed to its highest point since 1964, the year that the nation declared its "war on poverty."⁴ Wrenching dislocations in the occupational structure and the consequent contraction of reasonable employment opportunities have compelled record numbers of individuals and families to turn to government for the basic necessities of life.⁵ In the face of this national tragedy, an increasing number of states are openly attempting to exclude poor people from their borders by adopting "protectionist" social-welfare policies.⁶

The states' principal exclusionary strategy has been to revive "durational residence" restrictions on public benefit eligibility. These restrictions typically take one of two forms: an outright ban on newcomers from receiving benefits

history of national economic cycles and distribution of wealth in the United States). Starting in the 1930s, the federal government developed a broad spectrum of anti-poverty programs that operate nationally and receive federal funding. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS (Comm. Print 1991) [hereinafter GREEN BOOK] (describing and presenting data on selected federal anti-poverty programs in the areas of health, income support, disability benefits, and unemployment insurance).

3. Commentators have noted that the persistence of narrow, localist responses to poverty has made it extraordinarily difficult to formulate or implement a coherent approach to the problem at the national level. See, e.g., BEN B. SELIGMAN, PERMANENT POVERTY: AN AMERICAN SYNDROME 199-218; see also Paul Taylor, *Carrots and Sticks of Welfare Reform, Author of Landmark Federal Bill Hears Why States Are Going Their Own Way*, WASH. POST, Feb. 4, 1992, at A13 (discussing state requests for "waivers" of uniform federal guidelines for operating Aid to Families With Dependent Children program); *State and Local Officials Try to Map Their Own Paths Out of the Recession*, WALL ST. J., Jan. 29, 1992, at A2 ("While waiting for a concerted federal plan to prime the economic pump, many state and local governments have decided that the job of ending the recession has been left to them."). "Localist" in this sense is to be distinguished from authentic, community-based responses to poverty that have as their goal the empowerment and autonomy of the economically dispossessed. See FRANCES F. PIVEN & RICHARD A. CLOWARD, POOR PEOPLES' MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977).

4. See Robert Pear, *Ranks of the Poor Reach 35.7 Million, the Most Since '64*, N.Y. TIMES, Sept. 4, 1992, at A1; see also JOHN C. DONOVAN, THE POLITICS OF POVERTY 17-38 (1967) (describing historical background to "war on poverty"); SELIGMAN, *supra* note 3, at 161-78.

5. See, e.g., CENTER ON BUDGET & POLICY PRIORITIES, WELFARE ROLLS RISING DUE TO THE RECESSION (Feb. 21, 1992) (citing CONGRESSIONAL BUDGET OFFICE, A PRELIMINARY ANALYSIS OF GROWING CASELOADS IN AFDC (Dec. 1991) (on file with author)); John E. Schwartz & Thomas J. Volgy, *Above the Poverty Line—But Poor*, NATION, Feb. 15, 1993, at 191-92 (noting that in 1989 fully one-sixth of all full-time, year-round jobs in the United States "paid less than it took to lift even a family of three effectively out of poverty").

6. See *infra* notes 110-27 and accompanying text. In addition, many states have recently adopted regressive or punitive welfare policies that affect poor people who are already within the state's borders. At least seven states have indiscriminately cut assistance levels to amounts far below the officially recognized minimum for bare subsistence. See CENTER ON SOCIAL WELFARE POLICY & LAW, PUB. NO. 167 (rev.), NO RELIEF FOR THE POOR: 1992 STATE CUTBACKS IN AFDC, GA AND EAF, PART I (Sept. 14, 1992) [hereinafter NO RELIEF]. Other states have imposed demeaning and dehumanizing administrative conditions on relief, like the fingerprinting requirement adopted in New York. N.Y. SOC. SERV. LAW § 139-a(3) (Consol. 1992). Still others have threatened to reduce or terminate subsistence payments to young children in order to coerce "welfare mothers" to conform to legislated behavioral norms. See NO RELIEF, *supra*; Wayne King, *Florio Signs an Overhaul of Welfare*, N.Y. TIMES, Jan. 22, 1992, at B1 (describing New Jersey plan to deny additional payments to women who bear children while receiving AFDC payments); Paul Taylor, *Little to Soften Squeeze of Recession and State Cuts on the Poor*, WASH. POST, Jan. 30, 1992, at A10 (describing state cuts in welfare programs).

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until they have lived in the state for a fixed period; or a reduction in the level of benefits that a newcomer can receive (often capped at the lower rate of the state from which the applicant migrated).⁷ The assumption behind this strategy is that “liberal” welfare policies act as a magnet to attract indigents into higher benefit states.⁸ The undesired “pull-factor” can be mitigated, the theory goes, by restricting the rights of new residents to receive public benefits. Proponents of durational residence restrictions have unabashedly declared their purpose to be the prevention of in-migration by economically deprived citizens from other states.⁹ Consistent with this goal, some of the states that currently impose durational residence requirements also offer newcomers a bus ticket back home to avoid paying any benefits.¹⁰

Durational residence restrictions are constitutionally troubling for many reasons. They discriminate against disenfranchised nonresidents who have no participatory voice in the laws that affect them. They balkanize the states by seeking to divert the costs of economic downturn to other parts of the country. They arbitrarily deny one class of poor people subsistence benefits that may be necessary for survival. And they enforce a caste system under which an individual’s economic status becomes the measure of her citizenship.

Twenty years ago, the Supreme Court held that state durational residence restrictions on welfare violated the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution.¹¹ The resurgence of such restrictions, in slightly altered incarnations, has reopened the constitutional debate, and several courts have entered the fray.¹² For the most part, poor peoples’ advocates have continued to press equal protection claims on the theory that length-of-residence requirements unfairly burden the fundamental right to travel

7. See *infra* notes 110-13 and accompanying text.

8. See *infra* notes 128-133 and accompanying text. *But cf.* *Mitchell v. Steffen*, 487 N.W.2d 896, 900 (Minn. Ct. App. 1992) (appeal pending) (noting conclusion of reports by Minnesota Legislative Auditor and Minnesota Department of Human Services that “net effect” of welfare levels on migration “is negligible”); Paul R. Voss, *A Demographic Portrait of Wisconsin’s People*, in *STATE POLICY CHOICES: THE WISCONSIN EXPERIENCE* (Sheldon H. Danziger & John F. Witte eds., 1988) (discussing the *de minimis* effect of Wisconsin’s welfare payment levels on the movement of poor people into that state); James W. Wahner & Jerome R. Stepaniak, *Welfare In-Migration in Wisconsin: A Four County Report*, WIS. POL’Y RES. INST. REP., Dec. 1988, at 1 (concluding that Wisconsin’s welfare policies have a measurable, though insignificant, impact on the migration of poor people to the state).

9. See *infra* notes 128-33 and accompanying text.

10. See Office of Procedures, Income Support Programs, *Limited Home Relief for New Residents*, I.S. CHANGES, July 1992, at 16-17 [*Limited Home Relief*].

11. *Shapiro v. Thompson*, 394 U.S. 618, 634-38 (1969); see also *infra* notes 69-93 and accompanying text.

12. *E.g.*, *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993) (granting preliminary injunction against enforcement of California statute that denies full AFDC benefits during first 12 months of state residence); *Jones v. Milwaukee County*, 485 N.W.2d 21, 28 (Wis. 1992) (upholding 60-day length-of-residence requirement for Wisconsin general relief program); *Mitchell*, 487 N.W.2d at 907 (invalidating Minnesota statute providing only reduced general assistance benefits to persons with less than six-month residence in state); *Eddleman v. Center Township*, 723 F. Supp. 85, 92 (S.D. Ind. 1989) (invalidating one-year county and three-year state residence requirement for local assistance).

and can be justified only by a compelling state interest.¹³ An alternative argument contends that such restrictions violate the Privileges and Immunities clause of Article IV, section 2, because they create a two-tiered welfare system in which newcomers are treated as second-class citizens.¹⁴ Success on these claims has been mixed,¹⁵ and the litigation is fraught with uncertainty given the conservative activism of the Rehnquist Court.¹⁶

This Article proposes an additional framework for analysis. It contends that durational residence restrictions on welfare violate the Commerce Clause¹⁷ because they are, in essence, protectionist measures that seek to inhibit interstate migration by economically disadvantaged Americans. Courts and commentators have long accepted that the force of the Commerce Clause in its negative state derives, at least in part, from a political theory of union that subordinates provincial interest to national concern.¹⁸ A core function of the clause is to provide a bulwark against invidious treatment of outsiders,¹⁹ and to serve a structural role in the creation of national solidarity.²⁰ As Justice Cardozo declared more than a half-century ago, "the Constitution . . . was framed up on the theory that the peoples of the several states must sink or swim together" ²¹ State attempts to insulate themselves from national economic problems by actively discouraging the entry of poor Americans from other parts of the country tear at the fabric of this fundamental constitutional ideal.

Reliance on the Commerce Clause to safeguard the interests of poor people may seem incompatible with broader notions of human dignity and individual

13. See cases cited *supra* note 12.

14. See *Mitchell v. Steffen*, 487 N.W.2d 896, 899, 905 (Minn. Ct. App. 1992) (appeal pending). See generally John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385 (1992); Gary J. Simon, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979).

15. See cases cited *supra* note 12.

16. There is reason to believe that the doctrine on which these cases rely may be vulnerable. Members of the Rehnquist Court generally share the theoretical bent of commentators who severely criticized the Warren Court's invalidation of durational residence requirements in *Shapiro v. Thompson*, 394 U.S. 618 (1969). See, e.g., Raoul Berger, *Residence Requirements for Welfare and Voting: A Post Mortem*, 42 OHIO ST. L.J. 853 (1981); Ralph K. Winter, Jr., *Poverty, Economic Equality and the Equal Protection Clause*, 1972 SUP. CT. REV. 41. Moreover, for the past twenty years, the Court has accorded extreme deference to social welfare classifications that adversely affect the poor, and no challenge to such legislation has succeeded since 1973. See generally Peter B. Edelman, *The Next Century of Our Constitution: Rethinking our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). Emboldened by the court's poverty jurisprudence, state lawmakers have been willing to adopt legislation understood to violate *Shapiro*, see *Jones v. Milwaukee County*, 485 N.W.2d 21, 29 n.1 (statement by sponsor of Wisconsin durational residence requirement that *Shapiro* "was runaway judicial lawmaking" that "arguably violates the Constitution"), and at least one state court has declined to faithfully apply the *Shapiro* holding, *id.* at 24-30.

17. U.S. CONST. art. I, § 8.

18. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 415 (2d ed. 1988).

19. See, e.g., Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

20. See, e.g., Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

21. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

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liberty.²² Resort to the language of the Commerce Clause in this context might even be considered a form of “spirit-murder” that commodifies the individual and reduces her to the legal status of chattel.²³ On this view, relegating the legal protection of the poor to the Commerce Clause reinforces the “otherness” of poor people and their historic exclusion from the broader community of rights.²⁴ As Justice Douglas aptly put it, “the right of persons to move freely from State to State [should] occup[y] a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”²⁵

At least on the surface, this objection carries considerable moral appeal.²⁶ But it assumes that alternative doctrines will invariably protect the poor against the immediate and irreparable physical harms that exclusionary welfare policies inflict.²⁷ History shows, however, that in applying the Fourteenth Amendment to poor people’s claims, the Supreme Court has been all too willing to tolerate

22. See, e.g., PAUL R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970* 191 (1970) (stating that “[a]t first glance it may seem incongruous to associate the commerce clause with the current struggle [by African Americans during the civil rights movement] for human dignity and individual rights”).

23. Cf. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* 73 (1991) (setting forth the concept of racism as “spirit-murder”); Robin West, *Murdering the Spirit: Racism, Rights and Commerce*, 90 MICH. L. REV. 1771, 1793 (1992) (reviewing Williams’ concept of “spirit-murder”). At the same time, some conservatives have criticized any analysis of the commerce clause that regards it as a source of individual rights. See, e.g., *Dennis v. Higgins*, 111 S. Ct. 865, 874 (1991) (Kennedy, J., dissenting) (arguing that the Commerce Clause “assigned prerogatives to the general government, not personal rights”); cf. Jesse Choper, *The Scope of the National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1587 n.194 (1977) (arguing that an individual who “attack[s] state and local laws [as violative of the Commerce Clause] is asserting the interest of the central government, not his own constitutionally secured liberties”). See generally Stephen K. Schutte, *Doctrinal Foundations of Section 1983 and the Dormant Commerce Clause*, 77 IOWA L. REV. 1249 (1992) (critiquing “right-conferring capacity” of Dormant Commerce Clause).

24. See KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 125-26 (1991) (arguing that perception of non-working poor people as “the Other” drives public policies aimed at “separating the poor—especially the female and minority poor—from the rest of us”); cf. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1880 (1987) (contending that “an interpretive conception of rights is a way to . . . promote change by reliance on inherited traditions,” but noting that “[s]ome people may feel so shut out that the appeal to a communal commitment to rights makes no sense to them”).

25. *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); see *id.* at 182 (Jackson, J., concurring) (“[T]he migrations of a human being . . . do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the Commerce Clause is likely to result eventually in either distorting the commercial law or in denaturing human rights.”); see also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279 (1965) (Douglas, J., concurring) (criticizing a constitutional analysis that would accord “human rights . . . [no more of a] protected position in our constitutional system than . . . the movement of cattle, fruit, steel and coal across state lines”).

26. The Equal Protection Clause and the Article IV Privileges and Immunities Clause admittedly present by far the more felicitous constitutional frameworks. See, e.g., Eule, *supra* note 19, at 446-55; Brian H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); see also *Zobel v. Williams*, 457 U.S. 55, 71-81 (1982) (O’Connor, J., concurring) (setting forth an Article IV privileges and immunities analysis for invalidating Alaska scheme that distributed state oil revenues based upon citizens’ length of state residence).

27. But see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993) (analyzing the Court’s current poverty jurisprudence).

arbitrary and even punitive classifications that deny “the most basic economic needs of impoverished human beings.”²⁸ Moreover, while the Court has steadfastly employed the Equal Protection Clause to strike down even mild forms of state discrimination against newcomers,²⁹ there is reason to believe that the Rehnquist Court would regard a new welfare residence case as an opportunity to retreat from the holding and principles set forth in *Shapiro v. Thompson*.³⁰ Whatever principled doubts may linger about resort to the Commerce Clause in an area touching on human rights, the gravity of the stakes here—the difference between food and hunger, shelter and homelessness—counsels heed to the old adage, “grub first, then ethics.”³¹

This is not to concede that one sacrifices “ethics” by turning to the Commerce Clause to protect poor people. It sells the Commerce Clause short to regard its concern as confined to the narrow world of trade in commodities.³² In this century alone, the Commerce Clause “has played a major role . . . in the efforts of the federal government to secure ‘equal justice under law’ for American minority groups.”³³ Regulation of commerce may be the

28. *Dandridge v. Williams*, 397 U.S. 471, 485 (1971); *see, e.g., Bowen v. Gilliard*, 483 U.S. 587 (1987); *Schweiker v. Wilson*, 450 U.S. 221 (1980); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *James v. Valtierra*, 402 U.S. 137 (1970); *see also Loffredo, supra* note 27.

29. *See, e.g., Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (invalidating civil service rule that provided preference only for those resident veterans who had entered the military service while living in New York); *Zobel*, 457 U.S. 55 (invalidating as violation of equal protection Alaska program that distributed state’s mineral earnings to citizens in amounts proportionate to length of individual’s state residence). For a description and critique of the Court’s protectiveness of new state residents, *see, e.g., Kathryn D. Katz, More Equal Than Others: The Burger Court and the Newly Arrived State Resident*, 19 N.M. L. REV. 329 (1989).

30. The Wisconsin Supreme Court has already pursued this path, rejecting an equal protection challenge to the new 60-day residence requirement for that state’s general assistance program. *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992). The state court upheld the residence requirement by applying an “undue burden” balancing approach nearly identical to the analysis that Justice Harlan proposed, but the majority rejected, in *Shapiro*. *Compare Jones*, 485 N.W.2d at 24-28 (holding that Wisconsin 60-day residence requirement does not penalize an individual’s right to travel) with *Shapiro v. Thompson*, 394 U.S. 618, 671-77 (1969) (Harlan, J., dissenting) (concluding that government interests served by residence requirements outweigh burden imposed on the right to travel). Although the Wisconsin decision marks a sharp departure from *Shapiro*, it resonates with the judicial method of the Rehnquist Court and illustrates the extent to which *Shapiro* may be vulnerable to dismemberment at the federal level. *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (applying “undue burden” test to legislation impinging upon women’s fundamental right to make reproductive choices); *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) (finding no constitutional infirmity in generally applicable statutes that “incidentally burden” the First Amendment right to the free exercise of religion).

31. W.H. AUDEN & LOUIS KRONENBERGER, *THE VIKING BOOK OF APHORISMS* 368 (1981) (quoting BERTOLT BRECHT, *THE THREEPENNY OPERA* act 2, finale).

32. *See, e.g., Edwards v. California*, 314 U.S. 160, 181-86 (1941) (Jackson, J., concurring). Justice Jackson opposed the use of the Commerce Clause to advance civil rights in part because he regarded the doctrine as nothing more than a species of “commercial law.” *Id.* Constitutional provisions, though, do not generally lend themselves to this type of compartmentalization. For instance, the fact that the Equal Protection Clause has been successfully employed on behalf of business interests to invalidate state taxation schemes in no way diminishes its moral or legal force as a guarantor of human dignity. Similarly, one should look beyond the types of cases in which the Commerce Clause has most typically provided the ground for decision to the underlying values that the doctrine is intended to promote.

33. BENSON, *supra* note 22, at 191.

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clause's central mechanism, but its force and purpose lay in its structuring of governmental authority to assure certain ends; its underlying values and ultimate aims are no less weighty than national union, community, and democratic governance, all of which have the capacity to secure and advance human liberty.

Finally, the history of the Commerce Clause confirms its generative potential to protect individual freedom. In the years leading up to the Civil War, the Commerce Clause offered a potential constitutional basis for the federal government to remove from the states the important power to regulate slavery.³⁴ At the height of the Great Depression, the Commerce Clause prevented wealthier states from shutting their gates against poor migrant families looking for a better life.³⁵ And during the Civil Rights Movement of the 1960s, the Commerce Clause provided the constitutional basis for federal legislation against local practices that denied African-Americans their rightful place in the American community.³⁶ Some may argue that the availability of a Commerce Clause theory enabled the Court to avoid more sweeping and stable constitutional rulings in support of individual rights. Whatever force that argument may have once had, the doctrinal genie long ago escaped its bottle: for better or for worse, the Commerce Clause has become an established basis for the protection of individuals and, in this era of constitutional retrenchment, it is one that may be decisive for the poor.

This Article proceeds in four parts. Part I examines the historical theme of localism in American welfare policy and locates residence restrictions within the now-discredited poor law tradition of settlement and removal. It describes earlier efforts by states to fence out the poor, and analyzes the Court's response to those practices. Part II reviews current state proposals to restrict the welfare benefits that newcomers may receive. It examines the official policies and assumptions underlying these efforts and offers an alternative explanation for the re-emergence of state laws designed to inhibit in-migration by poor people. Part III assesses the constitutionality of state durational residence restrictions under settled Commerce Clause doctrine. It measures the legislation both against the principles set forth in *Edwards v. California*³⁷ and under the standard Commerce Clause analysis currently employed by the Court. This Part concludes that the current crop of durational residence

34. See, e.g., FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 67 (1937) (discussing Justice Taney's narrow reading of the Commerce Clause in *Groves v. Slaughter*, 15 Pet. 449 (1841), which concerned a state's right to prohibit the importation of slaves for sale); see also *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (holding that interstate commerce includes the movement of human beings).

35. See *Edwards*, 314 U.S. 160 (invalidating under Commerce Clause a California statute that criminalized transportation of an indigent person into state).

36. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding enforcement of Civil Rights Act of 1964 against local restaurant on basis of Commerce Clause).

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

restrictions on welfare plainly violate the Commerce Clause on either analysis. Part IV examines the competing theories and values underlying the Commerce Clause, and demonstrates that state efforts to exclude the poor through economic barriers or discriminatory welfare restrictions are inconsistent with each of them. The Article concludes by suggesting that durational residence requirements are symptomatic of more general efforts to exclude the economically disadvantaged from a shared public life. The breakdown of community, and of a collective sense of responsibility for our more vulnerable members, reflects the broader stigmatization and isolation that the poor increasingly experience in the United States. The Commerce Clause, it will be argued, offers a doctrinal source that has the potential for the creation of a more inclusive national identity and sense of national solidarity.

I. A BRIEF HISTORY OF STATE EFFORTS TO EXCLUDE THE POOR

The recent resurgence of durational residence restrictions on welfare composes the latest chapter in a long history of state efforts to repel poor people. From the founding of the Republic, states and localities have endeavored to prevent the migration of indigents into their jurisdictions. The Articles of Confederation generally required that the “free inhabitants of each [state]” be accorded the same “privileges and immunities of free citizens of the several states”—including “free ingress and regress to and from any other state”—but pointedly excluded “paupers” and “vagabonds” from protection.³⁸ The Constitution omitted this express discrimination against the poor³⁹ and—together with the Fourteenth Amendment—forged a concept of national citizenship that transcended state sovereignty. Nevertheless, local efforts to bar entry of impecunious citizens from other states survived ratification of the Constitution and persisted well into the twentieth century.

38. ARTICLES OF CONFEDERATION OF 1781 art. IV, *reprinted in* THE ANTI-FEDERALIST PAPERS 357 (Ralph Ketcham ed., 1986) (“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 the privileges and immunities of free citizens in the several states . . .”).

39. *See* U.S. CONST. art. IV, § 2 (“The Citizens in each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”) Some have argued that the Constitutional Convention intended the Privileges and Immunities Clause of Article IV to embody the “pauper” and “vagabond” exception to the privileges and immunities principle of the Articles of Confederation. *See Edwards*, 314 U.S. at 170 (argument for appellee) (citing *United States v. Wheeler*, 254 U.S. 281, 296 (1920)).

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A. Medieval English Antecedents

Local measures to curtail the in-migration of poor people have historically taken three basic forms: “settlement” qualifications for public assistance;⁴⁰ involuntary removal from the community of recently-arrived poor people; and criminal penalties for facilitating the movement of indigents into the state. These policies trace their origin to English laws of the fourteenth century which, upon the break-up of feudalism, sought to restrain the mobility of free laborers⁴¹ and create a “kind of substitute for the system of . . . serfdom”⁴² by providing that those without property could be forcibly ejected from a locality and removed to their place of birth.⁴³ The Elizabethan Poor Laws of the seventeenth century carried this regime forward by denying relief to persons without a “settlement”—an established residence of some duration accompanied by landholding and payment of tax—and by authorizing the involuntary return of newcomers who *might* require aid to the place of their last settled residence.⁴⁴ The settlement and removal provisions of the Elizabethan Poor Laws emerged from the confluence of several factors: the philosophy of local responsibility for poor relief, the ascendance of punitive theories of relief-giving, and a political determination to regulate labor by binding the lower classes to the land and halting the movement of dispossessed

40. Historically, settlement could be obtained only by being born in a community, by residing there for a number of years without receiving aid, or by owning or renting a substantial piece of property. See CLARKE, *supra* note 2, at 469-72 (discussing acquisition and loss of settlement). Settlement and residence thus were not synonymous for purposes of poor relief. See *State ex rel. Lillian Timo v. Juvenile Court*, 246 N.W. 544, 546 (Minn. 1933) (holding that “settlement for purposes of poor relief and legal residence ordinarily do, but need not, coincide geographically”). See generally 2 GRACE ABBOTT, *THE CHILD AND THE STATE* 287-98 (1938) (collecting cases).

41. See CLARKE, *supra* note 2, at 399-401 (discussing Statute of Labourers, 1350, 25 Edw. 3, ch. 5 (Eng.); 34 Edw. 3, ch. 10 (1360) (Eng.)).

42. 3 JAMES F. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 204 (1883), *quoted in Hicks v. District of Columbia*, 383 U.S. 252, 255 & n.3 (1966) (Douglas, J., dissenting).

43. See CLARKE, *supra* note 2, at 399-401 (discussing 12 Rich. 2 (1388) (Eng.)). The early English statutes referred to wandering laborers as “sturdy vagabonds.” See *id.* at 400. The terms “vagabond” and “vagrant” continued to be used in English and American laws to describe the category of person that could be excluded or removed from the jurisdiction. See, e.g., ARTICLES OF CONFEDERATION OF 1781 art. IV (excepting “paupers” and “vagabonds” from its “privileges and immunities” clause); *cf. City of N.Y. v. Miln*, 36 U.S. 102, 142-43 (1837) (upholding state legislation enacted to prevent the immigration of “paupers, vagabonds and possibly convicts”).

44. See Daniel R. Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57, 58 (citing 14 Eliz. 1, ch. 5 (1572) (Eng.) (requiring a settlement as a condition of receiving poor relief)); The Act of Settlement, 1662, 13 & 14 Car. 2, ch. 12, § 1 (Eng.) (authorizing compulsory removal of persons “likely to become chargeable” to their last settled residence). Those who did not own property or lease accommodations at the rate of at least ten pounds were deemed removable as “likely to become chargeable,” so that during the Restoration Period, nine-tenths of the people of England, “all . . . who did not belong to a small class of landowners, were liable to be expelled from any parish save their own, with every circumstance of arrest and ignominy. . . .” G.M. TREVELYAN, *ENGLISH SOCIAL HISTORY* 278 (2d Canadian ed. 1947).

people from rural areas into the cities.⁴⁵ The enforcement of these provisions during the Elizabethan Period has been described as “the most extreme and cruel form of localism that England had known previously or has known since.”⁴⁶

B. *Exclusionary Policies in the United States*

State and local officials in this country incorporated both of the English policies—settlement restrictions and removal authority—into their public assistance laws. Settlement requirements generally took the form of a statute or ordinance that denied relief to persons who had not resided in the state or locality for a prescribed period. Such laws caused severe hardships for the unemployed who traveled to find work during the economic depressions of the nineteenth century.⁴⁷ During the depression of 1893, for example, the surge in numbers of migrants seeking jobs caused municipal authorities to “harde[n] the wall between residents and strangers” and “devis[e] various strategies for discouraging needy strangers.”⁴⁸ In the twentieth century, durational residence restrictions on public assistance have typically ranged from one to five years,⁴⁹ and have continued to take their toll on low-income families.⁵⁰ Removal statutes in the U.S. were, for the most part, indistinguishable from their early English predecessors, though some state laws provided only for voluntary—not compulsory—removal of poor migrants, and others required local officials to secure consent of the migrant’s home state.⁵¹ Beyond these practices, many states and localities adopted laws that imposed civil or criminal sanctions upon anyone who assisted a poor person from another state to enter

45. 1 GEORGE NICHOLLS, *A HISTORY OF THE ENGLISH POOR LAW* 153-210 (1854); see ARTHUR BERNEY ET AL., *LEGAL PROBLEMS OF THE POOR* 683 (1975); Daniel R. Mandelker, *The Settlement Requirement in General Assistance*, 1955 WASH. U. L.Q. 355, 357 nn.6, 9; PIVEN & CLOWARD, *supra* note 2, at 130-31.

46. KARL DE SCHWEINITZ, *ENGLAND’S ROAD TO SOCIAL SECURITY* 39 (1943).

47. See STEPHAN THERNSTROM, *POVERTY AND PROGRESS: SOCIAL MOBILITY IN A NINETEENTH CENTURY CITY* 8 (1964) (noting that during mid-nineteenth century, only one-third of all households in surveyed areas remained in same town or city for at least ten years).

48. Katz, *supra* note 29, at 148.

49. See Note, *Interstate Migration and Personal Liberty*, 40 COLUM. L. REV. 1033 & n.7 (1940) (citing AMERICAN PUB. WELFARE ASS’N, *COMPILATION OF SETTLEMENT LAWS OF ALL STATES IN THE UNITED STATES* (1939)); CLARKE, *supra* note 2, at 469-70. From the 1940s through the disappearance of durational residence requirements in the 1970s, the most common period of ineligibility was one year. See Mandelker, *supra* note 45, at 367. Some jurisdictions, however, denied relief even to persons who satisfied the length-of-residence requirement if the person had been “warned out” of the jurisdiction by local officials, had been in need of (though not necessarily receiving) aid during the waiting period, or had not formed the requisite intent to make the locality a permanent home. See *generally id.*, for these and other restrictions imposed upon the acquisition of “settlement” for public assistance purposes.

50. See *infra* notes 70-75 and accompanying text.

51. See Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031 (1940) (cataloguing settlement requirements and compulsory removal legislation); CLARKE, *supra* note 2, at 472-77 (discussing state removal statutes).

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the jurisdiction.⁵² Exclusion laws of this sort were on the books in many states at the turn of the twentieth century, but first achieved notoriety during the Great Depression when enforced against the “Okies” and other internal economic refugees fleeing the dust bowl and other depressed agricultural or industrial areas.⁵³ Most of these laws penalized the transportation of poor people into the state, and not the migration itself.⁵⁴ Nonetheless, parents who led their families across state lines could be prosecuted under state exclusion statutes⁵⁵ and, once across, the whole family could be prosecuted as “vagrants.”⁵⁶ States also condoned extra-statutory patrols that forcibly turned back poor people at the state’s borders.⁵⁷

C. *The Decline of State Efforts to Exclude Poor People*

State and local efforts to impede the in-migration of low-income citizens have historically reflected a variety of underlying factors, but their common heritage is a social theory that regards poor people as undesirable⁵⁸ and even equates poverty with “moral pestilence.”⁵⁹ Although there are indications that such views continue to hold sway in some quarters,⁶⁰ length-of-residence restrictions and other exclusionary practices all but vanished by the mid-

52. See Note, *supra* note 51, at 1033.

53. A select committee of the House of Representatives was appointed to investigate the large-scale interstate migration of poor people. The committee’s chairman, Congressman John H. Tolan of California, appeared as *amicus curiae* before the Supreme Court in *Edwards* to oppose his home state’s restrictive legislation. See Leonard Boudin, *The Right to Travel*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 382 (Norman Dorsen ed., 1970).

54. See, e.g., Note, *supra* note 49, at 1034.

55. *Id.*; see Brief of Petitioner at 15 & n.66, *Edwards v. California*, 314 U.S. 160 (1941) (“The [exclusion] Statute is a convenient method of forcing the return of an entire group of migrants by arresting and sentencing the driver of the automobile and then suspending the sentence on condition that all leave the state.”).

56. See generally *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971) (discussing array of state vagrancy statutes).

57. See Note, *supra* note 49, at 1034; see also CLARKE, *supra* note 2, at 477 (recounting common state practice of “plac[ing] police at their borders to turn back those whose appearance gives indication of poverty”).

58. See JOEL F. HANDLER, *REFORMING THE POOR* 7-10 (1972) (describing stereotyped association of poor people with “moral degeneracy, drunkenness, vice and corruption”); SELIGMAN, *supra* note 3, at 7 (stating that “the American myths of independence, self-help, and laissez faire relegated the poor to a purgatory of personal failure”); CHRISTOPHER G. TIEDEMAN, *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES* 142 (1900) (“The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle and without apparent means of support, what but criminality is to be expected from such a person?”).

59. See *City of N.Y. v. Miln*, 36 U.S. 102, 142-43 (1837) (“[It is] as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers [and] vagabonds . . . as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported”); see also *Edwards*, 314 U.S. at 173-77 (rejecting California’s argument that allowing poor people to migrate into the state would create a “morals” problem).

60. See, e.g., Loffredo, *supra* note 27.

1970s⁶¹ and did not re-emerge until the recent spate of welfare reforms. This brief respite was animated in the main neither by enlightened social thinking in state legislative halls⁶² nor in response to the widely held belief that governmental attempts to inhibit free movement by poor people are antithetical to the "concepts of political democracy and personal liberty upon which this country was founded."⁶³ Rather, the relaxation of state measures to deter in-migration by poor people came about only at constitutional gunpoint, in response to two landmark decisions of the United States Supreme Court.

1. *The Demise of Exclusion and Removal: Edwards v. California*

In the first of these decisions, *Edwards v. California*,⁶⁴ the Court effectively invalidated two of the three devices that states had deployed to keep out the poor: exclusion and removal. The *Edwards* case arose during the Great Depression. In response to the large-scale interstate migration of displaced and impoverished families, several states began vigorous enforcement of laws that made it a crime to transport a destitute person into the jurisdiction. Fred Edwards was convicted under California's exclusion statute for driving his brother-in-law, a citizen of the United States and a resident of Texas, from Spur, Texas to Edwards' home in Marysville, California. The Court struck down the California law on the ground that the Commerce Clause proscribes any state attempt to isolate itself from national problems by restraining the movement of poor people across its borders.⁶⁵ The *Edwards* case will be discussed in more detail below,⁶⁶ but for now it suffices to note that the decision directly disapproved the then-common practice of exclusion and that its reasoning sounded the death knell for interstate removal legislation as well.⁶⁷ After *Edwards*, states were left with the settlement concept (enforced

61. See CASES AND MATERIALS ON LAW AND POVERTY 130-33 (George Cooper et al. eds., 1973).

62. But see MORELAND COMM'N ON WELFARE, STATE OF N.Y., PUBLIC WELFARE IN THE STATE OF NEW YORK 27-28 (1963) (arguing successfully against adoption of durational residence restrictions in New York State on the ground that "the present laws are sufficient to protect the taxpayer without penalizing the unfortunate").

63. Mandelker, *supra* note 44, at 59 (citing Falk, *Social Action on Settlement Laws*, 18 SOC. SERV. REV. 288 (1944); Allan Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955)); see also BERNEY ET AL., *supra* note 45, at 683 (describing welfare length-of-residence restrictions as vestiges of settlement concept and arguing that such restrictions are incongruous in the United States and "found their way into American law" largely as a result of "historical accident").

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

65. *Id.* at 173.

66. See *infra* notes 173-90 and accompanying text.

67. As discussed above, removal legislation generally authorized local authorities to eject unsettled poor people and remove them to their original place of residence. Since this practice—at least as applied to migrants from another state—interfered with the interstate movement of poor persons quite as much as the exclusion measure invalidated in *Edwards*, the decision necessarily implied the unconstitutionality of removal laws. See Note, *Constitutional Law—Interstate Commerce—State May Not Exclude Indigent Migrants*, 42 COLUM. L. REV. 139 & n.3 (1942) (contending that removal statutes are unconstitutional after *Edwards* because, like exclusion statutes, they are "antithetical to the idea of national unity embraced

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through durational residence requirements for public assistance) as the only direct, lawful method for discouraging immigration by poor people, though even here the Court's decision cast considerable constitutional doubt.⁶⁸

2. *The Apparent Demise of Settlement: Shapiro v. Thompson*

The *Edwards* Court's discomfort with the settlement concept flourished into full-fledged condemnation 28 years later in *Shapiro v. Thompson*.⁶⁹ Plaintiffs in *Shapiro* were impoverished mothers with minor children who were denied Aid to Families with Dependent Children (AFDC) benefits⁷⁰ because they did not satisfy a state length-of-residence requirement.⁷¹ As a result of these state laws, poor families that had recently relocated across state lines found themselves without the means for basic subsistence. Plaintiff Vivian Thompson was a pregnant 19-year-old and mother of one child who had moved from Dorchester, Massachusetts to live with her mother in Hartford, Connecticut after her husband abandoned her.⁷² Though Thompson and her child were needy and otherwise eligible for assistance, Connecticut denied them AFDC benefits because they had resided in the state for less than one year. Another plaintiff, Minnie Harrell, had moved with her three children from New York to Washington, D.C. because she was suffering from cancer and wished to be near her family.⁷³ Though destitute, Harrell and her children were denied AFDC benefits because they had not "resided in the District for one year immediately preceding the date of filing [for assistance]."⁷⁴ A third plaintiff had lived in Pennsylvania with her minor children for twelve years, but, in 1965, moved temporarily to South Carolina to care for her invalid grand-

in the commerce clause"). Statutes authorizing the *intrastate* removal of general relief recipients continued to be enforced well after the *Edwards* decision. See *Town of Vanden Broek v. Reitz*, 191 N.W.2d 913 (Wis.), *appeal dismissed*, 406 U.S. 902 (1971) (upholding Wisconsin statute that authorized local officials to seek court order conditioning receipt of state welfare benefits on the recipient's return to her "place of legal settlement").

68. The *Edwards* Court recounted the origins and underlying rationale of settlement restrictions on relief, but observed that "in an industrial society, the task of providing assistance to the needy has ceased to be local in character" so that "the theory of the Elizabethan poor laws no longer fits the facts." 314 U.S. at 174-75. The Court's conclusion on this score left durational residence restrictions vulnerable to much the same Commerce Clause analysis as had prevailed against California's exclusion statute. This point is developed *infra* notes 173-90 and accompanying text.

69. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

70. Social Security Act, tit. 4, 42 U.S.C. §§ 601-08 (1988).

71. The Court in *Shapiro* consolidated three appeals from lower court decisions that had invalidated durational residence requirements imposed by Connecticut, Pennsylvania, and the District of Columbia. The reference to "state" shall for convenience include the District of Columbia, though the federal status of that jurisdiction raised different constitutional questions. *Shapiro*, 394 U.S. at 621-27, 641-42. At the time *Shapiro* reached the Supreme Court, 46 states imposed durational residence requirements on their public assistance programs. *Id.* at 676 & n.35 (Harlan, J., dissenting).

72. *Id.* at 623.

73. *Id.* at 624.

74. *Id.* at 624 n.3 (quoting D.C. CODE ANN. § 3-203 (1967)).

mother. When she and her children returned to Pennsylvania two years later, the state denied them AFDC under a durational residence statute.⁷⁵

The Court held that these statutes abridged the Constitution's guarantee of equal protection of the laws. The Court began by observing that state durational residence requirements create two classes of needy families "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in a jurisdiction."⁷⁶ On this basis alone, noted the Court, destitute mothers and children in the second statutory category were denied the benefits upon which their subsistence might well depend. The Court then examined, and rejected, each of the governmental interests assertedly advanced by this discrimination. The principal justification offered was that durational residence restrictions served as a "protective device" to safeguard state treasuries against a feared "influx of poor families in need of assistance."⁷⁷ People who required public assistance within their first year of residence, the states argued, were likely to draw benefits on a long-term basis. Discouraging the movement of such people into the state would therefore promote the "fiscal integrity" of state public assistance systems.⁷⁸

The Court readily acknowledged that denying subsistence benefits to newcomers bore a rational relationship to the goal of deterring in-migration by low-income families. But it unequivocally declared that goal to be "constitutionally impermissible."⁷⁹ Nor did it make any constitutional difference if the state aimed to discourage entry by all poor families, or only those families migrating to take advantage of a more generous public assistance program. "[A] State may no more try to fence out those indigents who seek higher welfare benefits," the Court concluded, "than it may try to fence out indigents generally."⁸⁰ In either event, the Court explained, the goal of inhibiting the interstate migration of economically disadvantaged families was irreconcilably at odds with the fundamental right to travel that the Court had long found to inhere in the very notion of a "federal union."⁸¹

The Court went on to consider the other, more general, governmental interests advanced in support of the residence restrictions: fiscal planning, administrative convenience, and avoidance of fraud. The Court conceded that

75. *Id.* at 626. A number of other plaintiffs presented similarly compelling circumstances. *Id.* at 622-27.

76. *Id.* at 627.

77. *Id.* at 627-29. The state officials who defended durational residency requirements in Shapiro "frankly" conceded that the purpose of conditioning AFDC eligibility on length of residence was to "discourag[e] entry of those who come needing relief." *Id.* at 623 (quoting district court opinion reported at 270 F. Supp. 331, 336-37 (D. Conn. 1967)).

78. *Id.* at 627-28.

79. *Id.* at 629.

80. *Id.* at 631.

81. *Id.* at 629-33 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

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these interests, unlike the rank desire to deter poor families from entering the state, were legitimate. It concluded, however, that none of them was rationally promoted by a durational residence requirement, and that, in any event, such a restriction could be justified only by a “compelling state interest” because it “serves to penalize the exercise of [the] right [to travel].”⁸²

In *Shapiro*, the Court advanced the work that it had begun in *Edwards*. It eradicated the vestiges of settlement that most American welfare laws still retained and thereby eliminated the last of the three main devices that states had employed to keep poor people outside their borders. Given the breadth of *Shapiro*'s holding, the forty-six states that had conditioned welfare receipt on length of residence were legally compelled to abandon the practice.⁸³ Thus began the only period in American history not marred by widespread, overt state efforts to deter the interstate movement of poor people.

Edwards and *Shapiro* not only made advances on the constitutional plane, but also broadened the country's perspective on the issues of poverty, poor people, and governmental responsibility. In the *Edwards* decision—issued during the Great Depression when the economic submersion of the middle class forced a social reevaluation of the causes and meaning of poverty⁸⁴—the Court squarely rejected the long-held view that “a person . . . without employment and without funds . . . constitutes a ‘moral pestilence.’”⁸⁵ “Poverty and immorality are not synonymous,” the Court proclaimed.⁸⁶ Nor did the *Edwards* Court accept the traditional view that “relief is solely the responsibility of local government.”⁸⁷ In an “industrial society,” such matters had clearly acquired national status. “[T]he theory of the Elizabethan poor laws,” the Court opined, “no longer fits the facts.”⁸⁸ By the time the Court decided *Shapiro*, the positivist, New Deal ideology that was still nascent during the Depression had become established orthodoxy.⁸⁹ In the process, the dominant social paradigm had evolved from “industrial society” to “welfare state.” Consistent with this evolution (though perhaps ahead of it), the *Shapiro* Court surpassed *Edwards*'s rehabilitation of the poor and endeavored to remove

82. *Id.* at 634.

83. See Note, *Residence Requirements in State Public Welfare Statutes*, 51 IOWA L. REV. 1080, 1091-95 (1966) (cataloguing state durational residency restrictions on public assistance). A number of states and localities immediately attempted, without lasting success, to circumvent *Shapiro* with new legislation. See, e.g., *Lopez v. Wyman*, 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd*, 404 U.S. 1055 (1972) (voiding durational residence requirements re-enacted by New York after *Shapiro*); *Rivera v. Dunn*, 329 F. Supp. 554 (D. Conn. 1971), *aff'd*, 404 U.S. 1054 (1972) (voiding durational residence requirement re-enacted by Connecticut after *Shapiro*). See generally BERNEY ET AL., *supra* note 45, at 686-89 (1975) (discussing post-*Shapiro* legislation); CASES AND MATERIALS ON LAW AND POVERTY, *supra* note 61, at 131.

84. See, e.g., Katz, *supra* note 29, at 211-12.

85. *Edwards v. California*, 314 U.S. 160, 177 (1941).

86. *Id.*

87. *Id.* at 174.

88. *Id.* at 174-75.

89. See, e.g., Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

the stigma that attached to a poor person's receipt of needs-based public assistance. The Court regarded such benefits in the modern positive state as comparable to any other government-provided service, if not to more traditional forms of "property":⁹⁰

[W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers . . . the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.⁹¹

Shapiro traced the furthest reach of a 30-year discourse on poverty through which the Supreme Court attempted to lower some of the structural barriers that keep poor people from full and equal participation in the life of the national community.⁹² Only a year after *Shapiro*, however, this enterprise came to a halt. In a series of cases rejecting claims by welfare recipients, the newly-constituted Burger Court shifted from a poverty discourse that regarded the economically depressed as worthy members of our society to one that validated and reinforced negative stereotypes about the poor.⁹³ As this traditional ideology of poverty again became entrenched in the judicial sphere, and economic hard times returned, state efforts to fence out the poor resurfaced.

90. See Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). See generally Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (discussing notion of ideological baselines in American constitutional law).

91. *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969).

92. The discourse began with *Edwards*, resurfaced in several electoral rights cases that dismantled certain economic barriers to formal political participation by the poor, see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (declaring poll taxes unconstitutional); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating ballot access fees), and culminated with *Shapiro* and *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (describing poverty as a structural problem and welfare as a response that can "help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community"). For a discussion of the role that the *Shapiro* litigation played in the welfare rights movement, see Edward V. Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 74-76* (Norman Dorsen ed., 1971); see also ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 133-40 (1982).

93. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding state law that denied full AFDC benefits to families with more than five children); *Wyman v. James*, 400 U.S. 309 (1971) (upholding warrantless visits by social services personnel seeking evidence of cohabitation in AFDC mothers' homes). For a thorough discussion of the premises and assumptions underlying the Court's decisions in *Dandridge*, *Wyman*, and other poverty cases, see Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 72-73 (1985) (discussing the stereotyped notions about the poor ratified by the Court in *Dandridge*).

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II. THE RESURGENCE OF STATE EXCLUSIONARY MEASURES: CURRENT DURATIONAL RESIDENCE RESTRICTIONS ON WELFARE

The social and political impulse to designate certain groups as “other,” vilify them, and exclude them from the mainstream runs deep in American history⁹⁴ and has been resistant to judicial correction. This impulse was visible in the refusal of the southern states to abide by the Supreme Court’s desegregation decrees of the 1950s and 1960s.⁹⁵ It was also evident, though in a less dramatic context, in state efforts to re-impose welfare length-of-residence restrictions immediately following *Shapiro*’s unequivocal invalidation of such measures.⁹⁶ Similar forces appear to animate the current round of state welfare restrictions that seek to deter in-migration by poor people. The re-emergence of such laws after repeated and seemingly definitive constitutional condemnation by the Supreme Court is a remarkable phenomenon, especially given the *de minimis* fiscal payoff for the offending states.⁹⁷ This Part will describe some of the recent state laws and proposals, and will offer several explanations for their appearance.

A. Varieties of Residence Restrictions

The current vintage of state durational residence requirements targets two types of public benefit programs: Aid to Families With Dependent Children (“AFDC”) and general assistance. AFDC is a program of “cooperative federalism” in which participating states receive federal matching funds to operate welfare programs that conform to federal standards.⁹⁸ AFDC is a categorical, needs-based program,⁹⁹ and any impoverished family that meets the eligibility criteria is entitled to benefits.¹⁰⁰ Federal law gives participating states discretion to establish a statewide “standard of need” and to fix benefit

94. See, e.g., ROBERT H. WIEBE, *THE SEGMENTED SOCIETY* 66 (1975).

95. See, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982).

96. See cases cited *supra* note 83.

97. See *infra* notes 145-48 and accompanying text.

98. Congress created the AFDC program in 1935, under Title IV of the Social Security Act, 42 U.S.C. §§ 601-08. Title IV does not establish a federally administered or wholly uniform national welfare system, nor does it require states to operate an AFDC program in their jurisdictions. Rather, the law authorizes 50 to 80% federal financing for any state AFDC program adopted and administered in conformance with federal guidelines. States need not participate in the AFDC program—although all 50 states have elected to do so—but once a state chooses to participate, it must abide by the applicable federal criteria. GREEN BOOK, *supra* note 2, at 566-67. The median AFDC grant for a family of three in the United States as of January 1992 was 39.3% of the federal poverty income guidelines. *Id.*

99. To qualify, a family must not only be impoverished, it must also contain a minor dependent child who is “deprived of parental support” in that one or both parents are deceased, absent, disabled, or, in limited circumstances, unemployed. 42 U.S.C. § 606(a) (1991).

100. § 602(a)(10)(A); see *King v. Smith*, 392 U.S. 309 (1968).

levels at some percentage of that standard.¹⁰¹ AFDC levels vary significantly from state to state; all states, however, have set their grants below officially calculated subsistence levels.¹⁰² At present, federal law prohibits states from restricting or denying AFDC benefits based upon the length of a family's residence within the state.¹⁰³ The Social Security Act, however, authorizes the Secretary of Health and Human Services (HHS) to "waive" this, or any other, federal AFDC requirement, upon application by a state that wishes to conduct an "experimental, pilot or demonstration" project.¹⁰⁴

"General assistance" is the generic term for public assistance programs that are funded and authorized exclusively by state and local law.¹⁰⁵ For the most part, general assistance programs are non-categorical; that is, they are open to all needy residents who meet the financial eligibility criteria.¹⁰⁶ These programs do not receive federal reimbursement and are therefore free from federal restraints and oversight; they are the residual programs of last resort that make up the ultimate safety net for individuals who are destitute but do not fit into a federally-assisted category (e.g., aged, blind, disabled or family with dependent child). Though some two-parent families with minor children receive state general assistance because they do not meet the categorical standards for AFDC, the typical recipient of general relief is a non-disabled¹⁰⁷ adult under 65 years of age with no minor children. General assistance recipients have traditionally been regarded as the unworthy poor and

101. Federal law requires participating states to calculate and update a needs standard that approximates the cost of bare essentials, such as food, clothing and housing, *see* 42 U.S.C. § 602(a)(23) (1991); 45 C.F.R. § 233.20(a) (1992), but there is no federal requirement that states actually provide AFDC grants at or above the needs level, *see* *Rosado v. Wyman*, 397 U.S. 397, 408-09, 413 (1970).

102. No state provides AFDC benefits at or above the federal poverty index. CENTER FOR BUDGET & POLICY PRIORITIES, SELECTED BACKGROUND MATERIAL ON WELFARE PROGRAMS tbl. 1 (Feb. 21, 1992) [hereinafter BACKGROUND MATERIAL]. Nearly three-quarters of the states have seen fit to fix benefit amounts below 50% of the federal poverty line. *Id.* Thirty-six states currently hold AFDC benefit amounts below their own estimates of a bare subsistence level. NO RELIEF, *supra* note 6, at 4.

103. *See* 45 C.F.R. § 233.40 (1992) (state "may not impose any residence requirement which excludes any individual who is a resident of the State"); 45 C.F.R. § 233.20(a)(2) (1992) (the need standard and grant amount must be "uniformly applied throughout the State"). Benefit programs wholly funded by the federal government also prohibit the use of durational residence requirements. *See, e.g.*, 7 C.F.R. § 246.7(b)(1) (1992) (Special Supplemental Food Program for Women, Infants and Children); 7 C.F.R. § 273.3 (1992) (Food Stamp Program).

104. 42 U.S.C. § 1315 (1991), discussed *infra* at notes 244-58 and accompanying text.

105. *See generally* IRIS J. LAV ET AL., THE STATES AND THE POOR 35-36 (1993).

106. Some states, however, limit eligibility for general assistance to specific categories of poor people, and others restrict the number of weeks an impoverished individual may receive assistance, effectively creating another category of needy but ineligible individuals. *See* NO RELIEF, *supra* note 6, at 5. Many states have only a narrowly limited general assistance program, or no program at all. *See id.* at 2, 4-5. For instance, Michigan eliminated its general relief program in 1991. *See* Jason DeParle, *The Sorrows, and Surprises, After a Welfare Plan Ends*, N.Y. TIMES, Apr. 14, 1992, at A1. One year later, Illinois closed its general relief program to persons deemed employable, and Maryland barred assistance to any person without a disability expected to last for at least twelve months. *See* NO RELIEF, *supra* note 6, at 2.

107. "Non-disabled" for these purposes means not so thoroughly disabled as to satisfy the definition of disability used to determine eligibility for federal benefits under Title II or Title XVI of the Social Security Act. *See* 42 U.S.C. § 423(d) (1988).

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special stigma attaches to this form of relief,¹⁰⁸ though for the past several decades the women and children who receive AFDC have similarly been seen as outcasts whose very need is taken as evidence of moral and personal failure.¹⁰⁹

The length-of-residence restrictions recently imposed by various states on AFDC and general assistance applicants have assumed two basic forms. First is the durational residence restriction of the traditional type, which absolutely bars newcomers from receiving public assistance during a specified period of initial residence. This is precisely the kind of eligibility condition that the Supreme Court declared unconstitutional in *Shapiro v. Thompson*.¹¹⁰ At present, Wisconsin is the only state that imposes this form of residence requirement. Under Wisconsin law, a destitute individual who meets all other eligibility criteria for general assistance will nevertheless be denied relief if she has not resided in the state for at least two months immediately prior to her application for benefits.¹¹¹ Thus, a poor person contemplating a move to Wisconsin must consider whether she could survive for sixty days bereft of funds if employment cannot immediately be secured.¹¹²

The second, and more common, type of residence restriction does not deny *all* assistance to newcomers, but limits the benefits available during an initial residence period. This second option, frequently termed a "two-tiered" welfare system, calculates the new resident's benefit with reference to the level of assistance available in the state of origin. At least seven states currently employ or have proposed some version of a two-tiered model. California imposed a two-tiered durational residence scheme on its AFDC program in late 1992.¹¹³ Under the California program, AFDC grants to recently arrived families are capped at the lesser of the state's regular benefit level or the grant amount the family would have received in its prior state of residence.¹¹⁴ The California

108. See e.g., HANDLER, *supra* note 58, at 21-24.

109. See, e.g., Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991); see also *America's Most Wanted, Republicans Turn Welfare Mothers into Villains of '92 Campaign*, TORONTO STAR, June 7, 1992, at F1 [hereinafter *America's Most Wanted*]. The pariah status of poor women and children, though perhaps more acute in recent years, is by no means a new phenomenon. See PIVEN & CLOWARD, *supra* note 2, at 165-77.

110. *Shapiro v. Thompson*, 394 U.S. 618, 623, 642 (1969).

111. WIS. STAT. § 49.015 (1992).

112. Wisconsin adopted its durational residence requirement in 1986 and tightened the restriction in 1987 by repealing an exemption for persons who had entered the state "without the intent to seek benefits." See *Jones v. Milwaukee County*, 485 N.W.2d 21, 22-24 (Wis. 1992). The Wisconsin Supreme Court recently upheld the restriction against state and federal equal protection challenges. *Id.*

113. CAL. WELF. & INST. CODE § 11450.03 (West 1993). The Governor of California had proposed a virtually identical plan as part of the "Taxpayer Protection Act," a ballot initiative defeated by the voters in November 1992. See Vlae Kershner, *Welfare Reduction Defeated*, S.F. CHRON., Nov. 4, 1992, at A12.

114. California received approval for its durational residence restriction from the federal Department of Health and Human Services in November 1992. See *California Cleared to Pay Less in Welfare to State Newcomers*, CHI. TRIB., Nov. 13, 1992, at 4. A "waiver" from HHS was necessary because federal law proscribes state durational residency restrictions on AFDC eligibility. See 45 C.F.R. § 233.20(a)(2)(iii) (1992). HHS previously approved a California proposal to "limi[t] (for a 12-month period) the grant level

plan, which refers to the reduced benefits provided newcomers as "relocation grants," affects all families with less than one year continuous, current residence in the state.¹¹⁵ Since the AFDC levels (and the cost-of-living) in California exceed those in most states, the legislation will deny a majority of new AFDC families the payment thought minimally necessary for essential needs.¹¹⁶ Illinois has authorized a nearly identical two-tiered model for its AFDC and general assistance programs, and Iowa and Pennsylvania have been considering similar proposals.¹¹⁷

A second variant of the two-tiered model provides new residents with a reduced percentage of the usual state grant, or the payment the applicant would have received in her last place of residence (not to exceed the enacting state's usual grant), whichever is greater. Minnesota incorporated this version of the two-tiered scheme into its general assistance program in 1991.¹¹⁸ Under Minnesota law, a needy person who has resided in the state for less than six months may receive only sixty percent of the state's regular general assistance grant.¹¹⁹ If, however, the individual received public assistance in her last state of residence, she is eligible for an equal amount in Minnesota, up to the grant level provided to longer-term residents.¹²⁰ The Minnesota scheme thus leaves many destitute newcomers to attempt the near impossible task of subsisting for six months on \$122 per month.¹²¹ New York imposed a similar restriction on its general assistance program effective July 1992.¹²² In con-

for families moving to California to the lesser of California's grant level or the [AFDC level] of the State of previous residence." See Letter from Russell S. Gould, Secretary, California Health and Welfare Agency, to Jo Anne Barnhart, Assistant Secretary for Children and Families, U.S. Department of Health and Human Services 5 (May 19, 1992) (on file with author); Letter from Jo Anne Barnhart, Assistant Secretary for Children and Families, U.S. Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) (on file with author). The proposal died, however, when the ballot initiative in which it appeared failed to win public approval. See Kershner, *supra* note 113.

115. See CAL. WELF. & INST. CODE § 11450.03(a); Letter from Russell Gould to Jo Anne Barnhart, *supra* note 114, at 5. The California legislation was preliminarily enjoined by a federal district court in January 1993. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

116. See BACKGROUND MATERIAL, *supra* note 102, tbls. 1, 4 & 5.

117. The Illinois plan applies to new residents who received public assistance at any point during the final twelve months in their prior state of residence. Ill. Pub. Act 87-860 (1992). Such persons are disqualified for one year from receiving Illinois assistance at a higher rate than was available in the prior state. *Id.* The Iowa House of Representatives adopted a measure identical to the Illinois plan, but the measure was deleted in the conference process with the Iowa Senate. See H-5819, S-5667, S.F. 2355, 74th Iowa Gen. Assembly, 1992 Session. Pennsylvania is also considering a proposal identical to the Illinois plan except that the Pennsylvania version limits benefits to *all* newly-arrived residents, not only to those who had recently received assistance in their prior states. See H.R. 2577, Pa. Gen. Assembly, 1992 Session.

118. MINN. STAT. § 256D.065. The Minnesota statute is currently under challenge. See *Mitchell v. Steffan*, 487 N.W.2d 896 (Minn. Ct. App. 1992) (appeal pending).

119. MINN. STAT. § 256D.065.

120. §§ 256D.065, 256D.06.

121. See §§ 256D.065, 256D.06, subd. 1.

122. N.Y. SOC. SERV. LAW § 158(f) (Consol. 1992). The New York law covers all individuals who apply for relief within six months of moving into the state and sets the grant level at 80% of the regular benefit unless the applicant could have received a larger grant in her prior state of residence. In that case,

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junction with this residence restriction, welfare administrators in New York have been directed to offer newcomers transportation expenses for immediate return to their "original state."¹²³

A third version of the two-tiered model sets the benefit level of a recently arrived family at the amount payable in the state of origin, whether that amount is larger or smaller than the enacting state's grant. Wisconsin adopted this plan for its AFDC program,¹²⁴ and recently secured approval from the Department of Health and Human Services to implement the scheme on a demonstration basis.¹²⁵ The state has selected six counties for participation and will apply the two-tiered program to families that request AFDC within six months of establishing Wisconsin residency.¹²⁶ As the state has designated the counties closest to the Illinois border as demonstration sites—its express aim being to discourage migration of poor (mostly African-American) families from the Chicago area where benefit levels are lower¹²⁷—this plan will in most cases deny recently-arrived families the full measure of assistance available to longer term residents.

B. Residence Restrictions Analyzed

The state welfare reforms discussed above diverge in certain details, but they all share a common purpose that links them to the poor-law traditions of settlement and removal: the underlying objective in each instance is to deter in-migration by poor people. The goal of "settlement" and durational residence conditions has always been, as the defendants in *Shapiro v. Thompson* confessed, to "discourag[e] entry of those who come needing relief."¹²⁸ And so it is with the latest incarnations of this policy. Current proponents of residence restrictions freely admit that the object is to close their borders to destitute Americans from other states—a remarkable concession given that the Supreme Court has repeatedly declared that object unconstitutional.¹²⁹ The governor of California, to take one prominent example, campaigned for residence

the applicant receives the amount available in her state of origin up to the current New York grant level.
Id.

123. See *Limited Home Relief*, *supra* note 10, at 17.

124. WIS. STAT. § 49.19(11m) (1992).

125. See Letter from Jo Anne Barnhart, Assistant Secretary for Children and Families, U.S. Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (July 27, 1992) (on file with author).

126. WIS. STAT. § 49.19(11m)(c) (1992). The two-tiered plan does not apply to families that have resided in the state for over three months and can demonstrate at least 13 weeks of employment since moving into the state. § 49.19(11m)(am). The plan is currently scheduled to take effect in January 1995. Wisconsin Application for SSA Section 1115 Demonstration Project, App. No. 92-3-W0-010, June 26, 1992, at 34 [hereinafter Wisconsin Application].

127. See *id.* at 4-5.

128. *Shapiro v. Thompson*, 394 U.S. 618, 623 (1969) (quoting district court opinion reported at 270 F. Supp. 331, 336-37 (D. Conn. 1967)).

129. See *Shapiro*, 394 U.S. 618; *Edwards v. California*, 314 U.S. 160 (1941).

restrictions by exhorting voters to “stop out of state welfare recipients from moving to California.”¹³⁰ In the more sedate jargon of inter-bureaucratic communication, California explained to the U.S. Department of Health and Human Services that the purpose of its AFDC “relocation grant” is to “reduce the incentive for families to move to California to receive public assistance.”¹³¹ Wisconsin politicians openly agitated for state residence restrictions on the theory that “[a] two-tiered welfare system will quickly eliminate abuse by discouraging the out-of-state recipients’ migration to Wisconsin.”¹³² And Minnesota legislators candidly expressed their “primary objective” as “deter[ring] migration of low income individuals into [the State].”¹³³

The most benign explanation for these welfare restrictions is that they seek to create a relatively closed system within which a state can establish especially comprehensive social programs without risking the uncontrollable escalation of welfare costs that would accompany any large in-migration of new recipi-

130. Direct Mail Solicitation from Governor Pete Wilson (on file with the author) (emphasis omitted). Governor Wilson also campaigned for this restriction with television spots featuring statements such as, “It upsets me when I see people coming into this state and becoming freeloaders on our welfare system.” See John Wildermuth & Vlae Kershner, *Campaign Insider*, S.F. CHRON., Oct. 5, 1992, at A4; see also *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993) (noting that the apparent purpose of California’s durational residence legislation “is to deter migration of poor people into the State”).

131. Application of California Department of Social Services to U.S. Department of Health and Human Services for Approval of California Welfare Reform Demonstration Project, App. No. 92-3-WR-001, Apr. 7, 1992, at 17 [hereinafter California Application].

132. BOARD OF SUPERVISORS, KENOSHA COUNTY, WIS., RESOLUTION IN SUPPORT OF WELFARE REFORM (Jan. 2, 1992). The Kenosha County statement was made in support of Wisconsin’s proposed “two-tier” AFDC program. Milwaukee County Executive Tom Ament expressed a similar view, stating that the two-tiered AFDC program “will show that there has been a migration, and hopefully, this will put a halt to that.” See *Wisconsin Plan Aims to Discourage Immigration of Welfare Recipients*, L.A. TIMES, June 4, 1992, at A12. It is similarly evident that the object of durational residence restrictions in Wisconsin’s General Assistance program is “to discourage welfare recipients from neighboring states from migrating to Wisconsin. . . .” *Jones v. Milwaukee County*, 485 N.W.2d 21, 29 (Wis. 1992) (Heffernan, C.J., dissenting). The state legislative sponsor of this eligibility restriction argued that absent such legislation, “State and county governments and the taxpayer will have no defense against persons who enter Wisconsin in order to take advantage of this state’s generous welfare benefits.” *Id.* at 29 n.1 (quoting amicus brief of Wisconsin State Representative David Prosser, Jr.).

133. *Mitchell v. Steffen*, 487 N.W.2d 896, 902 (Minn. Ct. App. 1992). The senate author of the Minnesota statute urged its passage expressly as a method of discouraging in-migration by poor people:

I look down at the courthouse, and I see people coming in each and every day. And they’re getting assistance. . . . [T]here are people who have come, because welfare is better than the state in which they originated from [sic]. . . . That person came in here on a train and now we’re going to give him 203 bucks. Well, I’d rather have them go to another state and get their 203 bucks.

Quoted in *Mitchell v. Steffen*, No. C8-91-11691, at 4 (Minn. Dist. Ct. Jan. 8, 1992). In New York, welfare officials have diplomatically described the purpose behind the new residence restrictions as “mak[ing] the decision of whether to move to New York State fiscally neutral for persons who may need public assistance when they enter the State.” NEW YORK STATE DEP’T OF SOCIAL SERVS., REGULATORY IMPACT STATEMENT FOR 18 NYCRR § 352.29 (Consol. 1992) [hereinafter REGULATORY IMPACT STATEMENT].

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ents.¹³⁴ State and local officials pressed precisely this position in *Shapiro v. Thompson* and in earlier congressional hearings, arguing that judicial or legislative elimination of durational residence restrictions “would result in a heavy influx of individuals into States providing the most generous benefits.”¹³⁵ Although that argument may have seemed plausible in 1969,¹³⁶ twenty years have now passed since the *Shapiro* Court outlawed durational residence requirements, and the feared mass migration of poor people to high-benefit states has never materialized. To the contrary, poor people have migrated at the same rates and in the same directions as the population at large.¹³⁷ Indeed, throughout the late seventies and early eighties, poor people moved, along with other Americans, from the northeast and midwest to the south and sunbelt states, where welfare levels are significantly *lower* than average.¹³⁸

The benign explanation for the latest outbreak of state residence restrictions is implausible for another reason: the proponents of these measures have pressed them not to facilitate unusually generous benefits for current state residents, but rather as part of a broader campaign to cut spending for all poor people. New York, for example, adopted its durational residence requirement in conjunction with a package of general welfare cuts that includes a forty-five day waiting period for all general assistance applicants, severe restrictions upon the availability of emergency relief, and reductions in Medicaid coverage.¹³⁹ In California, the governor proposed durational residence restrictions as one element of a program that included a ten-percent across-the-board cut in AFDC benefits followed by an additional fifteen-percent cut for families receiving assistance longer than six months.¹⁴⁰ It is, therefore, difficult to maintain that states have barred their doors to outsiders in order to enhance welfare benefits for existing residents.

134. See Margaret K. Rosenheim, *Shapiro v. Thompson: "The Beggars are Coming to Town,"* 1969 SUP. CT. REV. 303, 318-19; see also *Shapiro v. Thompson*, 394 U.S. 618, 674-75 (1969) (Harlan, J., dissenting) (arguing that “[i]nvalidation of welfare residence requirements might have the unfortunate consequence of discouraging . . . State Governments from establishing unusually generous welfare programs . . . because of fears that the program would cause an influx of persons seeking higher welfare payments”).

135. 394 U.S. at 628-29 (citing *Hearings on H.R. 10032 Before the House Comm. on Ways and Means*, 87th Cong. 2d Sess. 309-10, 644 (1962); *Hearings on H.R. 6000 Before the Senate Comm. on Finance*, 81st Cong., 2d Sess. 324-27 (1950)).

136. But see Peter Kasius, *What Happens in a State Without Residence Requirements*, in RESIDENCE LAWS 20-22 (National Travelers Aid Ass'n ed., 1956) (noting the absence of “any evidence whatever that the availability of assistance is what attracts . . . people to New York City”). Peter Kasius was a Deputy Commissioner of the New York State Department of Social Welfare in 1956, a time at which New York imposed no durational residence restrictions on public benefit eligibility. *Id.*

137. BARBARA LEYSER ET AL., *BEYOND THE MYTHS: FAMILIES HELPED BY THE AFDC PROGRAM* 13-14 (2d ed. 1985).

138. *Id.*

139. 1992 N.Y. Laws ch. 41.

140. See Letter from Russell Gould to Jo Anne Barnhart, *supra* note 114.

Nevertheless, some states contend that they already provide generous welfare benefits¹⁴¹ and that those assistance levels can be sustained only if the state employs residence restrictions to curtail the in-migration of new beneficiaries.¹⁴² Here again, the argument does not persuade. First, the states that have proposed or adopted residence restrictions have little or no objective evidence that benefit levels actually influence migration—much less data quantifying that influence.¹⁴³ In one telling episode, California officials who had testified in support of residence restrictions were forced to concede to legislators that “the state had no data to show the impact of higher welfare benefits on the migration of poor people to California.”¹⁴⁴ Indeed, the data the state did have showed that the percent of newcomers receiving AFDC had *declined* throughout the 1980s. Nor do these states appear interested in accounting for the fiscal impact of *out*-migration by poor people or factoring in cost-of-living differentials among states.¹⁴⁵ Furthermore, even if one were to assume a causal relationship between benefit levels and migration, the potential savings from durational residence requirements are minuscule. In 1991, state expenditures on all AFDC benefits and administration amounted to less than two percent of state budgets.¹⁴⁶ The savings that California itself projects for its “relocation grant” are measured in single hundredths of one percent of the state budget.¹⁴⁷ And residence restrictions are an inefficient way of achieving even these tiny reductions given the high cost of administering this type of eligibility condition.¹⁴⁸ Under these circumstances, the claim

141. Politicians repeatedly refer to state welfare programs as generous despite the fact that AFDC and GA levels fall well below the poverty line in every state. See BACKGROUND MATERIAL, *supra* note 102. Inaccurate and inflammatory rhetoric of this sort has become a staple of the political discourse surrounding poverty issues. See *infra* notes 149-63 and accompanying text.

142. See Wisconsin Application, *supra* note 126.

143. The one study that has been cited to support state officials' welfare magnet theory is Wahner & Stepanik, *supra* note 8. Referring to this use of his study, Mr. Wahner stated: “It's been upsetting to me that [people] have indicated that my study is about welfare magnetism, because it isn't. Certainly grant level is one reason. But this incredible belief that the only reason people cross state lines is for welfare benefits isn't accurate.” *Researcher: Poor Don't Move to Wisconsin*, UPI, Dec. 26, 1988, available in LEXIS, Nexis Library, UPI File.

144. Virginia Ellis, *Is California's Welfare System Luring the Poor?*, L.A. TIMES, Apr. 11, 1992, at A1.

145. *Id.* (quoting Diana Pearce, visiting scholar at Stanford University, that “[y]ou can't begin to measure the net impact of migration without knowing how many move out as well as how many move in,” and noting that state studies have not measured out-migration of welfare recipients).

146. See BACKGROUND MATERIAL, *supra* note 102. As one scholar put it, “if you're talking about saving big dollars, AFDC is the last place you would start.” Philip Harvey, *quoted in* Thomas Sancton, *How to Get America Off the Dole*, TIME, May 25, 1992, at 44.

147. See California Application, *supra* note 131, at 6; see also Rosenheim, *supra* note 134, at 327-28 (noting that even when durational residence requirements imposed a full one-year waiting period, only 0.5 to 2% of public benefit caseloads were affected).

148. California officials estimated that it would cost over 5 million dollars annually to administer residence restrictions expected to generate less than 15 million in yearly savings to the state, and a like savings to the federal government. See California Application, *supra* note 131, at 6. Historically, administrative costs surrounding residence and settlement issues have been excessively high. See CLARKE, *supra* note 2, at 481; Mandelker, *supra* note 45, at 362. The famous Yates Report, which investigated poor-law

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that residence restrictions are necessary to maintain current levels of assistance lacks credibility.

The most plausible explanation for the resurgence of durational residence restrictions appears to be a political one. The prolonged economic recessions of the late 1980s and early 1990s sparked budget crises in many states, bred widespread popular discontent and created powerful incentives for politicians to identify scapegoats. The most common targets have been poor people and social welfare programs.¹⁴⁹ In 1991, more than one third of the families receiving AFDC suffered severe benefit cutbacks, and over three fifths of all recipients nationwide experienced benefit reductions in real terms.¹⁵⁰ Following the 1991 AFDC cuts, more than half of all families living below the official poverty line were ineligible to participate in this anti-poverty program.¹⁵¹ Yet in 1992, 15 of 37 states surveyed slashed basic welfare programs even further.¹⁵² Proposals to eliminate welfare entirely acquired a newly-minted respectability,¹⁵³ as political discourse became marked by “an increasingly strident attack on the very idea of welfare.”¹⁵⁴ Political observers have noted an increased willingness by politicians “to exploit [the] welfare . . . issue” as a way “to tap the electorate’s economic discontent.”¹⁵⁵ As one commentator put it, “[w]elfare is a hot-button issue these days. Plenty of politicians, especially on the right, see pay dirt in it.”¹⁵⁶

The political attractiveness of the welfare issue and the vulnerability of the poor are neither new nor particularly difficult to explain. Poor people are probably the least effective and most defenseless constituency in American

practices in New York in the early nineteenth century, estimated that fully one-ninth of all taxes raised for poor relief were spent “in the payment of fees of justices, overseers, lawyers and constables to resolve settlement disputes between localities that sought to avoid the payment of assistance.” Secretary of State, State of N.Y., *1824 Report on the Relief and Settlement of the Poor*, reprinted in *THE ALMSHOUSE EXPERIENCE* (David J. Rothman ed., 1971).

149. See, e.g., Editorial, *Blaming the Victims in New York*, N.Y. TIMES, Oct. 26, 1991, at 18 (noting that Senate Republicans “blame the poor for almost the entire state budget gap of \$500 million or more”); see also *America’s Most Wanted*, *supra* note 109, at F1.

150. See CENTER ON SOCIAL WELFARE POLICY & LAW, PUB. NO. 165, 1991: THE POOR GOT POORER AS WELFARE PROGRAMS WERE SLASHED 7, 9 (1992).

151. See GREEN BOOK, *supra* note 2, at 604-05, 621.

152. See NO RELIEF, *supra* note 6, at 2.

153. See, e.g., *Race Against Time*, NEW REPUBLIC, May 25, 1992, at 1, 9 (calling for “radical shift from the welfare model”); MICKEY KAUS, *THE END OF EQUALITY* (1992) (proposing to end all income support programs and to substitute massive public jobs program). In line with this movement, some states actually eliminated their general assistance programs. See *supra* note 106.

154. See, e.g., DeParle, *supra* note 106, at A1; see also Robert Greenstein & Edward Lazere, *The Dubious New Attack on Welfare*, SACRAMENTO BEE, Jan. 19, 1992.

155. See Kevin Sack, *The New Volatile Politics of Welfare*, N.Y. TIMES, Mar. 15, 1992, § 1, at 1; Sancton, *supra* note 146, at 44. See generally THEODORE R. MARMOR ET AL., *AMERICA’S MISUNDERSTOOD WELFARE STATE* (1990).

156. Neal R. Peirce, *Cold Approaches to a Hot-Button Issue*, NAT’L L.J., Apr. 11, 1992, at 890.

politics.¹⁵⁷ Those who attack the poor put little at political risk and are rarely, if ever, held accountable. This dynamic, and its role in what has come to be known as “welfare scapegoating,” is acknowledged even by established political figures. Governor Cuomo of New York, for example, recently remarked that “poor people don’t have any power. That’s why welfare’s such a terrific issue. Who’s going to march against you, a 15-year-old girl with a baby? She doesn’t even get to the polls.”¹⁵⁸ On this logic, poor people from other states present an irresistible target, being politically disabled as a result of both poverty *and* geography. Indeed, so attractive a scapegoat are the out-of-state poor, that the Governor of California showcased welfare residence restrictions in his campaign for Proposition 165 even after the state legislature had enacted an identical restriction, rendering the proposition obsolete.¹⁵⁹

The politics of welfare would appear to explain why states have rushed to impose durational residence restrictions without sufficient data or “mature deliberation,”¹⁶⁰ and despite the certainties that cost savings will be minimal and that families caught in the political crossfire will suffer crushing consequences.¹⁶¹ Protectionist welfare policies, and the rhetoric that surrounds them, not only isolate and ostracize the poor, but also pit state against state,¹⁶² recalling English historian G. M. Trevelyan’s critique of the Elizabethan Poor Laws: “The problem of the poor and of unemployment was

157. See Loffredo, *supra* note 27; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1970) (noting that “the ill-fed, ill-clothed and ill-housed [may be] among the most ineffective participants in the political process”).

158. Quoted in Sack, *supra* note 155, § 1, at 24.

159. See Wildermuth & Kershner, *supra* note 130, at A4.

160. *But see Shapiro v. Thompson*, 394 U.S. 618, 674 (1969) (Harlan, J., dissenting) (arguing that Court should defer to state residence restrictions as the products of “mature deliberation”).

161. This is not to suggest that other invidious factors do not animate exclusionary state policies, especially given the intersection of race and poverty in the United States. For instance, it is difficult to ignore the racial overtones in Wisconsin’s crusade to halt in-migration by poor, African American families from the Illinois border counties in and around Chicago. See Ellis, *supra* note 144 (noting focus of Wisconsin officials on poor people “flooding across the border from Illinois to escape the crime in inner-city Chicago and to take advantage of higher welfare benefits”); Rogers Worthington, *Welfare Magnet Attracts Fraud—And Paranoia*, CHI. TRIB., Jan. 24, 1992, at 5. The relationship between residence restrictions and race is by no means a recent development. See, e.g., Kasius, *supra* note 136, at 20 (arguing in 1956 that residence restrictions on public benefits trace largely to “attitudes toward minority groups”).

162. The political discourse on durational residence requirements not only impugns and devalues poor people, but also frequently includes accusations that neighboring states are attempting to “export” their “welfare problem.” See, e.g., Ellis, *supra* note 144 (noting complaints by politicians in California, Washington, Vermont, Wisconsin, and New York about the inflow of recipients from lower-benefit states, including Oregon, Idaho, New Hampshire, Illinois, New Jersey, and Pennsylvania). As one journalist reported, “[w]elfare magnets are relative, of course. Iowa suspects they may be drawing people from Missouri. And Minnesota is concerned about those North Dakotans. But then, top-paying Minnesota worries about most surrounding states, including Wisconsin.” Roger Worthington, *supra* note 161, at 5. For an earlier example of interstate acrimony on this issue, see *Edwards v. California*, 314 U.S. 160, 168 (1941) (argument for appellee); see also *infra* notes 284-86 and accompanying text.

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in its essence national—or at least regional—yet every petty parish dealt with it separately, in a state of hostility to every other.”¹⁶³ Three centuries later, American social welfare policy has begun to regress in this unfortunate direction.

III. A COMMERCE CLAUSE ANALYSIS OF STATE RESIDENCE RESTRICTIONS

Article I, section 8 of the Constitution provides that Congress shall have power to “regulate Commerce . . . among the several States.” The Commerce Clause occupies only a tiny fraction of the Constitution’s text, but it embodies one of the principal innovations for which the federal convention of 1787 was called.¹⁶⁴ Indeed, those who drafted the Constitution believed that political union would be unsustainable unless authority to regulate interstate commerce resided with the national government.¹⁶⁵ And, from the early nineteenth century, the Court has regarded the clause as so critical to both the ideal and reality of nationhood that it has interpreted this affirmative grant of congressional power as a constitutional negative upon state interference with interstate commerce.¹⁶⁶ By the middle of this century, the Court began routinely to acknowledge the constitutional centrality of the Commerce Clause and the judiciary’s role in enforcing its values:

163. TREVELYAN, *supra* note 44, at 351-52.

164. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 259 (1833); *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (“The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was the immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824) (“The power over commerce . . . was one of the primary objects for which the people of America adopted their government.”).

165. *See* THE FEDERALIST Nos. 6-9, 11 (Alexander Hamilton). *See generally* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

166. *See, e.g.*, *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 87 (1984) (“Although the Commerce Clause is by its text an affirmative grant of power to Congress . . . the Clause has long been recognized as a self-executing limitation on the power of the States. . . .”). The theory that the Commerce Clause itself restricts state power, even when Congress has not exercised its authority under the clause, was first suggested by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (*dictum*). *See also* *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1827) (intimating that state legislation violates the Constitution if “repugnant to the power to regulate commerce in its dormant state”). *See generally* Martin H. Redish & Shane v. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574-81 (tracing early doctrinal development of the negative Commerce Clause). There is evidence that this interpretation of the Commerce Clause accorded with the framers’ expectations. In a letter written some years after the constitutional convention, Madison expressed his understanding that the Commerce Clause was to operate “as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purpose of the General Government.” Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (Max Farrand ed., 1911).

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the States, it does not say what the states may or may not do in the absence of congressional action Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.¹⁶⁷

The Commerce Clause in its negative aspect shares with the Equal Protection doctrine the goal of checking "repeated attempts by state legislatures to exclude undesirable persons."¹⁶⁸ Unlike expansive interpretations of the Fourteenth Amendment, however, vigorous judicial enforcement of the negative Commerce Clause enjoys a pan-ideological appeal uncommon in constitutional law. It has frequently been observed that "even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary 'when the centrifugal, isolating or hostile forces of localism are manifested in state legislation.'"¹⁶⁹ Consequently, the negative Commerce Clause has been the most fertile constitutional ground for invalidation of state laws over the past several decades.¹⁷⁰ More to the point, the broad ideological support enjoyed by the negative Commerce Clause insulates the doctrine from the transient political shifts that have dramatically affected the Court's interpretation of the Fourteenth Amendment. Additionally, as will be seen, the anti-discrimination principle embodied in the negative Commerce Clause condemns state length-of-residence restrictions even more definitively than Equal Protection doctrine as elaborated in *Shapiro*.¹⁷¹

167. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 534-35 (1949).

168. J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 986-87 (1978).

169. See *TRIBE*, *supra* note 18, at 401 (quoting Ernest J. Brown, *The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary*, 67 *YALE L.J.* 219, 220 (1957)). Shortly after his appointment to the Court, Justice Scalia launched what appeared to be the opening volley of an extended conservative campaign to dismantle the negative Commerce Clause. See *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (critiquing negative Commerce Clause doctrine as "an enterprise that [the Court] has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well"); see also *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94 (1987) (Scalia, J., concurring). More recently, however, Justice Scalia has quiescently joined majority opinions setting forth and applying the doctrine in its traditional form. See, e.g., *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992).

170. Despite the potency of the negative Commerce Clause as a constitutional check on state legislation, it has only infrequently been engaged to safeguard individual rights. See, e.g., *Dennis v. Higgins*, 111 S. Ct. 865 (1991); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Edwards v. California*, 314 U.S. 160 (1941).

171. The Court recently confirmed that the Commerce Clause creates federal "rights" enforceable by individuals under the Civil Rights Act of 1871, 42 U.S.C. § 1983. *Dennis*, 111 S. Ct. 865.

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A. *The Doctrinal Analysis*

This section performs a standard Commerce Clause analysis on welfare residence requirements. The doctrinal presentation proceeds along two lines. First, length-of-residence requirements are measured against the principles enunciated by the Court fifty years ago in *Edwards v. California*.¹⁷² Next, these requirements are assessed within the Court's most current framework for adjudicating negative Commerce Clause claims. Under either analysis, state legislation that discriminates against interstate migrants in the provision of public assistance quite clearly fails constitutional scrutiny.

1. *The Edwards Template*

In *Edwards v. California*, the Court invalidated a California statute that made it a misdemeanor to transport indigent, nonresidents into the state. Some version of the statute had been on the books since 1860,¹⁷³ but vigorous enforcement of the proscription did not begin until the Great Depression, when drought and economic collapse displaced millions of families and resulted in unprecedented waves of interstate migration. In defense of its statute, California asserted that it had experienced a "huge influx" of destitute families fleeing intolerable conditions in other parts of the country, and that this "has resulted in problems of health, morals, and especially finances . . ." ¹⁷⁴ The Court credited the state's claims of public health concern and dire fiscal distress,¹⁷⁵ but concluded that any effort to address these ills by impeding the migration of poor people unconstitutionally interfered with interstate commerce.¹⁷⁶ Notably, the Court did not see fit to "balance" the state's admittedly substantial interests against the burden imposed by the statute on interstate commerce. Nor did the Court hesitate to void the statute on Commerce Clause grounds even absent state interference with "commercial"

172. 314 U.S. 160.

173. *Id.* at 172.

174. *Id.* at 173. California's brief in the Supreme Court incorporated a breathtaking array of negative stereotypes about poor people:

Underfed for many generations, they bring with them the various nutritional diseases of the South. Their presence here upon public relief, with their habitual unbalanced diet and consequent lowered body resistance, means a constant threat of epidemics. Venereal diseases and tuberculosis are common with them, and are on the increase. The increase of rape and incest are [sic] readily traceable to the crowded conditions in which these people are forced to live. Petty crime among them has featured the criminal calendars of every community into which they have moved.

Id. at 167-68.

175. *Id.* At the same time, the Court rejected the notion that the immigration of poor people itself threatened public morality. "Poverty and immorality are not synonymous," the Court declared. *Id.* at 177.

176. *Id.* at 173-74.

activity.¹⁷⁷ Rather, the Court held that the Commerce Clause *categorically* proscribes any state effort to extricate itself from national problems by “the simple expedient of shutting its gates to the outside world.”¹⁷⁸ No limitation on state power is “more certain,” the Court held, than “the prohibition against attempts on the part of any single State to isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders.”¹⁷⁹ Viewing economic dislocation, poverty, and relief of the needy as indisputably national problems, common to all states, the Court had no difficulty concluding that California’s exclusion statute violated the Commerce Clause.¹⁸⁰

Edwards did not directly decide whether states may constitutionally deny newcomers public assistance,¹⁸¹ but the core principle and teaching of the case distinctly answer this question in the negative. Durational residence restrictions on welfare are parochial and isolationist in precisely the respect that *Edwards* found to be impermissible.¹⁸² Whatever may be their ultimate aim, such restrictions uniformly seek to insulate the enacting state from the common difficulty of economic recession and poverty by inhibiting the interstate movement of poor people. The legislative thesis underlying all current residence restrictions is that high-end welfare allowances attract poor families from other states, that this magnet effect is undesirable because it burdens state financial resources, and that the in-migration of needy families can and should be curtailed by denying newcomers some or all of the public assistance available to longer term residents.¹⁸³ Beyond question, a state may validly adopt countermeasures to forestall fiscal crises and budgetary shortfalls. But *Edwards* teaches that a state may not constitutionally advance even these significant interests by attempting to shut its gates to the interstate migration of needy Americans. Since this is exactly the means employed by durational residence restrictions, if not their independent goal, such laws run afoul of the Commerce Clause as interpreted in *Edwards*.

It has been argued that durational residence restrictions on welfare eligibility are distinguishable from the California law struck down in *Edwards* in that the latter directly *prohibited* interstate migration whereas welfare restrictions

177. The Court concluded that “the transportation of people is ‘commerce,’” *id.* at 172, and that “[i]t is immaterial whether or not the transportation is commercial in character.” *Id.* at 172 n.1.

178. *Id.* at 173.

179. *Id.*

180. *Id.* at 173-75.

181. *Id.* at 174-75. The Court did, however, express doubts about the constitutionality of any such discrimination. *Id.*; see *supra* notes 66-68 and accompanying text.

182. The controversies surrounding current durational residence requirements closely parallel *Edwards* in a number of respects. Perhaps most notable is the fact that state officials are presently defending length-of-residence restriction in terms that are virtually identical to those advanced on behalf of the California exclusion statute invalidated by *Edwards*.

183. See *supra* notes 128-44 and accompanying text.

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merely *deter* it.¹⁸⁴ These arguments founder both on factual and legal grounds. First, the California statute invalidated in *Edwards* did not “absolute[ly] exclude indigents.”¹⁸⁵ It prohibited third parties from transporting nonresident indigents into the state, but did not proscribe the passage of poor people across the state’s borders.¹⁸⁶ To be sure, the statute was intended to make in-migration more difficult and indeed performed that function, but welfare waiting periods are qualitatively indistinguishable from the California law in this respect. Although they do not flatly outlaw the passage of poor people across state lines, they are designed to inhibit that movement. Second, even if one viewed the California law as an “absolute” prohibition and welfare restrictions as mere deterrents, the distinction would make no constitutional difference. The Commerce Clause, as understood at the time of *Edwards* and as currently interpreted, condemns state legislation that overtly discriminates against the cross-border movement of people or goods, whether the discrimination impedes that traffic directly or indirectly, absolutely or partially; the Court has repeatedly declared that it “makes no difference for purposes of Commerce Clause analysis” whether a discriminatory state action “exclude[s]” or merely “impose[s] additional costs upon” interstate commerce.¹⁸⁷

It has also been argued that *Edwards* is distinguishable because the California statute had as its very *purpose* the exclusion of indigents, whereas durational residence requirements, even if they deter in-migration, ultimately aim to reduce welfare fraud and advance other administrative interests.¹⁸⁸ The answer to this argument is that *Edwards* invalidated California’s exclusion statute not merely because it pursued an illegitimate *goal*, but because—like welfare restrictions, even benignly construed—it sought to achieve legitimate

184. See Comment, *The Constitutionality of Residence Requirements for State Welfare Recipients*, 63 NW. U. L. REV. 351, 357 (1968); see also Appellant’s Jurisdictional Statement at 7, *Shapiro v. Thompson*, 394 U.S. 619 (1969) (arguing that *Edwards* does not support invalidation of welfare residence restrictions because the California statute was “penal” and had “permanent effect . . . on the persons aimed at”); cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 282-83 (1974) (Rehnquist, J., dissenting) (arguing that the barrier to interstate travel raised by a one-year residence requirement for free non-emergency medical care was not comparable to the barrier created by the criminal statute invalidated in *Edwards*).

185. Comment, *supra* note 184, at 357.

186. *Edwards v. California*, 314 U.S. 160, 169 (1941) (reargument for appellee) (construing California statute as not “exclud[ing] any indigent person [or] . . . family” but as applying only to third parties who “without any tie of legal support to the indigent, knowingly bring, or assist in bringing, indigent persons into the State”); *id.* at 171-76 (opinion of the Court analyzing the California statute as a prohibition on the “interstate transportation of persons”).

187. *New Energy Co. v. Limbach*, 486 U.S. 269, 275-76 (1988); see also *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992) (voiding Alabama statute that imposed higher disposal fees on hazardous waste generated out of state); cf. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1093-94 (1986) (chronicling demise of the “direct/indirect” distinction in negative Commerce Clause doctrine).

188. Comment, *supra* note 184, at 357.

state ends through the impermissible *means* of restraining interstate migration.¹⁸⁹ Moreover, the proponents of durational residence restrictions have made it abundantly clear that their very purpose is to prevent poor people from moving into the state.¹⁹⁰

2. Modern Commerce Clause Analysis

Durational residence restrictions fare no better under the Court's contemporary Commerce Clause analysis. Indeed, the current analysis closely resembles the framework employed in *Edwards*, the doctrine having remained relatively stable over the last half-century.¹⁹¹ And while the modern Court's delineation of the negative Commerce Clause admittedly falls short of complete precision and consistency,¹⁹² the fundamental elements of the doctrine have emerged with sufficient clarity for purposes of the present inquiry.

The Court has described its method of reviewing state legislation under the Commerce Clause as a "two-tiered" approach.¹⁹³ Facially neutral statutes that have only an incidental impact on interstate commerce (or incidentally disadvantage out-of-state interests) are assessed under a test that calls for judicial balancing of the local interests against the burdens imposed upon interstate commerce.¹⁹⁴ A facially neutral statute for these purposes is, quite simply, one that does not by its terms discriminate against interstate commerce or out-of-state economic interests.¹⁹⁵ The most widely cited formulation of the balancing test applicable to facially neutral statutes appears in *Pike v. Bruce Church, Inc.*:

189. 314 U.S. at 173-74.

190. See *supra* notes 130-33 and accompanying text.

191. See, e.g., Eule, *supra* note 19; Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. REV. L. & SOC. CHANGE 1, 51 (1989-90).

192. See, e.g., *Kassel v. Consolidated Freightways*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (critiquing the "jurisprudence of the 'negative side' of the Commerce Clause [as] hopelessly confused").

193. E.g., *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986) ("This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause.").

194. E.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted). For an argument that the Court only *claims* to engage in interest balancing, but in fact follows a categorical, "anti-protectionist" analysis, see Regan, *supra* note 187.

195. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), for instance, involved a Maryland statute that prohibited oil refiners from owning retail gasoline operations within the state. Since no oil refiners were located in Maryland, the law had a disparate impact on out-of-state interests. Nevertheless, the statute was considered facially neutral for Commerce Clause purposes because it classified in terms that did not overtly refer to state origin or interstate commerce.

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Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁹⁶

“Protectionist” statutes, on the other hand, are subject to a “virtually *per se* rule of invalidity.”¹⁹⁷ A statute is “protectionist” in this sense if it overtly discriminates against interstate commerce or out-of-state economic interests.¹⁹⁸ It does not matter whether this discrimination is the “ultimate aim” of the state regulation, or simply the instrument for achieving a legitimate, non-protectionist governmental goal. The Court has repeatedly emphasized that “the evil of protectionism can reside in legislative means as well as legislative ends.”¹⁹⁹ In either event, the statute is subject to what the Court has variously termed “the strictest scrutiny”²⁰⁰ or a virtual *per se* rule of invalidity.²⁰¹ On this branch of the analysis, the statute immediately fails, regardless of the degree of impediment to interstate commerce, unless the state convincingly demonstrates that its regulation is narrowly tailored to achieve a legitimate, non-protectionist state interest. Even then, the Court will void the statute absent a showing by the state that its interests cannot be achieved by less discriminatory means. Not surprisingly, the survival rate under this test borders on zero.²⁰²

196. *Pike*, 397 U.S. at 142.

197. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978).

198. For examples of statutes that the Court has found “protectionist” or overtly discriminatory, *see, e.g., Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992) (voiding Alabama statute that imposed higher disposal fees on hazardous waste generated out of state); *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992) (Oklahoma statute requiring coal-fired utilities to burn mixtures containing at least 10% Oklahoma coal violates Commerce Clause); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (striking down West Virginia wholesale gross receipts tax from which in-state manufacturers were exempt); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (holding unconstitutional Florida statute prohibiting out-of-state banks, but not other out-of-state interests, from owning Florida investment advisory businesses).

199. *Fort Gratiot Sanitary Landfill v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019, 2024 (1992) (quoting *City of Phila.*, 437 U.S. at 626 (1978)). This same principle was the unspoken, though clear, basis for the decision in *Edwards* and a number of earlier negative Commerce Clause cases. *See cases cited in City of Phila.*, 437 U.S. at 626-27.

200. *See, e.g., Chemical Waste Management*, 112 S. Ct. at 2014 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 (1982).

201. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 100 (1984).

202. Only one statute has survived strict scrutiny under the Court’s negative Commerce Clause doctrine. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Court upheld a Maine statute that prohibited the importation of certain live baitfish into the state. The Court accepted fact findings by the trial judge that “Maine’s unique and fragile fisheries . . . would be placed at risk by . . . parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine,” and that “non-native species inadvertently included in shipments of live baitfish” could endanger Maine’s aquatic ecology. *Id.* at 141. The Court also accepted fact finding that no workable tests or inspection techniques were available to screen shipments for diseased baitfish or non-native species. *Id.* at 141-42. Because the out-of-state baitfish posed a unique threat to the

The applicability of this analytical framework to durational residence requirements turns upon the resolution of several preliminary issues. First is whether the passage of persons across state borders constitutes commerce protected against state interference by the negative Commerce Clause. There is no need for extended discussion on this score because an unbroken line of cases extending from contemporary times back into the nineteenth century answers the question resoundingly in the affirmative.²⁰³ One might still argue that migration—as opposed to mere transient travel—is excluded from the ambit of “commerce” in the relevant sense, but the Court implicitly rejected that position in *Edwards*.²⁰⁴ Nor do the cases suggest any constitutionally relevant distinction between the two types of interstate movement.²⁰⁵

Another threshold issue is whether the Commerce Clause reaches a state’s “police power” to design its public benefit programs, since social welfare regulations are not “commercial” in the traditional sense. The short answer is that the Court long ago rejected any such categorical approach to the negative Commerce Clause in favor of a functional analysis that asks whether a state regulation in purpose or effect, as an end or a means, interferes with interstate commerce or discriminates against out-of-state economic interests.²⁰⁶ The operative inquiry is not the subject matter of the state legislation, but whether it discriminates on a basis that offends the Commerce Clause.²⁰⁷ Indeed, the Court routinely sustains Commerce Clause challenges to state legislation concerned with public health²⁰⁸ and safety,²⁰⁹ natural

environment that could not be counteracted by any less discriminatory means, the Court sustained the statute. *Id.* at 148 & n.19.

203. See, e.g., *United States v. Guest*, 383 U.S. 745, 757 (1966) (“commerce” includes the interstate movement of persons); *Edwards v. California*, 314 U.S. 160, 172 (1941) (“the transportation of persons is ‘commerce’ within the meaning of [the Commerce Clause]”); *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (movement of persons between states is “commerce”); *Covington Bridge Co. v. Kentucky*, 154 U.S. 204, 218 (1894) (“travel in person” across state lines is “commerce”); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (“[c]ommerce among the States . . . includes the transportation of persons”); see also *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875) (state statute requiring vessel owners to post an indemnity bond for poor relief that might be provided to alien passengers violates Commerce Clause); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (state taxes on passengers arriving from foreign ports violates Commerce Clause); cf. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (invalidating tax on movement of people through state).

204. 314 U.S. at 172 & n.1.

205. See cases cited *supra* note 203; cf. *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (“[I]t is clear that the freedom to travel includes the ‘freedom to enter and abide in any State in the Union.’”) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972)).

206. See, e.g., *TRIBE*, *supra* note 18, at 408.

207. See *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350 (1977) (“[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection area, does not end the inquiry [because] [s]uch a view . . . ‘would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.’”) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)).

208. See, e.g., *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

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resource conservation,²¹⁰ state finances,²¹¹ and the environment.²¹² That the primary subject of durational residence restrictions is also non-commercial does not immunize it from constitutional review under the Commerce Clause.

The principal question, then, is which branch of negative Commerce Clause analysis applies to length-of-residence restrictions on public benefit eligibility. More specifically, it must be determined whether state welfare laws that discriminate against recent interstate migrants are “evenhanded regulations” to be assessed under the *Pike* balancing test, or “protectionist” measures subject to the virtual *per se* rule of invalidity. The answer seems plain. A central purpose of durational residence restrictions has always been to discourage or prevent the passage of poor people into the enacting state.²¹³ And the proponents of recently adopted residence restrictions have repeatedly avowed that the underlying goal is to impede the movement of poor people into their states.²¹⁴ This, of course, is protectionism in its classic form: the attempt by a state to “isolate itself in the stream of interstate commerce from a problem shared by all.”²¹⁵ One need not resolve whether the desire to curtail in-migration by poor families is a state’s ultimate aim or merely a means to advance a non-protectionist state interest, such as the containment of welfare expenditures. In either case, the intentional effort to “block the flow of interstate commerce at [the] State’s borders”²¹⁶ triggers “the strictest scrutiny.”²¹⁷

209. See, e.g., *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1980); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978); *Hale v. Bimco Trading*, 306 U.S. 375 (1939).

210. See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

211. See, e.g., *Edwards v. California*, 314 U.S. 160 (1941).

212. See, e.g., *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

213. See *supra* notes 128-33 and accompanying text. In *Shapiro v. Thompson*, the defendants openly described their durational residence laws as “protective device[s]” designed to “deter[]” the in-migration of needy families. 394 U.S. 618, 627-29 (1969).

214. See *supra* notes 130-33 and accompanying text. Perhaps the most tempered account of legislative purpose was advanced by the New York State Department of Social Services, which described that state’s durational residence restriction as aimed at making a poor person’s decision to move to the state “fiscally neutral.” REGULATORY IMPACT STATEMENT, *supra* note 133. Of course, once one factors in the relatively higher cost of living in New York, it becomes apparent that pegging welfare levels to the lower amounts available in the applicant’s prior state of residence is not “fiscally neutral” at all. Cf. *Green v. Anderson*, 811 F. Supp. 516, 521 (E.D. Cal. 1993) (concluding that a California law capping newcomers’ welfare payments at the amount available in their state of origin “cannot fairly be said to provide the same payment as new residents could have received in [their prior state] since the cost of living . . . generally is much higher in California than elsewhere”). And even if the statute merely sought to curtail cross-border “welfare shopping,” it would still fall within the “protectionist” category because it intentionally discriminates against interstate commerce.

215. *City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978).

216. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 100 (1984) (quoting *City of Phila.*, 437 U.S. at 624).

217. This is the aspect in which negative Commerce Clause analysis more definitively condemns durational residence requirements—and is less susceptible to judicial manipulation—than equal protection doctrine. In equal protection analysis, if a statutory goal—here, deterring the in-migration of poor people—is deemed constitutionally impermissible, the statute might yet be sustained if it bears a rational relationship

One¹ reaches the same conclusion even without considering the many declarations of protectionist motive made by state politicians. State legislation that denies public benefits to new residents facially classifies on the basis of state origin and overtly discriminates against interstate commerce (cross-border migration) and out-of-state interests. This statutory discrimination is explicit and intentional: poor families who have relocated from other states are for that characteristic alone disfavored. These laws are decidedly not “evenhanded regulations”—like highway safety rules,²¹⁸ for example—that apply to all and only incidentally impact on interstate commerce. To the contrary, length-of-residence restrictions expressly single out recent and prospective interstate migrants and target them for especially harsh treatment. These restrictions are closely analogous to state statutes that impose higher taxes on articles imported from outside the enacting jurisdiction—statutes that the Court has uniformly invalidated as violative of the Commerce Clause.²¹⁹ In both cases, a person or item found in-state is disfavored solely because it originated from another state. And, in both instances, the state law does not absolutely prohibit the passage of persons or goods across state borders,²²⁰ but facially discriminates against that movement in the collection or distribution of public money. If anything is certain in negative Commerce Clause doctrine, it is that outright discrimination of this sort draws a statute within the virtual *per se* rule of invalidity, whether or not the state’s ultimate objective is to impede the flow of interstate commerce.

One might object to the foregoing analysis as too sweeping, since states routinely classify on the basis of residence and have compelling reasons to do so. This empirical observation is certainly accurate, and it must also be conceded that essential sovereign attributes would all but vanish if state governments could not condition the franchise, the right to hold high office,

to some other, legitimate state end (or, in the case of a fundamental right, if it is necessary to achieve a compelling state interest). Compare *Shapiro with Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992). In a negative Commerce Clause analysis, by contrast, the consequence of a statute being found to have as a purpose or as an intended means the inhibition of interstate migration is *per se* invalidity, even if the statute might also advance some other, legitimate state interest. See, e.g., *City of Phila.*, 437 U.S. at 624.

218. See, e.g., *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177 (1938); see also *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1980); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978).

219. See, e.g., *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992) (invalidating as Commerce Clause violation Alabama statute that imposed higher “disposal fee” on hazardous waste generated outside of the state); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (invalidating as Commerce Clause violation Ohio statute denying sales tax credit to ethanol produced in other states); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (invalidating as Commerce Clause violation West Virginia wholesale gross receipts tax from which in-state manufacturers were exempted); *Hale v. Bimco Trading*, 306 U.S. 375 (1939) (invalidating as Commerce Clause violation Florida statute that imposed inspection fee on imported, but not locally produced, cement).

220. That a state statute does not “exclude,” but merely “imposes additional costs upon” interstate commerce “makes no difference for purposes of Commerce Clause analysis.” *New Energy*, 486 U.S. at 275-76.

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and entitlement to important public goods on bona fide state residence.²²¹ That is why, even on a Commerce Clause analysis, the Court has recognized that states may openly favor their own citizens in the distribution of government largesse.²²²

Welfare waiting periods, however, are not bona fide residence requirements that enable a state to limit polity-defining public goods to the state community and thereby function “as guardian and trustee for its people.”²²³ Instead, waiting periods draw distinctions *among* bona fide state residents and disfavor those who have recently arrived through the flow of interstate commerce.²²⁴ The Court has consistently emphasized this “difference between bona fide residence requirements and durational residence requirements,” noting that the latter represents discrimination by a state against a discrete group of its own residents.²²⁵ Sovereignty interests of the sort advanced by true residence requirements simply are not implicated here.

The analysis does not change if one conceives of durational residence restrictions as aimed at, or principally disfavoring, nonresidents who would otherwise relocate to the enacting state. Although some “distinctions between [state] residents and nonresidents merely reflect the fact that this is a Nation composed of individual states, and are permitted, other distinctions are prohibited because they hinder the formation, the purpose or the development of a single Union of those States.”²²⁶ Local efforts to deter American citizens

221. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (“A bona fide state residence requirement [for free public schools], appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by [its] residents”); *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) (“[A] State may make residence within its boundaries more attractive by offering direct benefits to its citizens. . . . [This] inheres in the very idea of maintaining the States as independent sovereigns within a larger framework”). See generally William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMMENTARY 9 (1984); Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

222. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 441-42 (1980). In *Reeves*, the Court alternatively conceptualized bona fide residence requirements for education and other core public goods as not “protectionist” at all, or as “‘protectionist’ in a loose sense” but fully justified because “essential” to the very “purpose of state government—to serve the citizens of the State.” *Id.* at 442. See generally Comment, *supra* note 184, at 357.

223. *Reeves*, 447 U.S. at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (quoting *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903))).

224. States that currently impose durational requirements make no pretense that such restrictions are necessary administrative devices to determine bona fide residence. See *supra* notes 130-33 and accompanying text; cf. *Shapiro v. Thompson*, 394 U.S. 618, 636 (1969) (rejecting state contention that waiting periods rationally enhanced the administration of bona fide residence requirements). Any such argument would be inconsistent with the structure of current state welfare restrictions which—in all but one case—accept newcomers as bona fide residents but deny them the same level of public assistance available to longer-term inhabitants. See *supra* notes 110-27 and accompanying text.

225. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); see also *Martinez*, 461 U.S. 321; *Shapiro*, 394 U.S. at 636.

226. *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978).

from migrating between states and establishing state residence at their point of destination plainly fall on the impermissible side of this dichotomy.²²⁷

The remaining inquiry is whether durational residence restrictions can survive the close judicial scrutiny that attaches to "protectionist" legislation. On this branch of the analysis the state bears a nearly insurmountable burden of justification.²²⁸ Legislation that facially discriminates against "commerce coming from outside the State" will be invalidated without further inquiry unless the state convincingly demonstrates that "there is some reason, apart from [its] origin, to treat [the incoming commerce] differently."²²⁹ The only such demonstration ever found sufficient by the Court was the extensive trial presentation made by the State of Maine, which empirically established that baitfish from outside the state carried parasites uncommon in, but potentially devastating to, the Maine aquatic ecosystem.²³⁰ The Court held this to be a valid, non-protectionist reason for discriminating against interstate commerce because a characteristic *other than the origin* of the embargoed baitfish made them a peculiar source of the environmental threat that the state legitimately sought to avoid.²³¹ No similar showing is possible with respect to durational residence requirements for welfare. Indeed, no state has even suggested a neutral basis for distinguishing newly arrived poor families from any other needy family residing in the state. To the contrary, the evidence is that the states with durational residence restrictions have discriminated against newcomers almost exclusively on account of recent passage across state boundaries.²³² This is a prohibited purpose that in itself would doom the statutes. Moreover, even if no evidence of an impermissible goal existed, the legislative failure to articulate some non-protectionist reason for singling out newcomers is fatal at this stage of a negative Commerce Clause analysis, since

227. This proposition is established by *Edwards* and a line of decisions known as the "right to travel" cases. See, e.g., *Dunn*, 405 U.S. at 338 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970)) ("it is clear that the freedom to travel includes the 'freedom to enter and abide in any State in the Union'"); see also *Zobel v. Williams*, 457 U.S. 55 (1982); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). In an oft-quoted passage that captures the solidity of this notion, Justice Stewart declared for the Court that "[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. . . . [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 757-58 (1966). So foundational was the right of citizens to interstate movement, that the Court found it constitutionally protected against both state and private infringement. *Id.* at 757-60. See also *Cohen*, *supra* note 221, at 17 (arguing that "[o]ne aspect of full sovereignty denied to the states [by the Fourteenth Amendment] is the power to determine membership in the community"). See generally *Katz*, *supra* note 29.

228. "At a minimum . . . facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

229. *City of Phila. v. New Jersey*, 437 U.S. 617, 626-27 (1978).

230. *Maine v. Taylor*, 477 U.S. 131, 140-42 (1986), discussed *supra* note 202.

231. *Id.*

232. See *supra* notes 130-33 and accompanying text. In some states, there are racial overtones to the reaction against poor migrants. See *supra* note 161.

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courts may neither supply legitimating rationales not advanced by the lawmakers themselves, nor consider “evidence [not] before or available to them that might have supported their judgment.”²³³

The one interest that every enacting state *has* advanced as justification for denying new residents regular welfare benefits is cost-savings.²³⁴ But even if one ignores the objections outlined above and assumes that the states could demonstrate the requisite “close fit”²³⁵ between this goal and durational residence requirements,²³⁶ ordinary fiscal concerns fall far short of the special justification demanded at this stage of the analysis. To begin with, the states could not possibly prove the absence of any less discriminatory method for achieving what they themselves have projected as a *de minimis* financial benefit.²³⁷ One can readily imagine any number of evenhanded, across-the-board program reductions or tax increases that would address the asserted fiscal interests not merely “as well as” durational residence restrictions, but more efficiently than those overtly discriminatory measures.²³⁸ Given the near absolute fungibility of budgetary inputs and outputs, it would be difficult not to classify durational residence restrictions as among the *most* discriminatory fiscal reform means available to the states. Moreover, the cases strongly suggest that financial concerns of the type here involved are categorically insufficient to justify outright discrimination, even absent any less restrictive alternatives.²³⁹ Indeed, the Court reaffirmed just last Term that preservation of the state fisc cannot constitutionally support local efforts, whether means or ends, to inhibit interstate migration by needy families:

233. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 680 (1981) (Brennan, J., concurring); *see also Hughes v. Oklahoma*, 441 U.S. 322, 338 n.20 (1979) (refusing to accept “*post hoc* rationalization[s]” offered in support of state legislation that discriminates against interstate commerce).

234. *See supra* notes 128-44 and accompanying text.

235. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982).

236. *But see supra* notes 134-48 and accompanying text (discussing the near total absence of supporting data for state legislation imposing durational residence restrictions and the extreme administrative costs that render such restrictions a highly inefficient method of budget reduction).

237. *See supra* notes 146-47 and accompanying text.

238. *See supra* note 148 and accompanying text (explaining excessive administrative costs associated with and actually projected for durational residence requirements).

239. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 626-27 (1978) (“[W]e assume New Jersey has every right to protect its residents’ pocketbooks. . . . [but this] may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”).

No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade. . . .

"The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition; or to create jobs by keeping industry within the State; or to preserve the State's financial resources from depletion by fencing out indigent immigrants."²⁴⁰

The issues surrounding poverty in America are even more national in today's highly interdependent welfare-state economy than when the Court observed fifty years ago that "the relief of the needy has become the common responsibility and concern of the whole nation."²⁴¹ State attempts to embargo this national problem by discouraging the in-migration of needy Americans are plainly unconstitutional on the prevailing interpretation of the Commerce Clause.

The doctrinal analysis to this juncture establishes that the Commerce Clause in its negative aspect forbids durational residence restrictions on welfare. There remains, however, the prospect that an affirmative exercise of the commerce power by Congress might rescue such laws from unconstitutionality. Since 1946, the Court has consistently held that Congress may authorize states to legislate in ways that the Commerce Clause would otherwise prohibit.²⁴² The theory is that negative Commerce Clause doctrine merely creates a judicial presumption that congressional silence—the commerce power in its dormant state—signifies an intent to prohibit local interference with interstate commerce. Once Congress breaks silence, however, the presumption no longer operates. And since the Constitution vests Congress with plenary power over interstate commerce, that power may be exercised by "permit[ting] states to regulate . . . in a manner which would otherwise not be permissible."²⁴³

As noted above, several states have secured permission from the federal Department of Health and Human Services (HHS) to deny full AFDC benefits to needy families that have recently migrated from another state.²⁴⁴ These permissions were dispensed pursuant to Section 1115 of the Social Security

240. *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009, 2012-13 (1992) (quoting *City of Phila.*, 437 U.S. at 627) (internal citations and quotations omitted) (emphasis added).

241. *Edwards v. California*, 314 U.S. 160, 175 (1941).

242. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174 (1985); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 91-92 (1984); *Prudential Ins. v. Benjamin*, 328 U.S. 408, 425 (1946); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) (dictum). The *Prudential Insurance* and *Southern Pacific* decisions are widely regarded as having laid the theoretical foundation for this doctrine, although the Court had much earlier recognized a congressional authority to immunize state laws from Commerce Clause review. See *In re Rahrer*, 140 U.S. 545, 562 (1891). See generally Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947).

243. *Southern Pac.*, 325 U.S. at 769.

244. See *supra* notes 114, 125-26 and accompanying text. Absent HHS approval, durational residence restrictions on AFDC benefits would violate federal law. See *supra* notes 103-04 and accompanying text.

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Act,²⁴⁵ which authorizes HHS to waive state compliance with any federal AFDC requirement “[i]n the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the Act].”²⁴⁶ An argument might therefore be made that durational residence restrictions possessed of this federal imprimatur enjoy immunity from any Commerce Clause objection.²⁴⁷ The argument would present an issue of first impression, but the case for congressional consent seems exceedingly weak.

The commerce power resides with Congress, not with the executive, much less with an administrative agency.²⁴⁸ Since only Congress may validate state measures that would otherwise contravene the Commerce Clause,²⁴⁹ the

245. 42 U.S.C. § 1315 (West 1991).

246. *Id.* § 1315(a).

247. *Cf. Shapiro v. Thompson*, 394 U.S. 618, 666 (1969) (Harlan, J., dissenting) (suggesting that Congress could empower the States to impose durational residence requirements even if such requirements would otherwise violate the Commerce Clause).

248. U.S. CONST. art. I, § 8, cl. 3.

249. The Court has uniformly required a strong showing of *congressional* approval before finding validation of a state law that impedes interstate commerce. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138-39 (1986); *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174 (1985); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 91 (1984); *Prudential Ins. v. Benjamin*, 328 U.S. 408, 430-31 (1946); *see also Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). In one case involving the “dormant Foreign Commerce Clause,” however, the Court posed the issue as whether a policy of the “Federal Government” (not Congress in particular) immunized a state tax law from constitutional attack. *Wardair Canada, Inc. v. Florida Dep’t of Revenue*, 477 U.S. 1 (1986). In *Wardair*, a Canadian airline challenged the application of a uniform Florida tax to the purchase of aviation fuel for its international flights. The parties agreed that the nondiscriminatory tax would pass muster on an interstate Commerce Clause analysis. *Id.* at 8-9. However, since *foreign* commerce was implicated, the Court required that the tax undergo two additional inquiries, including “whether the tax prevents the Federal Government from ‘speaking with one voice when regulating commercial relations with foreign governments.’” *Id.* at 8 (quoting *Japan Line v. County of L.A.*, 441 U.S. 434, 451 (1979)). On the merits, the Court held that a number of international agreements evinced a federal policy to permit the challenged state tax. *Id.* at 10-12.

Notwithstanding some loose dicta to the contrary, *see id.* at 12, the only hope of reconciling *Wardair* with the theory of the Commerce Clause established by prior and subsequent cases is to read it as a rule that non-congressional, “federal government” approval may excuse state laws only from dormant *foreign* Commerce Clause challenge, or perhaps only from the additional hurdles imposed on state laws in that context. (The latter was the sole practical effect of “federal approval” in *Wardair* since the Florida tax was unobjectionable under an ordinary *interstate* Commerce Clause analysis. *Id.* at 8-9.) This interpretation of *Wardair* neatly corresponds to the underlying values that the Court has offered for its interstate and foreign Commerce Clause doctrines. As explained below, *infra* notes 254-55, 293-301 and accompanying text, the Court closely scrutinizes local laws that discriminate against interstate commerce because—among other reasons—“[u]nrepresented interests . . . often bear the brunt of [such legislation].” *South-Central Timber*, 467 U.S. at 92. Congress may authorize discriminatory state laws, but the Court demands an “unambiguous” expression of congressional intent to do so. The Court has adopted this rule to ensure that an open, deliberate decision, arrived at “collectively” by all affected interests, has actually been made to permit state-based discrimination. *Id.*; *see also Taylor*, 477 U.S. at 139-40. Although express consideration and authorization by Congress may plausibly be regarded a “collective decision,” unilateral action by the Executive or its administrative agencies quite clearly may not. The analysis with respect to *foreign* Commerce Clause doctrine, however, proceeds on an altogether different theory. The Court polices local discrimination against foreign commerce not because foreign interests are unrepresented in state legislatures, but rather because national uniformity under the aegis of the federal government is thought essential in the international sphere. *See Japan Line*, 441 U.S. at 448 (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)) (“In international relations and with respect to foreign intercourse and trade the people

requisite assent must be discovered, if at all, in the general waiver authority conferred on HHS by section 1115 of the Social Security Act. This is unlikely, though, because the Court demands unusually strong evidence before it will conclude that Congress meant to ratify an otherwise unconstitutional state law. Indeed, the ordinary rules of statutory analysis do not apply in this context. Rather, “for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*.”²⁵⁰ It is not enough that the state law be consistent with or even advance a “parallel federal policy.”²⁵¹ Nor will intent on a specific matter be inferred from general legislation. Congress must “affirmatively contemplate otherwise invalid state legislation” for assent to be found.²⁵²

The stringency of these rules derives from the democratic governance value of the Commerce Clause. As the Court explains it, one reason for disfavoring protectionist or discriminatory measures is that they frequently disadvantage interests unrepresented in the enacting state’s political process.²⁵³ When Congress authorizes discriminatory state legislation, by contrast, the decision is a “collective” one in which “all segments of the country are represented.”²⁵⁴ The Court’s insistence upon the clearest evidence of congressional authorization is said to minimize the risk of adverse action against unrepre-

of the United States act through a single government with unified and adequate national power.”). Since the paradigm here is “single national voice,” not “collective decisionmaking,” even non-congressional approval of state laws by the federal government might be accepted as consistent with the theory and policy concerns underlying the foreign Commerce Clause doctrine.

250. *South-Central Timber*, 467 U.S. at 91 (emphasis added); see, e.g., *Taylor*, 477 U.S. at 139 (“An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny.”); *TRIBE*, *supra* note 18, at 525 (the Court will “examine federal legislation carefully before upholding a [protectionist] state law”). The principle that Congress must speak with special clarity and directness to alter the usual distribution of governmental powers has emerged in a number of constitutional settings. See, e.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991) (holding that application of federal Age Discrimination in Employment Act to a state law mandating retirement of judges at age 70 would “upset the usual constitutional balance of federal and state powers,” and therefore required an “unmistakably clear” textual expression of congressional intent) (internal quotations omitted); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (holding that states may not be sued under the Civil Rights Act of 1871, 42 U.S.C. § 1983, because statute does not contain “unmistakably clear” language subjecting states to liability) (internal quotations omitted); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (holding that Congress must make its intention to abrogate states’ Eleventh Amendment immunity “unmistakably clear in the language of the statute”); cf. *United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement ensures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”).

251. *South-Central Timber*, 467 U.S. at 91.

252. *Id.* at 91-92.

253. See *infra* notes 293-301 and accompanying text.

254. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 92 (1984).

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sented interests by ensuring that the national political process has in fact generated a collective decision.²⁵⁵

It would appear beyond dispute that, by these standards, Congress's broad and nonspecific delegation of waiver authority to HHS falls short of immunizing state durational residence restrictions from constitutional review. Section 1115 itself rules out any credible argument for "unmistakably clear intent" or open and deliberate approval by the national political process. The terms of the statute yield no hint that Congress affirmatively contemplated the authorization of durational residence restrictions or of any other measure that would otherwise violate the Commerce Clause. To the contrary, section 1115 eschews specifics in favor of vesting HHS with discretion to approve a nearly limitless and unforeseeable variety of demonstration projects that a state might develop and propose.²⁵⁶ A deliberate and collective decision to authorize what amounts to discrimination against residents from relatively low-benefit states is anything but apparent in section 1115. There is no evidence that Congress "affirmatively contemplate[d]" authorization of durational residence restrictions that would otherwise violate the Constitution. Nor, obviously, could the procedure established by section 1115—a bilateral exchange involving officials from the petitioning state and bureaucrats from HHS²⁵⁷—claim the mantle of "collective decisionmaking," even if agency action could under any circumstances authorize state measures violative of the Commerce Clause.²⁵⁸

255. *Id.*; see also *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (quoting *South-Central Timber*, 467 U.S. at 92) ("Absent a 'clear expression of approval by Congress,' any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.'").

256. See 42 U.S.C. § 1315(a)(1) (1991) ("[T]he Secretary may waive compliance with any of the [relevant federal] requirements . . . to the extent and for the period he finds necessary to enable such State or States to carry out [a proposed demonstration] project . . .").

257. See § 1315(b)(3) (1991). The statute does require that states seeking approval for a demonstration project "issue a public notice" of their proposal and "invite comment," but it neither specifies the nature of the public notice, nor, apparently, requires publication outside of the petitioning state. § 1315(b)(3)(A).

258. Although section 1115 authorizations quite clearly fail to save state durational residence restrictions in the AFDC program, it remains true that the Achilles' heel of any negative Commerce Clause claim is its apparent susceptibility to displacement by future, simple-majority legislation. See *Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946) (suggesting that Congress possesses unrestricted power to authorize state "regulation" of interstate commerce). And while the modern Court has apparently disclaimed any judicial role in defining Congress' affirmative commerce power, *but see New York v. United States*, 112 S. Ct. 2408 (1992) (holding that Congress exercises its conferred power subject to constitutional constraints), one might nevertheless construct an argument that discrimination against interstate migration by needy Americans treads too heavily on core Commerce Clause interests to be permitted even upon congressional authorization. Cf. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341 (advocating as limit on Congress' power under positive Commerce Clause "a jurisprudence . . . aimed at preserving and enhancing the national political process.").

IV. WELFARE RESTRICTIONS AND THE UNDERLYING VALUES OF THE COMMERCE CLAUSE

The previous Part demonstrated that established Commerce Clause doctrine provides a constitutional check against durational residence restrictions on welfare. This Part carries the analysis further, arguing that state efforts to deter cross-border migration by poor people also offend the principal values underlying the Commerce Clause. From early on, the Court has recognized that while the Commerce Clause has as its stated purpose the regulation of commerce, the mission of the provision is far broader.²⁵⁹ Over the years, three discernible values have emerged as justifications for judicial development and enforcement of the extra-textual negative Commerce Clause: free trade, national union, and democratic governance. Scholars have vigorously debated the relative merits of these approaches, both in terms of descriptive accuracy and normative attractiveness.²⁶⁰ The purpose of the discussion that follows is not to enter this debate, but rather to show that discriminatory state welfare policies undermine each of the values that courts and commentators associate with the negative Commerce Clause.

A. *Free Trade Value*

One value said to animate negative Commerce Clause doctrine is the advancement of "free trade" among the states of the union.²⁶¹ The Court has long suggested that "[t]he very purpose of the Commerce Clause was to create

259. See, e.g., *Welton v. Missouri*, 91 U.S. 275, 280 (1876) (noting that while commerce power most directly speaks to matters commercial, "[t]he very object of investing this power in the [National] Government" is larger end of eradicating "discriminating State legislation").

260. For a concise description of the current debate and competing schools of thought on the negative Commerce Clause, see *TRIBE*, *supra* note 18, at 402 & n.6.

261. A number of commentators have critiqued the free trade theory both on a descriptive and normative level. They point out that the Commerce Clause nowhere expresses a substantive preference for "free trade" as opposed to regulated markets, but merely centralizes the power "to regulate commerce . . . among the States" in the national government. See, e.g., Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 *TEX. L. REV.* 71, 78-80 (1980) (questioning assumptions about Commerce Clause's commitment to free trade as opposed to regulated markets); Eule, *supra* note 19, at 430 (arguing that the Constitution "did not attempt to solve economic parochialism by an express prohibition against interference with free trade"). Others have linked the "free trade" interpretation of the Commerce Clause to the judicial advancement of laissez faire economic theory in the late eighteenth and early nineteenth centuries. See Gey, *supra* note 191; *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 562-63 (1949) (Black, J., dissenting) ("The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory . . . The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation. . . .").

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an area of free trade among the several States”²⁶² so that the Nation would comprise a “federal free trade unit.”²⁶³ Some commentators contend that the federal convention of 1787 was called principally to address the issue of state interference with free trade.²⁶⁴ And the substantive value of free trade has been a persistent theme in the Commerce Clause case law.²⁶⁵

The classic statement of the free trade theory appears in Justice Jackson’s majority opinion in *H.P. Hood & Sons v. Du Mond*:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.²⁶⁶

Embedded in this theory is the notion that local interference with “free market” allocation prevents the most productive deployment of resources and generates inefficiencies that reverberate throughout the economy.²⁶⁷ As elaborated by the Court, this “free trade” value of the Commerce Clause has come to

262. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); see also *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946) (purpose of Commerce Clause was to “creat[e] an area of trade free from interference by the States”); *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557, 573 (1886) (arguing that “the entire freedom of commerce among the States” was “deemed essential to a more perfect union by the framers of the Constitution”).

263. *H. P. Hood*, 336 U.S. at 538. See generally Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957); Bernard Schwartz, *Commerce, the States, and the Burger Court*, 74 NW. U. L. REV. 409, 411 (1979); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 986 (1985).

264. See, e.g., *Eule*, *supra* note 19, at 435 (“the Constitutional Convention was prompted by commercial protectionism”); FRANKFURTER, *supra* note 34, at 13 (the federal convention sought principally to “remove those commercial obstructions and harassments to which the militant new free states subjected one another.”); Sedler, *supra* note 263, at 993 (“It was a widely held belief at the time of the adoption of the Constitution that the Articles of Confederation had failed, in large part, because the states had waged destructive trade wars against one another.”). But see Edmund W. Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM AND INTERSTATE COMMERCE 9-19 (A. Dan Tarlock ed., 1981) (arguing that the Confederation was an economic success).

265. See, e.g., Sedler, *supra* note 263, at 982-83 and cases there collected; see also *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669 (1981) (“The Clause requires that some aspects of trade generally must remain free from interference by the States.”); *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350 (1977) (adverting to “the Commerce Clause’s overriding requirement of a national ‘common market’”). Early expositions of the theory appear in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), and in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

266. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949). For an argument that Justice Jackson’s formulation establishes not a “free trade” principle, but a “nondiscrimination” principle, see Sedler, *supra* note 263, at 983-84.

267. See, e.g., Regan, *supra* note 187, at 1118; see also THE FEDERALIST No. 12 (Alexander Hamilton) (arguing that eliminating state trade barriers would permit more efficient development of agriculture and industry).

encompass an "anti-protectionist" principle, a "free location" principle, and a general "market efficiency" principle. These three currents of thought overlap in significant respects. The anti-protectionist command forbids state action "designed to benefit in-state economic interests by burdening out-of-state competitors."²⁶⁸ The free location tenet condemns state laws that interfere with economic actors' freedom "to choose the state where various conditions give them a competitive advantage in the national marketplace."²⁶⁹ Intersecting both these approaches is the "market efficiency" principle, which disapproves local interference with "the natural functioning of the interstate market"²⁷⁰ and its free allocation of economic factors, at least absent some sufficiently weighty countervailing benefit.²⁷¹

Durational residence restrictions on public assistance are inconsistent with each of these free trade principles. As discussed earlier, states impose such restrictions in order to inhibit the free movement of low-income citizens across state borders. This type of legislation presents a pure form of prohibited "protectionism" because it seeks to externalize costs by insulating the enacting state against the perceived ills of the national economy. Length-of-residence requirements also violate the principle of free location, which reaches persons as well as goods and capital.²⁷² It has long been recognized that settlement laws and related restrictions on relief have prevented the free movement of labor to where it might most advantageously be employed.²⁷³ Finally,

268. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *see, e.g., Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (invalidating Hawaii statute that exempted from state liquor tax fruit wines manufactured in the State from products grown in the State); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidating New York law that prohibited importation of milk purchased out-of-state for less than New York state-mandated price); *Regan, supra* note 187, at 1095 (defining prohibited "protectionism" under a free trade theory as state efforts to put local actors in a better competitive situation).

269. *See Sedler, supra* note 263, at 985; Earl Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); *see also South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984) (invalidating Alaska's attempt to require that timber taken from state lands be processed in state before export); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (invalidating Florida law that prohibited out-of-state banks from offering investment advisory services in Florida); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating order of Arizona official requiring cantaloupe producers to locate packing operations within the state); *Foster-Fountain Packing v. Haydel*, 278 U.S. 1 (1928) (invalidating Louisiana law that prohibited the export of shrimp unless heads and hulls had been removed in state).

270. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)).

271. *See, e.g., Richard B. Collins, Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 63 (1988); Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 45-46 (1983); David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post-Industrial 'Natural' Resources and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1314; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 509-524 (1977).

272. *See, e.g., Collins, supra* note 271, at 60 ("[a] common market requires reasonable mobility of goods and people across interior borders").

273. Franklin D. Roosevelt, upon signing the Social Security Act, inveighed against durational residence requirements, arguing that such measures inhibited the free migration of workers. *See Shapiro v. Thompson*, 394 U.S. 618, 640 n.24 (1969); *see also PIVEN & CLOWARD, supra* note 2, at 144 n.30 (discussing the English Act of 1795, which relaxed existing settlement restrictions to free the movement of laborers); *Rosenheim, supra* note 134, at 310 (quoting 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW

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durational residence restrictions generate a variety of social and market inefficiencies. Richard Posner has observed that the absence of nationally mandated welfare rules invites states to export poverty either by setting benefits at very low levels or by attempting to exclude the poor with length-of-residence requirements.²⁷⁴ The latter strategy, Posner notes, distorts the labor market and impedes the efficient deployment of resources by “discourag[ing] the migration of . . . poor famil[ies] that [are] motivated by superior [employment] opportunities in the high welfare state.”²⁷⁵

B. *National Unity Value*

The second value associated with the Commerce Clause is national union. This value also traces its origins to the early days of the Republic and the framing of the Constitution.²⁷⁶ In contrast with the free trade interpretation, the “political union” theory of the Commerce Clause identifies the central concern as “ensur[ing] national solidarity, not economic efficiency.”²⁷⁷ Protectionist state laws are inconsistent with this value because they encourage destructive interstate “rivalries and retaliations” and thereby threaten national cohesion.²⁷⁸ Internal barriers to trade are disallowed, not because they distort the market, but because they are irreconcilable with the very idea of nationhood. As Justice Cardozo most memorably put it, the Constitution forbids parochial legislation “upon the theory that the peoples of the several states

352 (1924)) (relating view that settlement and residence requirements in the English poor laws interfered with free trade and “the growth of the capitalistic organization of industry”).

274. POSNER, *supra* note 271, at 519-21.

275. *Id.* Posner also argues that inefficiencies arise when states set benefits levels very low because this may “discourag[e] indigents in high welfare benefit states from seeking employment in other areas.” *Id.* at 521 n.2; cf. MICHAEL WALZER, SPHERES OF JUSTICE 37 (1983) (“The same writers who defended free trade in the nineteenth century also defended unrestricted immigration. . . . In their view, as Henry Sidgwick reported it in the 1890s, the only business of state officials is ‘to maintain order over [a] particular territory . . . but not in any way to determine who is to inhabit this territory, or to restrict the enjoyment of its natural advantages to any particular portion of the human race.’”).

276. *See, e.g.*, THE FEDERALIST Nos. 6-9, 11 (Alexander Hamilton). In this regard, it has been suggested that Chief Justice Marshall developed the Commerce Clause in its negative aspect “to realize James Wilson’s goal of [b]urying all local interests and distinctions’ in order to become ‘one nation of brethren.’” *See Gey, supra* note 191, at 6; 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 166-67 (Max Farrand ed., 1937).

277. TRIBE, *supra* note 18, at 417.

278. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”²⁷⁹ “To give entrance to” state protectionism, he warned, “would be to invite a speedy end to our national solidarity.”²⁸⁰

The modern Court has frequently adverted to political union as the central value promoted by judicial enforcement of the negative Commerce Clause.²⁸¹ This ideal of national unity assumes special force and value during times of national crisis or periods of economic downturns, as states attempt to secede from problems of national scope.²⁸² Legislation that openly and unabashedly discriminates against out-of-state interests poses the sharpest threat to interstate harmony and so has most often been held to be inconsistent with the Commerce Clause concept of union.²⁸³

Durational residence restrictions on welfare undermine the goal of national solidarity in at least three respects. First, they abort the possibility of a national response to poverty in favor of a beggar-thy-neighbor approach that seeks to export the problem instead of solve it.²⁸⁴ Second, durational residence restrictions provoke internecine rivalries and destructive competition among the states. The adoption of such restrictions by even one or two states invariably triggers a chain reaction, causing other states to erect similar barriers for fear of becoming the only non-forbidden destination for the country’s poor.²⁸⁵ And the political discourse surrounding these laws is rife with hostile cross-

279. *Id.* Justice Frankfurter described this theory of the negative Commerce Clause as proceeding on the premise that “State authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community.” FRANKFURTER, *supra* note 34, at 18-19. Justice Holmes described the rationale for judicial enforcement of the negative Commerce Clause in similar terms: “I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.” OLIVER W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).

280. *Baldwin*, 294 U.S. at 523.

281. *See, e.g.*, *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533-35 (1949) (“[the] Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to [the commerce clause in its dormant state]”); *Duckworth v. Arkansas*, 314 U.S. 390, (1941); *Baldwin*, 294 U.S. at 522-23.

282. *See Sedler, supra* note 263, at 886-87.

283. *See TRIBE, supra* note 18, at 417 (arguing that Court’s pattern of tolerating discriminatory effects, even of large magnitude, but refusing to tolerate outright, facial discrimination, even if trivial, proves that main values animating the dormant Commerce Clause doctrine are interstate harmony and national unity).

284. *Cf. Taylor, supra* note 3.

285. This dynamic was apparent from the prevalence of interstate reciprocal exemption agreements in pre-*Shapiro* durational residence statutes. *See Shapiro v. Thompson*, 394 U.S. 618, 635 & n.15 (1969) (noting that both state defendants had “entered into open-ended interstate compacts” that waived the one-year ineligibility period for anyone migrating from another participating state); *see also* *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379-81 (1976) (holding that state barriers to commerce with waivers under reciprocity agreements cannot be justified as response to or countermeasure against protectionist legislation by other states); *cf. Katz, supra* note 29, at 148-49 (recounting that when populist governor Lorenzo D. Lewelling declared unconstitutional the State of Kansas’ vagrancy laws, “[o]ne observer reported that tramps were flocking to Kansas from across the country and increasing the crime rate”).

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border fingerpointing and invective.²⁸⁶ Lastly, and most importantly, the proliferation of state laws designed to restrain the interstate movement of American citizens is antithetical to the very concept of nationhood.²⁸⁷ Justice Douglas, though not a supporter of projecting the Commerce Clause into any area touching upon human rights,²⁸⁸ cautioned that to permit state restrictions on interstate migration by poor people “would be to contravene every conception of national unity.”²⁸⁹ In this same vein, the Court has repeatedly asserted that a constitutional right to interstate travel inheres in and is “fundamental” to “the concept of our Federal Union,”²⁹⁰ and that state discrimination against its newer residents “conflicts with the constitutional purpose of maintaining a Union rather than a mere ‘league of States.’”²⁹¹ Finally, whether one conceives of durational residence restrictions as an attempt to fence out needy Americans from other states or as the relegation of poor newcomers to a *de jure* subordinate caste, such legislation strikes at the heart of national union by rejecting one of its irreducible attributes: the concept of national citizenship.²⁹²

286. See *supra* notes 130-33, 162 and accompanying text. California’s defense of its exclusion statute in *Edwards* most vividly exemplifies the genre:

States that have so long tolerated, and even fostered, the social conditions that have reduced these people to their state of poverty and wretchedness [should not] be able to get rid of them by low relief and insignificant welfare allowances and drive them to become our public charges at our immeasurably higher standard of social services. . . . Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.

Edwards v. California, 314 U.S. 160, 168 (1941) (argument for appellee); see also *Thompson v. Shapiro*, 270 F. Supp. 331, 341 (D. Conn. 1967) (dissent) (arguing that absent the “deterrent” of a durational residence restriction, Connecticut would become a “refuge for welfare recipients of other states” who “might be encouraged or even assisted” to migrate to Connecticut by officials of other states).

287. See CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 28-29 (1969) (arguing that “internal barriers to travel are unthinkable” if national unity is to prevail).

288. See *supra* note 25 and accompanying text.

289. *Edwards*, 314 U.S. at 181 (Douglas, J., concurring). Professor Regan may be correct in asserting that “when states distribute benefits, they can prefer their own citizens” without seriously offending “the concept of union.” Regan, *supra* note 187, at 1194. But, as discussed earlier, *supra* notes 221-24 and accompanying text, durational residence restrictions are not citizen preference measures in this sense. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 334, 337 & n.7, 338-43, 350-52 (1972) (emphasizing the critical constitutional distinction between bona fide state residence requirements and durational residence restrictions). To the contrary, such restrictions deeply offend the concept of union by attempting to deny poor people from other parts of the country the opportunity to affiliate with the enacting state’s polity and become full citizens of the community.

290. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

291. *Zobel v. Williams*, 457 U.S. 55, 72-73 (1982) (O’Connor, J., concurring); see *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) (“[W]ithout some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists . . .”).

292. See *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring) (“[I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining

C. *Democratic Legitimacy Value*

A third value underlying negative Commerce Clause doctrine is democratic governance. An issue of democratic legitimacy arises whenever a state regulation discriminates against out-of-state interests. In such cases, the state imposes a disproportionate burden upon those who have neither voice nor representation in the state legislative process and are powerless to hold decision-makers politically accountable.²⁹³ Close judicial scrutiny under the Commerce Clause has often been rationalized as a necessary corrective and check upon this undemocratic latency in our federal system.²⁹⁴ Justice Stone introduced this theory of the Commerce Clause²⁹⁵—which exemplifies a process-based, representation reinforcement approach to constitutional review²⁹⁶—in *South Carolina State Highway Dept. v. Barnwell Bros.*:

State regulations affecting interstate commerce, whose purpose or effect is [to discriminate against outside interests] have been thought to impinge upon the constitutional prohibition [imposed by the negative Commerce Clause].

resultant citizenship thereof. If national citizenship means less than this, it means nothing.”); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873) (“[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.”). See generally Varat, *supra* note 221.

293. Some have argued that a similar problem arises even with *nondiscriminatory* state laws that act upon outsiders, since the state in such instances effectively exercises sovereignty without the consent of the governed. See, e.g., Lea Brilmayer, Carolene, *Conflicts, and the Fate of the 'Inside-Outsider,'* 134 U. PA. L. REV. 1291 (1986). Despite this perceived difficulty, evenhanded state laws have been tolerated on the theory that the affected in-state constituencies will provide an adequate check against political abuse and “virtually represent” similarly situated out-of-state interests. See, e.g., *South Carolina State Highway Dep’t v. Barnwell*, 303 U.S. 177, 187 (1938) (“The fact that [the regulations] affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.”); see also *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473 n.17 (1981) (“The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.”).

294. See, e.g., Eule, *supra* note 19, at 445; Tushnet, *supra* note 20, at 128-29; see also TRIBE, *supra* note 18, at 411 (contending that the dormant Commerce Clause proceeds on the “premises that unaccountable power is to be carefully scrutinized and that legislators are accountable only to those who have the power to vote them out of office”).

295. The doctrinal forbear of this approach to the Commerce Clause is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819), where the Court invalidated a state tax on a federal instrumentality, in part on the theory that the state legislative process did not represent, and could not be expected adequately to attend to, the national interests affected.

296. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

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Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.²⁹⁷

The Court has repeatedly returned to this “process perfecting” rationale for vigilant judicial enforcement of the Commerce Clause against state legislation.²⁹⁸ In advancing this value, the Court focuses “on a question of political procedure rather than economic substance: whether the burden of the legislation falls on groups too weak politically to participate in the battle of interest groups.”²⁹⁹ A number of commentators have embraced this democratic-structural approach to the Commerce Clause, some on the view that “[t]he contemporary dangers of state parochialism lie in its evisceration of the democratic process, not in its impairment of free trade,”³⁰⁰ others because the approach strikes them as most consistent with proper judicial respect for majoritarian decisionmaking and the “realities of national politics.”³⁰¹

State laws that deny or reduce subsistence benefits to newcomers are prime candidates for judicial invalidation on a democratic process theory of the Commerce Clause. Poor people are among the most politically marginalized and defenseless constituencies in America. In a nation where political and economic power converge, the “democratic process” operates less than democratically with respect to the have-nots, even within their own states.³⁰² State discrimination against a class of poor out-of-staters, therefore, casts the issue

297. 303 U.S. at 185 n.2 (1938) (citations omitted). Justice Stone’s process-based formulation of Commerce Clause doctrine in *Barnwell* presaged the language and theoretical framework that he employed several months later in the renowned footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry.”).

298. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (“any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases ‘the risk that unrepresented interests will be adversely affected by restraints on commerce.’”) (quoting *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 92 (1984)); *Southern Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 767-68, n.2 (1945) (“[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”); *see also Kassel v. Consolidated Freightways*, 450 U.S. 662, 676 (1981); *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333 (1979); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 444 n.18, 447 (1978).

299. *Anson & Schenckan*, *supra* note 261, at 83; *see also Dowling*, *supra* note 242, at 15-19; *Eule*, *supra* note 19, at 445; *Redish & Nugent*, *supra* note 166, at 612; *TRIBE*, *supra* note 18, at 402; *Tushnet*, *supra* note 20, at 132-33. The democratic value of the Commerce Clause has also been associated with substantive features. *See, e.g.*, *Walter Hellerstein, State Taxation and the Supreme Court: Toward A More Unified Approach to Constitutional Adjudication*, 75 MICH. L. REV. 1427, 1446-52 (1977); *Sedler*, *supra* note 263, at 893. *But see Collins*, *supra* note 271, at 46; 110-29.

300. *Eule*, *supra* note 19, at 428.

301. *Tushnet*, *supra* note 20, at 164-65; *see also ELY*, *supra* note 296, at 82-83. For a critique of the democratic process theory of the negative Commerce Clause, *see, e.g.*, *Regan* *supra* note 187, at 1160-67.

302. *See supra* notes 149-61 and accompanying text. *See generally Loffredo*, *supra* note 27.

of democratic illegitimacy in particularly high relief.³⁰³ As the *Edwards* Court concluded in a similar context, discrimination of this sort calls forth strict judicial supervision because “the indigent non-residents who are the real victims . . . are deprived of the opportunity to exert political pressure upon the [state] legislature in order to obtain a change in policy.”³⁰⁴

Durational residence restrictions raise especially acute democratic process concerns for yet another reason. In the run-of-the-mill Commerce Clause case, in-state consumers who face higher prices as a result of protectionist commercial legislation share interests with and may “virtually represent” the out-of-state business competitors targeted by such laws.³⁰⁵ Moreover, those out-of-state interests, though not formally enfranchised, frequently wield considerable political clout, locally and/or in Congress.³⁰⁶ Despite the presence of these ameliorating factors, the Court routinely strikes down discriminatory legislation with reference to the democratic theory of the Commerce Clause. The victims of welfare residence restrictions do not enjoy even these ordinary buffers against legislative abuse. No politically effective in-state constituency “virtually represents” the impoverished targets of such restrictions.³⁰⁷ Nor does this dispossessed minority command the political resources necessary to secure legislative change at the state or national level.³⁰⁸ Not surprisingly, the absence of poor people’s voices has engendered a political discourse virtually devoid of empirical foundation and driven instead by arbitrary and stereotypical perceptions of the poor.³⁰⁹ Where, as here, the disadvantaged out-group has no power to enforce political

303. Durational residence restrictions burden two classes of people: low-income residents from out-of-state who are deterred from migrating, and needy people who have recently arrived from other states and are denied the public benefits available to longer-term residents. Both classes are politically disenfranchised in the enacting state: the first because of nonresidence, the second because of economic status and because the vast majority of its members will age out of the disadvantaged category (current restrictions range from 60 days to one year) before the next election.

304. *Edwards v. California*, 314 U.S. 160, 174 (1941) (citations omitted).

305. *But see* Tushnet, *supra* note 20, at 132-33 (arguing caution in considering diffuse consumer interests as an effective political check against protectionist legislation).

306. *See, e.g.*, MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 79-83 (1988).

307. As noted above, the class composed of poor people who relocate to a restricted state and suffer under durational residence requirements is too fluid and transitory to become an effective constituency, even if the economic status of that class did not itself rule out effective political action.

308. *See, e.g.*, Edelman, *supra* note 16, at 2 (discussing “the poor’s continuing political powerlessness”); *cf.* ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 114-15 (1989) (noting the “familiar fact” that political power is a function of access to money and related resources that are unequally distributed).

309. *See supra* notes 149-61 and accompanying text.

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accountability, a critical incentive for considered and informed decisionmaking dissolves.³¹⁰ The democratic theory of the Commerce Clause arose to counteract this feature of the political process.

V. CONCLUSION: THE COMMERCE CLAUSE AS A SOURCE OF COMMUNITY

An important question facing courts and commentators today is how to “recogni[ze]”³¹¹ America in order to forge a more inclusive sense of national identity, one that extends membership to groups and persons historically excluded from the life of the community.³¹² Because membership in the national community has become a constitutive element of political identity, exclusion poses significant barriers to participation in public life.³¹³ A Commerce Clause analysis of welfare restrictions provides an important perspective on this central issue of American society. The clause has historically allowed the Court to act as a catalyst in a national dialogue about how the community has been, or ought to be, defined. In its best moments, the clause has been sensitive to local concerns,³¹⁴ while at the same time fostering sentiments of nationwide scope and encouraging an ethos of national community.

The Court’s elaboration of Commerce Clause doctrine, like the definition of community itself, holds importance for both society and the individual.³¹⁵ Justice Stone, the principal architect of modern Commerce Clause doctrine, once remarked that “the Commerce Clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation.”³¹⁶ In its national aspirations, though, the clause reaches beyond the establishment of a union of states to the creation of a community of people. The national solidarity often extolled in the Court’s

310. Two decades ago, Justice Marshall noted the prevalence of this dynamic in the context of restrictive or punitive welfare legislation, observing that “[b]ecause the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions.” *New York State Dep’t of Social Servs. v. Dublino*, 413 U.S. 405, 432 (1973) (Marshall, J., dissenting).

311. Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1495 (1988).

312. Frank Michelman, for example, speaks of the need to “extend political community to persons in our midst who have as yet no stakes in ‘our’ past because they had no access to it.” *Id.* Kenneth Karst asks simply: “Who belongs to America?” KARST, *supra* note 24.

313. See WALZER, *supra* note 275, at 31-32; Drucilla Cornell, *Toward a Modern/Post Reconstruction of Ethics*, 133 *U. PA. L. REV.* 291 (1985).

314. See, e.g., *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794, 816 (1975) (Stevens, J., concurring) (stating that the Commerce Clause does not “inhibit a State’s power to experiment with different methods of encouraging local industry”); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (dormant Commerce Clause does not prohibit “effective and creative programs for solving local problems”).

315. See KARST, *supra* note 24, at 77-79 (contending that “national community helps to provide a sense of wholeness, not only for the society, but for the citizens’ sense of self”).

316. Harlan Stone, *Fifty Years Work of the Supreme Court*, 14 *A.B.A. J.* 428, 430 (1928).

Commerce Clause decisions refers not simply to harmony among the several state governments, but to bonds between their citizens.

When a state attempts to close its borders to needy Americans and refuses to extend full membership rights to those who do establish state citizenship, it rejects this concept of national community.³¹⁷ The social theory reflected by durational residence restrictions is, instead, an anachronism: "an outgrowth of the centuries-old belief that everyone belongs to some locality and that no district is under obligation to provide for those who do not belong."³¹⁸ This notion of who does and who does not belong describes a concept of community that tends strongly toward the static and parochial. The Constitution, by contrast, sought above all to redefine our community on an evolving and national basis. "For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States [and] members of the same community."³¹⁹

The poor have long been branded as other and marginalized from social and public life.³²⁰ Not only do we deny poor people the means to participate in the community (or structure participation in ways that exclude those of a poor person's means),³²¹ we affirmatively isolate and vilify them, and thereby reinforce an outcast status.³²² For a brief period in the 1960s, it appeared

317. As Justice Jackson put it, "[a]ny measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune" is inconsistent with the idea of "national citizenship" that largely defines the national community. *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring).

318. CLARKE, *supra* note 2, at 467-68.

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

320. See generally JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* (1991); Ross, *supra* note 93. At the founding of the Republic, states commonly restricted the franchise to freeholders, so that the very poor, in common with slaves and women, had little or no voice in the political life of the community. See Derrick Bell & Preeti Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609, 1612 (1986). Of course, when a majority of Americans lived under economically "impoverished" circumstances—as was the case throughout the nineteenth and early twentieth centuries—poverty did not differentiate its victims in ways that now lead to ostracization. See generally KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1969); MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 348-50 (1992). The present day poor, however, not only have become a numerical minority, they are also now associated with racial minorities and women, the two most prominent out-groups in America's history. See, e.g., Richard Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating* 525 (1991); Fineman, *supra* note 109; RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1992); see also GREEN BOOK, *supra* note 2, at 1135 (noting that "blacks, individuals in female-headed households, and Hispanics have poverty rates that greatly exceed the average").

321. See Bell & Bansal, *supra* note 320, at 1612 ("civil participation" is viable only for those citizens who enjoy "the luxury of material independence"); James C. Davies, *The Development of the Individual and the Development of Politics*, in *HUMAN NEEDS AND POLITICS* 74 (R. Fitzgerald ed., 1977) (arguing that individuals cannot participate in or defend themselves through politics unless and until their basic human needs are met); cf. HANNAH ARENDT, *THE HUMAN CONDITION* 29-31 (1958) (stating that in ancient Greece the slaves could not be members of the *polis* because they lacked "the necessities of life").

322. See, e.g., Branfman et al., *Measuring the Invisible Wall: Land Use Control and Residential Patterns of the Poor*, 82 *YALE L. J.* 483 (1973); CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986); *CONCENTRATED URBAN POVERTY IN AMERICA* (Michael G.H. McGeary & Lawrence E. Lynn, Jr. eds., 1990); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987); Loic

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that the nation had renounced this course. The “Great Society” and its “War on Poverty,” though only halting responses to deep-seated problems, nevertheless reflected a gathering consensus that our best sense of national identity compelled policies and programs that would facilitate the active integration of poor people into the larger community. Justice Brennan’s opinion for the Court in *Goldberg v. Kelly*³²³ seemed to build upon that basic insight. Affording extensive due process protections to welfare recipients, he asserted, not only safeguards individual rights, but also promotes the “important governmental interes[t]” of opening the national community more fully to the poor:

From its founding, the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not in the control of the poor contribute to their poverty . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community . . . Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity.”³²⁴

Twenty years later, American society has decisively retreated from this nascent politics of inclusion. Not only has public policy broken faith with the ideal of an inclusive community, but in the private sphere, the nation has witnessed an acceleration of the secession of the elites³²⁵ and a more virulent social and spatial segregation of the poor.³²⁶ The resurgence of durational residence restrictions on welfare symbolizes this wider disintegration in the nation’s sense of community and shared public life. It casts aside the “ideal of sympathy . . . [t]he sentiment that animates community.”³²⁷

J.D. Wacquant & William J. Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 11 (1989); see also KARST, *supra* note 24, at 125 (“Among a ‘people of plenty,’ the poor are apt to be seen as deviants, as outsiders.”) (citation omitted).

323. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

324. *Id.* at 264-65.

325. Robert B. Reich has explained the secession of the affluent as follows:

The secession is taking several forms. In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members.

Robert B. Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 2; see also JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA’S SCHOOLS (1990) (proposing market-based approach to provision of educational services). See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

326. See sources cited *supra* note 322.

327. See ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 220-22 (1977); see also *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940) (“[T]he ultimate foundation of a free society is the binding tie of cohesive sentiment.”).

Throughout this country's history, the Commerce Clause has served as the fundamental constitutional instrument for developing a more inclusive national community and national identity. Its jurisgenerative potential ought to be tapped again to advance a sense of community in which all are welcome regardless of social or economic status. Testifying in support of the Civil Rights Act of 1964, Dean Erwin Griswold stated "It has been said long ago that the Commerce Clause is the element that makes us a nation. This is something on which we ought to be a nation, it seems to me."³²⁸ We similarly "ought to be a nation" in recognition that poverty is a deep national tragedy that afflicts entire generations of our children and demands unified structural solutions, not parochial, isolationist reactions.

328. *Civil Rights—Public Accommodations, 1963: Hearing Before Senate Comm. on Commerce*, 88th Cong., 1st Sess., Part 2, 775-76 (1963) (statement of Erwin Griswold, Commissioner, Civil Rights Commission).