CONSTITUTIONAL LAW—YOU CAN'T TAKE IT WITH YOU: THE CONSTITUTIONALITY OF WORKERS' COMPENSATION RULES BASED ON RESIDENCY

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CONSTITUTIONAL LAW — YOU CAN’T TAKE IT WITH YOU: THE CONSTITUTIONALITY OF WORKERS’ COMPENSATION RULES BASED ON RESIDENCY

INTRODUCTION

Imagine the following scenario: Alice Doe is a blue-collar worker in the fictional state of Utopia, performing specialized tasks in a factory for average wages. She was born and raised in the state, but her children have moved away to Pennsylvania to find better jobs and to live closer to their spouses’ families. One day at work, a freak accident occurs, and Alice loses three fingers on her right hand. She is no longer able to perform her job, but she is eligible for workers’ compensation benefits. Alice is confident she will be able to maintain her modest lifestyle because Utopia’s workers’ compensation system is known to give fair and adequate benefits.

According to Utopia’s benefits schedule, Alice receives sixty-six percent of her former salary for twenty-five weeks as compensation for the loss of her fingers. Forty-eight additional weekly payments will make up for her lost earning potential. However, six months after her injury, she has yet to find a suitable job, and she is concerned about doing simple household chores with her injury, such as shoveling snow. Alice’s son convinces her to move to Pennsylvania, where her children can assist her with daily life and where skilled jobs that Alice can perform are plentiful.

Not long after Alice moves to Pittsburgh, she is notified by the state of Utopia that she is no longer eligible to receive workers’ compensation payments. The state’s Workers’ Compensation Act requires those receiving loss of earning potential payments to be residents of Utopia. Alice checks with the Pennsylvania Workers’ Compensation board to see if its rules would allow her to continue receiving benefits, but the Pennsylvania statute only applies to workers who are injured while working in Pennsylvania or for a Pennsylvania corporation. She checks with a Utopia attorney, and she tells Alice that the highest court in Utopia has upheld the statute. Alice is shocked. She is disabled due to a work accident that occurred in Utopia, and she will never be able to earn her former salary; yet she cannot receive any of the benefits she was formerly entitled to because she decided to move to another state. Further-
more, her attorney informs her that she cannot sue her former employer for the injury because the Utopia Workers' Compensation Act precludes suits for covered injuries.¹

At present, most states do not treat residents and non-residents receiving workers' compensation benefits differently. However, a few states have adopted workers' compensation laws that allow for such disparate treatment.² That number could increase as many states are currently experiencing a fiscal crisis.³ States may consider changing workers' compensation laws to encourage employers to relocate and to help strengthen the economy.⁴ This Note questions the constitutionality of workers' compensation systems that reduce or eliminate payments to recipients who, although otherwise eligible, are no longer residents of the state. Specifically, this Note will discuss whether such statutes infringe on the constitutional right to travel and should, therefore, be subject to the same strict scrutiny review as other statutes that penalize moving from state to state.

This Note begins, in Part I, with a brief primer in workers' compensation law, including its history and current operation. Then, Part II gives a history of the right to travel and a discussion of the impact of recent cases relying on that right. Part III closely examines two cases that have evaluated workers' compensation laws

¹ See infra Part I.C.
² ALASKA STAT. § 23.30.175 (2002) (out-of-state resident's benefits calculated by multiplying the in-state compensation rate "by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state"); CONN. GEN. STAT. § 31-308a (2003) (limiting additional benefits for partial permanent disability to those injured employees who remain "willing and able to perform work" in Connecticut); NEV. REV. STAT. 616C.455 (2002) (giving a 65% cost-of-living increase to residents of Nevada who receive compensation for injury that occurred before April 9, 1971).
⁴ For example, California Governor Arnold Schwarzenegger called for "real workers' comp reform" during his 2004 state of the state address. Governor Arnold Schwarzenegger, California State of the State Address, Sacramento, Cal. (Jan. 6, 2004) (transcript available at http://www.governor.ca.gov/state/govsite/gov_homepage.jsp). This appeal was part of a list of ways to improve the business climate in California and to bring new jobs to the state. Id. Other states also see lower workers' compensation insurance rates as a way to attract new businesses. Charles Stein, Hoping to Mine Gold from the Golden State Romney, Other Governors See Chance to Woo Firms Away, BOSTON GLOBE, Nov. 20, 2003, at C1. See also NEB. REV. STAT. § 48-1-118 (2004) (requiring a biannual review of the current workers' compensation laws to determine effectiveness in "controll[ing] or reduc[ing] the cost of workers' compensation premiums").
in terms of the right to travel. Finally, in Part IV, this Note argues that the current right to travel jurisprudence is not sufficiently broad to evaluate the constitutionality of all penalties on interstate movement. Specifically, it contends that the three components of the right articulated in *Saenz v. Roe* have been narrowly applied in the workers' compensation cases and as such, do not fully protect the right to free movement. Part IV also stresses that the current application of the law fails to further the goals of workers' compensation and any attempts to treat workers' compensation like welfare should be abandoned. Finally, Part IV will argue that strict scrutiny review is the appropriate test to evaluate the constitutionality of any workers' compensation statute that takes benefits away from a recipient solely because they have changed their state of residence.

I. WORKERS' COMPENSATION

Workers' compensation is a broad, complex topic. This section will touch only on the areas that are critical to the discussion of the right to travel issue. First, Part I.A explores the history of workers' compensation, explaining that it was created to allow workers to recover for on-the-job injuries in a predictable way from employers and to ensure that injured workers did not become burdens to the state. Part I.B attempts to clarify the nature of workers' compensation by contrasting it with tort recoveries and social insurance programs like welfare. Workers' compensation is further defined in Part I.C by a discussion of its *quid pro quo* characteristics, that an employee may collect from the employer without a finding of fault, but in return the employer is shielded from all lawsuits arising from the action. In other words, in exchange for a guaranteed remedy, the employee receives an exclusive remedy. Finally, Part I.D explains the role of state statutes in determining eligibility and benefits. While an employee may be able to look to a number of state statutes for a determination of benefits, it is always the employer who pays, either directly or through its insurer.

A. Historical Background and Underlying Purposes

Before the nineteenth century, employers were never liable in tort for on-the-job injuries suffered by employees. Indeed, most


people were considered fortunate just to be employed. The risk of
injury was part of the job, and there was no shortage of people will­
ing to take that risk.7

The first reported employer liability cases – in England in
18378 and in the United States in 18419 – ended in findings for the
employers. However, even though it also found for the employer,
Farwell v. Boston & Worcester Railroad10 set the stage for tort suits
against employers when employees were injured, not due to their
own misconduct, but because of some shortcoming in the way the
employer conducted his business.11 However, the ability to sue did
not necessarily mean success. The common law defenses to negli­
gence of assumption of risk,12 contributory negligence,13 and the
fellow-servant rule14 proved to be formidable obstacles rarely over­

7. Id. at 777-78.
8. Priestley v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837) (refusing to hold employer
responsible for the negligence of an employee that caused injury to another employee).
plaintiff's claim against defendant railroad because the injury was caused by the negli­
gence of another employee, not the owner of the railroad himself).
10. 45 Mass. (4 Met.) 49 (1842).
11. Id. at 62. The employer was not found liable in this case because the miscon­
duct of the injured employee's co-worker actually caused the injury. However, the
court left the door open for liability in cases of negligence by the employer. Id. “We are
far from intending to say that there are no implied warranties and undertakings arising
out of the relation of master and servant.” Id. See Epstein, supra note 6, at 778-84 for a
detailed discussion of Farwell.
12. An assumption of risk defense claimed that the employee understood the
risks inherent in the workplace and, in essence, released the employer from liability
when the employee accepted the job. E.g., Fitzgerald v. Conn. River Paper Co., 29 N.E.
464, 465 (Mass. 1891) (“[A] servant assumes the obvious risks of the service into which
he enters, even if the business be ever so dangerous . . . .”). This rule was softened in
some jurisdictions when courts held that an employee could not assume the risk of an
employer violating a safety statute. E.g., Narramore v. Cleveland, C., C. & St. L. Ry.
Co., 96 F. 298, 305 (6th Cir. 1899) (holding that where employer violated statue enacted
for protection of employees, the employee who continued working with knowledge of the
violation did not assume risk); Fitzwater v. Warren, 99 N.E. 1042, 1042 (N.Y. 1912)
(“[P]ublic policy precludes an employee from assuming the risk created by a violation
of the statute or waiving liability of the master for injuries caused thereby.”). But see,
e.g., Denver & R.G.R. Co. v. Norgate, 141 F. 247, 252-54 (8th Cir. 1905) (stating that a
safety statute cannot repeal the common law defense of assumption of risk unless spe­
cifically stated in the statute).
13. Contributory negligence rendered the plaintiff completely unable to recover if
he was at least partially at fault for his injuries. See generally W. PAGE KEETON ET AL.,
14. The fellow-servant rule was used to find against the plaintiff in Farwell and
stood for the proposition that if another employee was at fault for the accident, the
come by injured employees.15

The growth of industry in the late nineteenth century meant that workplaces became home to more machinery, which in turn became a breeding-ground for accidents. Indeed, during the time of the Industrial Revolution, the number of work-related injuries increased sharply.16

However, the plight of the injured industrial worker did not go unnoticed. In 1884, Germany became the first country to enact workers' compensation laws.17 Other industrialized countries soon followed suit. In the United States, New York enacted the first state workers' compensation laws in 1910.18 By 1963, all fifty states had adopted such acts.19

Until 1917, legislatures feared that workers' compensation statutes would be held unconstitutional on the grounds that their compulsory and no-fault nature amounted to a taking of the employers' property without due process of law.20 Indeed, New York's system was held to violate the state constitution for that reason in 1911.21 Because of this constitutional crisis, several states adopted "elec-

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employer could not be held liable. See Farwell, 45 Mass. (4 Met.) at 62. Some jurisdictions attempted to temper this rule in favor of the injured employee by creating exclusions. See, e.g., N. Pac. R.R. v. Herbert, 116 U.S. 642, 647-48 (1886) (stating the "well settled" rule that it is the duty of the employer to provide safe working conditions and to hire competent people and that the delegation of these duties will not shield the employer from liability through the fellow-servant rule); Berea Stone Co. v. Kraft, 31 Ohio St. 287, 292-93 (1877) (holding that the acts of a supervisor, even when "performing the duty of a common workman" will not exonerate the employer under the fellow-servant rule).


17. Keeton et al., supra note 13, § 80, at 573 n.46.

18. Maryland and Montana passed earlier, narrower acts in 1902 and 1909 respectively, but they were short-lived. Larson & Larson, Workers' Compensation Law, supra note 15, at § 2.07.

19. Id. at § 2.08.

20. Id. at § 2.07. Due process requires that a person charged with liability have the opportunity to refute the charges and have his defenses heard in a court of law before his property is taken. See U.S. Const. amend. XIV, § 1. The argument here was that since employers had to compensate accident victims virtually automatically, they were not given that opportunity. See Ives v. S. Buffalo R.R., 94 N.E. 431 (N.Y. 1911).

tive" statutes, which allowed employers to opt-out of the system. By opting-out, an employer could be sued by an injured employee and could not assert the usual common law defenses. In 1917, however, a trio of Supreme Court cases firmly established the constitutionality of compulsory workers' compensation systems.

Since then, the states have adopted varied statutes, creating a patchwork of benefits, requirements, and exceptions. In 1972, the National Commission on State Workmen's Compensation Laws presented its report, which recommended standards for state programs. The commission recommended federalization of these standards with sanctions for states that did not comply by 1975, but no such federal legislation has been adopted, "in part because no device could be invented that would be both effective and politically acceptable." Nonetheless, many states have used these standards as benchmarks, perhaps to stave off the threatened federalization.

In addition to suggesting standards for state programs, the report acknowledged common purposes served by the workers' compensation system. It listed four major objectives for modern programs: "Broad coverage of employees and of work-related injuries and diseases," "[s]ubstantial protection against interruption of income," "[p]rovision of sufficient medical care and rehabilitation

24. Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917); N.Y. Central R.R. Co. v. White, 243 U.S. 188 (1917). It is beyond the scope of this Note to examine the intricate constitutional arguments surrounding these cases; suffice it to say that it is well established that compulsory workers' compensation systems are constitutional, and the system is flourishing today. Larson & Larson, Cases, Materials, and Text, supra note 5, at 24.
25. See generally Statistics and Research Center, supra note 23 (charts comparing state workers' compensation programs throughout publication).
29. Id.
services," and "[e]ncouragement of safety." The report also recognized that "an effective system for delivery of the benefits and services" was essential to attain these objectives.

Today, workers' compensation is firmly embedded in this country's social, industrial, and statutory framework. While differing somewhat in scope and detail, every state provides this protection for injured workers and their employers. Even with these disparities, state programs can be generalized according to what injuries are covered, how benefits are calculated, and whether damage suits may be brought. Nevertheless, workers' compensation as a whole remains a mongrel, leading to confusion when compared to tort and social insurance. This next section will attempt to alleviate that confusion.

B. What is Workers' Compensation? Distinguishing Tort and Social Insurance

Workers' compensation plans are extremely difficult to categorize. Workers' compensation is not a system for tort recovery, and it is not "social insurance." Instead, it embodies many of the features of both but also differs in very important ways. This section will compare and contrast workers' compensation with tort actions and social insurance.

1. Distinguishing Workers' Compensation from Tort Recovery

While workers' compensation seeks to compensate personal injuries like tort actions, the system does not carry with it a fault component. Indeed, even a very clumsy or careless employee

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31. Id.
32. Statistics and Research Center, supra note 23, at 15-23.
33. "Almost every major error that can be observed in the development of compensation law ... can be traced to the importation of tort ideas, or ... to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy." Larson & Larson, Workers' Compensation Law, supra note 15, at § 1.02.
34. Id.
35. See, e.g., Alaska Stat. § 23.30.045 (2002) ("Compensation is payable irrespective of fault as a cause for the injury."); Ark. Code Ann. § 11-9-401 (2002) ("Every employer should secure compensation to its employees and pay or provide compensation for their disability or death from compensable injury arising out of and in the course of employment without regard to fault as a cause of the injury."); D.C. Code Ann. § 32-1503 (1998) ("Every employer subject to this chapter shall be liable for com-
may recover when he is injured while working for the most careful and non-negligent employer. However, this should not be confused with pure strict liability. The crucial but subtle difference is an added requirement of a “work connection” for workers’ compensation eligibility. Additionally, typical defenses to strict liability, such as acts of God and acts of third persons, are not available in workers’ compensation.

In another important contrast to tort, workers’ compensation bases its awards only on injuries that diminish an employee’s earning capacity. In this way, the compensation does not attempt to restore the injured worker to the position he would have been in had the injury not occurred, as it does in tort recoveries. Instead, the system establishes an amount that will ensure the employee will not become a burden to society. Payments are based solely on a

[Raw text continues with citations and legal references.]

See, e.g., MONT. CODE ANN. § 39-71-105 (2003) (limiting coverage to those injuries that “arise[ ] out of and in the course and scope of employment”).
percentage of the employee's pre-injury wages, making the amount not completely arbitrary, but with some basis in the employee's former economic position.\(^{41}\) However, in keeping with the goal of merely protecting the injured employee from destitution, payments are often capped at the average wage for all workers in the area.\(^{42}\) Pain and suffering is not considered in benefit calculation, nor are injuries that do not impact earning potential.\(^{43}\) Personal expenses not directly related to the health of the employee are likewise not covered.\(^{44}\)

Also, the employee does not "own" the unpaid balance in an award to be paid in installments.\(^{45}\) It cannot be devised or assigned, nor can it be attached for obligations like child support or alimony.\(^{46}\) An injured employee's heirs have no claim on any unpaid benefits when the employee dies before receiving the fixed number of payments for his injury.\(^{47}\) The rationale for this lies in the theory that workers' compensation benefits are provided to replace the employee's lost earning capacity and to ensure that he or she is not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer."

\(^{41}\) See, e.g., MONT. CODE ANN. § 39-71-105 (2003) (stating that "wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease").

\(^{42}\) See, e.g., ALA. CODE § 25-5-68 (2003) (maximum weekly benefit $220.00 or 100% of the average weekly wage for the state); GA. CODE. ANN. § 34-9-261 (1998) (temporary total disability payments are two-thirds of the employee's average weekly wage with a minimum of $42.50 and a maximum of $425.00).

\(^{43}\) LARSON & LARSON, WORKERS' COMPENSATION LAW, supra note 15, at § 1.03[4]. E.g., ARIZ. REV. STAT. § 23-1044 (1995) (determining amount of benefits based solely on diminished capacity to do work); ARK. CODE. ANN. § 11-9-522 (2002) ("The guide shall not include pain as a basis for impairment."). For example, a woman whose only injury is that she can no longer bear children will not be able to recover under the typical workers' compensation systems because this injury does not impact the ability to work or earning capacity.


\(^{45}\) LARSON & LARSON, WORKERS' COMPENSATION LAW, supra note 15, at § 1.03[6].

\(^{46}\) See, e.g., ARIZ. REV. STAT. ANN. § 23-1068 (1995) ("[C]ompensation is exempt from attachment, garnishment and execution and does not pass to another person by operation of law."); COLO. REV. STAT. ANN. § 8-42-124 (2003) ("[C]laims for compensation or benefits . . . shall not be assigned, released, or commuted . . . and shall be exempt from all claims of creditors . . . .").

\(^{47}\) LARSON & LARSON, WORKERS' COMPENSATION LAW, supra note 15, at § 89.03. But see ARIZ. REV. STAT. ANN. § 23-1068 (1995) (allowing for any unpaid benefits that remain at death to be paid to the employee's personal representative).
subject to poverty. Once the employee dies, there exists neither a need to supplement his or her earnings nor a danger of the employee becoming a burden to society. Most statutes do provide that the injured employee's dependents will continue to receive benefits upon his or her death. However, these payments end when the dependents die or reach majority and no longer rely on the employee's earning potential for survival.

Finally, workers' compensation is not designed to punish the employer who is liable. Fault is not determined, so there is no "wrong" behavior to deter or correct through punishment. The compensation paid to the injured employee is not supposed to "hurt" the employer. In economic theory, the cost of compensating workplace accidents should fall to consumers through increased prices required to pay for employers' workers' compensation insurance.

Workers' compensation differs greatly from tort remedies. Workers' compensation requires no finding of fault, establishes benefits based on the worker's former income - rather than actual loss due to the injury - and does not act to punish the employer. Indeed, such characterization could lead to a belief that workers' compensation is a form of social welfare. The next section attempts to dispel that belief.

2. Distinguishing Workers' Compensation from Social Insurance

Even though workers' compensation is very similar to social insurance programs like welfare, workers' compensation may be readily distinguished because payments are not based on actual
Rather, the benefits are a "compromise between actual loss of earning capacity and arbitrary presumptions of the amount needed for support." Compensation schedules in workers' compensation statutes base benefits on a percentage of current wages and impose an upper limit for benefits to be paid over a maximum number of weeks. These schedules do not take into account circumstances such as marital status, number of children, or current monetary obligations.

Additionally, benefits are not paid from state treasuries, so the cost of the program is not borne by the public at large. Employers either pay the benefits directly or they take part in insurance plans that will cover payouts. In either case, the cost is passed on to the consumers of the employer's products. Thus, consumers of products made in industries or by employers particularly prone to industrial accidents will pay proportionately more than consumers of products made in inherently safer industries. Nonetheless, the cost of workers' compensation is not being paid by taxes levied...
against all citizens of a state; it is a cost of doing business. This feature of workers' compensation represents a stark contrast to social insurance.

C. Exclusivity of Remedy

For injured employees covered by a state's workers' compensation act, benefits under the act are the sole available remedy. Even if the employee does not choose to claim benefits, he is still precluded by statute from filing suit against the employer. In almost every case, a covered employee is barred from bringing both common law tort and statutory claims against an employer. Even statutes particularly targeting worker protection, such as the federal Occupational Safety and Health Act and the federal Migrant and Seasonal Agricultural Worker Protection Act, will not give rise to a private action if the implicated injury is covered by a state's workers' compensation act.

The converse of the exclusivity principle is also true: an employer may be liable for injuries that are not covered by the act. This seems only logical since the rationale behind exclusivity is that the employee is guaranteed benefits in return for the forfeiture of the right to sue. Therefore, if the employee is not entitled to ben-


64. LARSON & LARSON, WORKERS' COMPENSATION LAW, supra note 15, at § 100.03[1]. The exception to this is federal and state anti-discrimination laws. See, e.g., Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1105 (10th Cir. 1998) (concerning Title VII); Karcher v. Emerson Elec. Co., 94 F.3d 502 (8th Cir. 1996) (holding workers' compensation barred common law tort suit, but not suit for emotional damages resulting for discrimination in violation of Missouri Human Rights Act).

65. 29 U.S.C. § 653(b)(4) (2003) ("Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law . . . ").

66. 29 U.S.C. § 1854(d)(1) (2003) ("[W]here a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker, the workers' compensation benefits shall be the exclusive remedy for loss of such worker under this Act in the case of bodily injury or death . . . .")

67. The exclusivity provision in the Migrant and Seasonal Agricultural Worker Protection Act was added after the Supreme Court ruled that the Act, before the amendment, showed no congressional intent to limit its coverage for injuries covered by workers' compensation. See Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990).

68. LARSON & LARSON, WORKERS' COMPENSATION LAW, supra note 15, at § 100.01.
benefits because the injury is not covered by the act, he or she should not be required to give up that right. Many examples of this type of situation exist, and most involve injuries that occurred at work but not in the course of employment.

However, a critical distinction must be made from those cases where the injury is technically covered by the statute, but because of the injury's nature, no benefits are payable. In these cases, the undoubtedly work-related injury does not impair the employee's earning capacity. Since the goal of workers' compensation is to ensure that the injured employee can still provide adequately for his or her livelihood, there is no need to compensate these injuries. The statute does cover these injuries; the injured employee may not bring tort claims against the employer.

Additionally, the exclusivity rule will bar common-law suits where the statute of limitations has run, or a statutory requirement has not been met. For example, in the Anaconda Case, a miner attempted to secure benefits under the Occupational Disease

69. "[R]ights of action for damages should not be deemed taken away except when something of value has been put in its place." Id. at § 100.04. See also Potts v. UAP-GA. AG. Chem., Inc., 506 S.E.2d 101, 103 (Ga. 1998) (finding that employee's action in tort was not precluded because Georgia's act provided no coverage for injuries resulting from employer's fraudulent statements to doctors about employee's exposure to chemicals); Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 361-63 (Or. 2001) (holding that where benefits were denied because plaintiff failed to prove his work-related exposure to chemicals was the "major contributing cause" of his injury, plaintiff entitled to bring suit under Oregon's Remedies Clause guaranteeing citizens a right to redress for injuries).

70. See, e.g., Skinner v. Ogallala Pub. Sch. Dist. No. 1, 631 N.W.2d 510 (Neb. 2001) (finding that teacher could bring personal injury suit for injury occurring when she came back to school at night with her husband, a band director, to return borrowed computer equipment because it was a personal, not work-related visit); McBride v. Hershey Chocolate Corp., 188 A.2d 775 (Pa. Super. Ct. 1963) (holding that exclusivity did not bar suit against employer for failing to control co-employee who assaulted plaintiff; conflict between employees was personal and therefore the injury did not arise in the course of employment).

71. The most common examples of this are found in cases where reproductive organs have been injured. See, e.g., Hyett v. Northwestern Hosp. for Women & Children, 180 N.W. 552 (Minn. 1920) (finding that employee's work related injury to pubic nerve, rendering him impotent, did not entitle him to compensation). But see Spyhalsky v. Cross Constr., 743 N.Y.S.2d 212 (N.Y. App. Div. 2002) (stating that, while tort action was barred, payments of medical expenses for artificial insemination of wife were granted). See also supra note 43 and accompanying text.

72. Larson & Larson, Workers' Compensation Law, supra note 15, at § 100.05[1].


Act relating to his contraction of silicosis. The Act, however, required that an employee be exposed to silicon for a minimum of 1,000 shifts to be eligible for benefits. The miner was denied benefits and was also barred from a tort claim because his injury was technically covered by the Act.

D. Issues of Conflicts of Law and Eligibility

When an employee qualifies for benefits under a workers' compensation statute, the benefits are paid either by the employer directly or by the employer's insurer. When more than one state has an interest in the injury, the question arises: which state's statute will apply? A discussion of the resolution of such conflicts of law is beyond the scope of this Note.

However, two important points must be made here. First, regardless of what state's law applies to the determination of benefits for the injured employee, the employer must pay those benefits, either directly or through its insurance. The state itself does not pay the benefits out of its general funds. The question of which state's law applies does not alter who pays the benefits.

Second, state laws vary in their requirements for applicability, but they all require some kind of connection to the state at the time of the injury. In general, a question only arises when the employee is injured while working in another state since the injury itself is typically enough of a connection to trigger the applicability of

76. Id. at 84.
77. Id. at 85. This case was overturned by Gidley v. W.R. Grace & Co., 717 P.2d 21,22-23 (1986) (interpreting the Montana statute stating that there is "no common-law right of action for occupational disease against an employer ... excepting for those employees not eligible for compensation under ... this act" to mean that employees whose injuries did not meet the requirements were able to sue).
78. Some states allow employers to choose between self and commercial insurance, while others require employers to carry commercial insurance. Statistics and Research Center, supra note 23, at 10-13. Ohio and North Dakota maintain a state run fund for workers' compensation benefits, funded by the employers in the state. Id.
79. A complicated example is the situation in Daniels v. Trailer Transp. Co., 42 N.W.2d 828 (Mich. 1950). The employee in that case lived in Illinois and made a contract for employment in Texas with a company based in Michigan. The company had operations in various states, and the employee traveled extensively in his work. He was injured in Tennessee. The court held that even though the employee signed a contract stating that Michigan's workers' compensation law would apply, Michigan's statute was not applicable. Id. at 830.
80. Cf. Statistics and Research Center, supra note 23, at 10-13 (indicating that all states provide for penalties for failure to insure).
the statute. The common threads of the applicability requirements center on the place of employment, the place of the employer’s headquarters, and the place where the employment contract was made. Less often, a state will consider the residence of the employee.

From these principles, it is clear that when an employee travels to another state to work for his employer, coverage by some state statute travels with him or her, either by virtue of the statute in the employer’s home state, or because the statute in the state of injury will apply to any injury that occurs within its borders. The question posed in this Note is: what happens when an employee moves after they are injured? Clearly, the statute that applied to them at the time of injury will still govern their benefits. But is it permissible for a state to declare that it will no longer require the employer to pay benefits to the employee, once they have left the state? To answer this question, this Note will first explore the history and development of the constitutionally guaranteed right to travel among the states.

II. HISTORY AND DEFINITION OF THE RIGHT TO TRAVEL

The idea that citizens of the United States have a fundamental right to travel originated in the Articles of Confederation, and the particulars of the scope and constitutional source of this right have

82. Id. at § 101.05[3].

83. Id.; Statistics and Research Center, supra note 23, at 8. The Alaska statute offers a clear example of extraterritorial coverage provisions:

(a) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of the employee’s death, the employee’s dependents, would have been entitled to the benefits provided by this chapter had the injury occurred in this state, the employee or, in the event of the employee’s death resulting from the injury, the employee’s dependents shall be entitled to the benefits provided by this chapter, if at the time of the injury (1) the employee’s employment is principally localized in this state; (2) the employee is working under a contract of hire made in this state in employment not principally localized in any state; (3) the employee is working under a contract of hire made in this state in employment principally localized in another state whose workers’ compensation law is not applicable to the employee’s employer; or (4) the employee is working under a contract of hire made in this state for employment outside the United States and Canada.


85. See supra note 81 and accompanying text.

86. See infra note 114.
been the source of debate ever since. Part II.A discusses how the Supreme Court first recognized and justified the right to travel as a component of the Commerce Clause. Next, Part II.B looks at more recent developments in the right to travel based on the Equal Protection Clause of the Fourteenth Amendment. This part will highlight three important "right to travel" cases, Shapiro v. Thompson, Dunn v. Blumstein, and Memorial Hospital v. Maricopa County, in which the Court established and clarified the right of a newly arrived state citizen to be treated in the same manner as long-time residents. Part II.C examines Saenz v. Roe, the most recent Supreme Court "right to travel" decision. This section centers on the Court's shift in emphasis to the Privileges and Immunities Clause of the Fourteenth Amendment and on the establishment of three "components" of the right to travel.

A. Early Development Through the Commerce Clause

While the Constitution does not articulate a specific "right to travel," judicial discussions of such a right can be found as early as 1823 in Corfield v. Coryell, a decision by a Pennsylvania federal court regarding a New Jersey statute disallowing the taking of oysters by non-residents. The court upheld the statute as constitutional, and Justice Washington, in his opinion, enumerated a number of rights the court thought to be "fundamental." The list included "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." Other rights articulated were "[p]rotection by the government," "life and liberty," "to acquire and possess property," "to pursue and obtain happiness," "to claim the benefit of the writ of habeas corpus," "the right to bring suit in state courts," and "the elective franchise."
Chief Justice Taney. In the Passenger Cases, the Court consolidated two cases, Smith v. Turner and Norris v. City of Boston, which challenged fees paid by vessel masters for every passenger brought into the New York and Boston ports, respectively. The Court did not rest its opinion on the right to travel, but instead struck down the fees as unconstitutional restrictions on interstate commerce. However, both the majority and the dissent recognized the fundamental nature of the ability to move among the states in the union without impediment.

Two decades later, in 1867, the Court used infringement on the right to travel as grounds for finding a state law unconstitutional in Crandall v. Nevada. The statute in question required a fee from any passengers leaving the state of Nevada, the opposite of the fee requirement in the Passenger Cases. The Court made clear its belief that a nation made up of many states, but with one central seat of government, could not function if states were free to place restrictions or taxes on citizens crossing state borders to reach the place of government. The Court declined to follow the lower court's lead and decide the case based on either the Commerce Clause, which forbids the states from regulating interstate commerce, or the clause that prohibits states from laying duties on imports or exports. Instead, the Court rested its decision solely on the right to travel and fully embraced Chief Justice Taney's words in the Passenger Cases. The Court cited the Crandall holding in

96. Id. at 392-93, 409.
97. Id. at 409-10. The Supreme Court has inferred from the constitutional grant of power to regulate interstate commerce to Congress that states may not enact laws that place an undue burden on interstate commerce. See U.S. Const. art I, § 8, cl. 3; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199-200 (1824) (“[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.”). See generally Irwin Chemerinsky, Constitutional Law: Principles and Policies 401-34 (Aspen Publishers 1997).
98. The Passenger Cases, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting) (“We are all citizens of the United States . . . [and] must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”).
99. 73 U.S. (6 Wall.) 35, 43-50 (1867) (holding as unconstitutional a fee levied on all passengers leaving Nevada).
100. Id. at 36.
101. Id. at 43-44. See also U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.”).
102. Crandall, 73 U.S. (6 Wall.) at 43.
103. Id. at 48-49. See supra note 98.
subsequent cases, and the fundamental right to travel was born.104

While the Court has never denied the existence of the right to travel,105 it has struggled to give the right a constitutional “home.”106 At first, the Court grounded the right on the Commerce Clause, which prohibits states from regulating or interfering with interstate commerce.107 In *Edwards v. California*, the Court held unconstitutional a state statute making it a misdemeanor to bring an “indigent” into the state of California.108 It reasoned that the movement of persons across state lines was a component of interstate commerce, and thus any restriction on that movement by a state was an impermissible regulation.109

The Court again addressed the right to travel in terms of the


106. For a thorough examination of the constitutional source of the right to travel, see Lonnie Shirl Turner, *The Right to Travel and the Problem of Unenumerated Constitutional Rights* (1972) (unpublished Ph.D. dissertation, University of California, Los Angeles, on file with the Western New England College School of Law Library). Turner concludes that there are several sources, and “each protects travel in a different way and to a different degree.” *Id.* at ix. Turner further explains that establishing the source of this unenumerated right will help to define the scope of the right and better protect it from future judicial challenges. *Id.* at 5-8. See also Karin Fromson Segall, Note, *Federal Courts: It’s Not Black and White: Spencer v. Casavilla and the Use of the Right of IntraState Travel in Section 1985(3)*, 57 *BROOKLYN L. REV.* 473, 480-95 (1991).


109. *Id.* at 172. Although the decision was unanimous, only five justices joined the majority opinion grounding the right to travel in the Commerce Clause. Three of the other justices believed that the right of citizens to travel should have “a more protected position” than the movement of goods. *Id.* at 177 (Douglas, J., concurring, joined by Black, J., and Murphy, J.). They asserted that the right to travel is a national right of itself and should have its own protection apart from any clause of the Constitution. *Id.* at 181. Justice Jackson, in his lone concurrence, rested the right to travel on the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 182-83 (Jackson, J., concurring). See ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 189-93 (University of Kansas Press 1956) for a thorough discussion of these different opinions. *See infra* notes 139-41 and accompanying text for a discussion of the Privileges and Immunities Clause.
Commerce Clause in *United States v. Guest.* This time, instead of examining a statute that was alleged to infringe on that right, the Court upheld an indictment against individuals who were charged with "conspir[ing] to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . of the United States." One of the counts in the indictment was for depriving black citizens of "[t]he right to travel freely to and from the State of Georgia." The lower court found the indictment did not charge an offense under the law, presumably on the belief that the Constitution did not secure the right to travel in and out of the state. In upholding the indictment, the Court strongly reaffirmed the notion of a fundamental right to travel but stopped short of establishing its Constitutional source.

B. A Change of Focus: Equal Protection

A trio of cases in the late 1960s and early 1970s signaled a shift in the focus of the right to travel from mere border crossings to how a citizen exercising that right would be treated upon arrival in the new state. *Shapiro v. Thompson,* *Dunn v. Blumstein,* and *Memorial Hospital v. Maricopa County* all involved state statutes

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111. Id. at 747 (quoting 18 U.S.C. § 241 (1964)).
112. Id. at 748.
113. Id. at 747-48.
114. Id. at 758-59. This Court mentioned the thorny issue that the Articles of Confederation specifically provided that "the people of each State shall have free ingress and regress to and from any other State," but this statement was not included in the Constitution. Id. at 758; ARTICLES OF CONFEDERATION art. IV. The attorney for New York in *The Passenger Cases* made this point, arguing that power over ingress and egress must have initially rested with the States, since the Articles purported to limit it. The Passenger Cases, 48 U.S. (7 How.) 283, 356 (1849). The Constitution's omission of this limitation, he claimed, must have been a conscious reallocation back to the States. *Id.* The Court in *Guest* speculated that the drafters of the Constitution believed the right to travel "so elementary" to a union of states that it did not merit specific mention. *Guest,* 383 U.S. at 758. For an argument that the framers of the Constitution could not have meant to exclude this right but instead believed it was "already embodied elsewhere and left it out as superfluous," see Chafee, *supra* note 109, at 184-87.
116. 405 U.S. 330 (1972) (invalidating a Tennessee statute requiring one-year state residency to vote in state elections).
117. 415 U.S. 250 (1974) (invalidating an Arizona statute requiring one-year county residency for indigents to be eligible for free non-emergency care at that county's hospital).
requiring minimum residency periods before new citizens could take advantage of certain benefits or privileges. Shapiro set out the test to be used by later durational residency cases, and Dunn and Maricopa clarified and narrowed the scope of the right to travel.

Shapiro consolidated challenges to three statutes that required twelve months of consecutive residency for welfare benefits eligibility.\(^{118}\) In its analysis, the Court admitted that the challenged waiting-periods fulfilled the legislative intent “to preserve the fiscal integrity of state public assistance programs” inasmuch as the state would not be required to serve a large “influx of indigent newcomers.”\(^{119}\) However, the Court stated that “inhibiting migration by needy persons into the State is constitutionally impermissible” and grounded this in the right to travel.\(^{120}\)

The Court could have stopped with this holding and with its invocation of United States v. Jackson: “If a law has 'no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.’”\(^{121}\)

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118. Shapiro, 394 U.S. at 621-22. The Connecticut Welfare Department, by statute, denied Aid to Families with Dependent Children (AFDC) benefits to a 19-year-old single mother because she had not yet lived in Connecticut for a full year. Id. at 622-23. The challenge to the District of Columbia statute involved three citizens denied AFDC benefits and one citizen denied Aid to the Permanently and Totally Disabled benefits. The denials were based on a statute that required one full year of residency prior to applying for benefits. Id. at 623-25. The third challenge involved two Pennsylvania residents denied AFDC benefits because they had not been residents for at least one year. Id. at 625-26. In the Connecticut and Pennsylvania cases, the lower courts held the statutes to violate the Equal Protection Clause of the Fourteenth Amendment. Id. at 623, 626. The District Court for the District of Columbia used the Due Process Clause of the Fifth Amendment to hold the statute unconstitutional. Id. at 625.

119. Id. at 627-28. The Court quoted sponsors and defenders of the statutes to show that the underlying intent was to avoid attracting indigents. Id. For example, the sponsor of the Connecticut statute said during debate: “I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy.” Id. at 629 (quoting H. B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504).

120. Id. at 629-31. The Court stated it had no reason to establish the constitutional source of the right to interstate travel. Id. at 630 (“We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”). Instead, it relied on the previous assertion by the Court in Guest that the right to travel is “a right so elementary” that it does not need a specific mention in the Constitution. United States v. Guest, 383 U.S. 745, 757-58 (1966).

However, the Court went on to apply the test established in *Skinner v. Oklahoma* to determine constitutionality under the Equal Protection Clause of the Fourteenth Amendment. Under that test, also known as “strict scrutiny review,” “any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.” Pennsylvania and the District of Columbia contended that the waiting period served the compelling government interests of better welfare budget planning, supplying an objective test for bona fide residency, minimizing fraud, and encouraging new residents to enter the work force quickly. The Court examined these governmental ends and quickly discounted them as not “compelling.” Indeed, because minimum residency requirements were not even rationally related to a legitimate end—the “traditional equal protection [test]” used for classifications that do not infringe on a fundamental right—the Court held that the classification could not satisfy the more rigorous strict scrutiny review, and the statutes had to be struck down.

Shortly after *Shapiro*, additional residency requirement cases gave the Court an opportunity to clarify its position on right to travel cases. *Dunn*, in invalidating a one-year residency prerequisite to voting, added that actual intention to deter interstate travel was not required to trigger the compelling state interest test. As long as the statute in some way penalized the exercise of the right to travel, the constitutional right was abridged.

*Dunn* also clarified that the first step in the evaluation of such a statute was to look at the nature of the classification and the nature of the affected individual interests to determine whether either was fundamental. The Court stated that if either the right upon which the classification was based—in this case, the right to vote—

123. *Shapiro*, 394 U.S. at 634.
124. *Id.*
125. *Id.*
126. *Id.* at 638. See, e.g., U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973); McGowen v. Maryland, 366 U.S. 420, 425-26 (1961) (“[T]he Fourteenth Amendment permits the State a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.”); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).
129. *Id.*
130. *Id.* at 335. This was not a pivotal issue in this case since the Court could find
or the interest affected – the right to travel – was fundamental, the compelling state interest test would be used. In this case, a one-year residency requirement not only infringed on the right to travel, but also on the right to vote, so strict scrutiny was clearly the correct standard to apply.

Memorial Hospital explained that the Court was looking for the denial of a "vital" benefit when determining if the right to travel had been implicated. It noted with approval lower court rulings that upheld state statutes requiring one-year residency to obtain in-state tuition discounts at state funded colleges. A college education, while important, was not a "basic necessity of life."

After Shapiro, Dunn, and Memorial Hospital, the courts were left with a relatively simple Equal Protection analysis for right to travel cases. If a statute or state regulation was based on a classification that penalized the exercise of the right to travel by denying a basic necessity of life, a court was to evaluate it using strict scrutiny review. If the classification was not necessary to accomplish a compelling state interest, then the statute would be struck down. However, this clarity ended with Saenz v. Roe.

little argument that the rights to vote and to travel were anything but fundamental rights.

131. "[W]hether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that [the compelling state interest test must used]." Id. However, Memorial Hospital later stated that "[t]he amount of impact required to give rise to the compelling-state-interest test was not made clear" in Shapiro [and Dunn]. Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 256-57 (1974).

132. Dunn, 405 U.S. at 335.

133. Mem'l Hosp., 415 U.S. at 258-60. The Court compared the denial of "basic [necessities] of life," which had been struck down, with residency requirements for lower in-state tuition, which had not. From this comparison, the Court determined that the "necessity" of the benefit being denied was important, even though it did not draw a bright line: "Whatever the ultimate parameters of the Shapiro penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." Id. at 259.

134. Id. at 260 n.15. See Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) ("Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement . . . .")


136. Id. at 258-60.

137. Chemerinsky, supra note 97, at 767.

C. Finding the Right to Travel in the Privileges and Immunities Clause

Before Saenz, it would have been safe to say that whenever a statute penalized someone for exercising his or her right to travel by moving to a new state by denying a fundamental right or basic necessity of life, the compelling state interest test would be used. However, Saenz cast doubt on this simple summary. Instead of denying welfare benefits to new residents, as in Shapiro, the California statute in Saenz limited welfare payments to new residents to the amount they had received in their former state. The Court began its analysis by again looking for the constitutional source of the right to travel. It identified three "components" of the right to travel: the right to move between the states, the right to not be treated as an "unfriendly alien" when temporarily in another state, and the right to be treated in the same way as long-time citizens of a state when one permanently settles there.

Since the first component was not at issue, the Court declined to attempt to find its source. However, the Court did not hesitate in pinpointing Constitutional protection for the second component, even though this component, again, was not at issue in the case. The Court said the right could be found in the Privileges and Immunities Clause of Article IV, which guarantees that non-residents will not be discriminated against solely because they are residents of other states.

In establishing a constitutional home for the third component, which this case clearly implicated, the Court took a different, per-
haps surprising, it instead used the Equal Protection Clause as it had in *Shaprio* and its progeny, it grounded its decision on the Privileges and Immunities Clause found in the Fourteenth Amendment. The Court explained that this clause gives United States citizens the right to reside in any state and to have the same rights and benefits of any other citizen in that state. Thus, the Court found that newly arrived citizens in California must be given the same opportunity for, and amount of, welfare as any other current resident.

After *Saenz*, determining whether an enactment penalized the right to travel seemed simple. If an enactment infringed on one of the three components, then it was a penalty and should be reviewed using strict scrutiny. However, these components do not address non-residency based benefits administered through state statutes, such as workers' compensation.

### III. STATEMENT OF THE CASES

Three state workers' compensation statutes have been challenged on the grounds that they unconstitutionally impinge on the right to travel. Only two cases, *Fisher v. Reiser* and *McEnerney v. United States Surgical Corp.*, were decided in a federal court based on the U.S. Constitution. Part III.A discusses the first

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147. *Id.* at 503-04. "The States . . . do not have any right to select their citizens."

148. *Id.* at 507.

149. *Id.* at 505 ("But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.").


151. 610 F.2d 629 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980).


153. The state case was *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264 (Alaska 1984). The Alaska court struck down a provision of the Alaska Workers' Compensation program that significantly decreased benefits to injured employees who moved outside of Alaska as being contrary to the Alaska state constitution. *Id.* at 269. The court held that the right to travel was part of the Alaska constitution, and this right was implicated by the statutory scheme. *Id.* at 271. With a fundamental interest impinged, the court applied Alaska's equal protection analysis. In that analysis, the level of justification the state must show is in direct proportion to the extent of the infringe-
case, *Fisher*, which was decided before *Saenz*. *Fisher* upheld a Nevada cost of living increase to workers’ compensation benefits given only to recipients residing in Nevada. Part III.A also describes the dissent of that opinion where Judge Hufstedler of the Ninth Circuit argued that denying a cost of living increase for workers’ compensation to non-residents was indeed a penalty on those who exercised their right to travel. She asserted that this case could fit into the *Shapiro* Equal Protection model. Part III.B discusses *McEnerney v. United States Surgical Corp.*, the most recent workers’ compensation case to rely on right to travel jurisprudence. In this case, the Connecticut Appellate Court upheld a provision in the Connecticut Workers’ Compensation Act that denies additional partial disability benefits to injured employees no longer willing and able to work within Connecticut.

A. Fisher v. Reiser: Allowing Different Compensation For Out-of-State Recipients

1. The Majority Opinion

In *Fisher v. Reiser*, Nevada’s cost-of-living increases in workers’ compensation benefits were challenged as unconstitutional because they were given only to those injured employees and their survivors who continued to reside in Nevada. The state’s workers’ compensation program covered employees who were working...
in Nevada for a covered employer at the time of their injury. Workers who were permanently and totally disabled could receive two-thirds of their "average wage" at the time of their injury, until their death, and death benefits were available to the surviving spouse until their death or remarriage. In 1973 and 1975, the Nevada legislature recognized the steep inflation rate was severely impacting recipients and enacted cost-of-living increases totaling twenty percent. However, only those recipients who remained residents of Nevada could receive the increases.

The facts of this case focus on Gladys Fisher. Her husband was injured while working in a Las Vegas metal shop in 1962, and he began receiving total disability payments. The couple moved to California in 1963 so their children could assist in the care of Mr. Fisher, and when he died in 1972, Mrs. Fisher remained in California. Mrs. Fisher requested the cost-of-living increase when enacted in 1973, and she was told that, unless she moved back to Nevada, she would continue to receive only $167.50 per month — the same amount she and her husband had been receiving since 1962.

The Ninth Circuit held that the right to travel was not penalized, and therefore strict scrutiny review of the statute was not warranted. The court found three fatal distinctions between this case and the three right to travel cases cited by Fisher for support. First, the majority contrasted the state’s obligation to immediately grant new residents the same benefits enjoyed by long-time residents with the continuing obligation of a state to a former resident. Indeed, the court held

156. *Fisher*, 610 F.2d at 631. Employees working temporarily outside of the state were also covered provided they had been hired or regularly employed in Nevada, and employees hired outside of Nevada were covered as long as they were not working in Nevada only temporarily and thus covered by another state’s program. *Id.* (citing NEV. REV. STAT. § 616.520, 616.260 (1979)).
157. *Id.*
158. *Id.* at 631-32.
159. *Id.* at 632.
160. *Id.*
161. *Id.* at 633.
162. *Id.*
164. *Fisher*, 610 F.2d at 633-34.
165. *Id.* at 634.
that only the state in which a person currently resides has the means and the obligation to provide for the well being of a resident.\footnote{166}{\textit{Id.} at 633.}

Second, the court stated that the right to travel would only be implicated where there was a "durational aspect" in the statute.\footnote{167}{\textit{Id.} at 635.} States have an unfettered right to offer certain benefits only to their citizens, and the Supreme Court had, at this point, only struck down requirements that a new resident live in the state for a specified time.\footnote{168}{\textit{Id.} (citing McCarthy v. Phila. Civil Servo Comm’n, 424 U.S. 645 (1976)).} The court noted that it upheld "bare residency requirements," such as residency as a condition for municipal employment.\footnote{169}{\textit{Id.}}

Third, the majority stated that an important factor in right to travel cases is whether the benefit being denied is of a "fundamental character," like non-emergency medical care, the right to vote, and subsistence welfare benefits.\footnote{170}{\textit{Id.}} It decided that since Fisher's benefits were only "supplemental payment[s] for spousal disability," not based on "financial need," the court would not elevate them to the same "urgency" as welfare or medical care.\footnote{171}{\textit{Fisher}, 610 F.2d at 636. The court cited \textit{Mathews v. Eldridge}, 424 U.S. 319, 340-43 (1976), for the holding that benefits not based on financial need will not bring into question the same constitutional issues that withholding basic subsistence benefits will.}

Since the right to travel was not implicated, the court applied the equal protection rationality test.\footnote{172}{\textit{Fisher}, 610 F.2d at 636. Where two classes similarly situated are treated differently, but no fundamental right is implicated, the court will uphold the statute in question so long as it is rationally related to a legitimate end. \textit{Chemerinsky, supra} note 97, at 764.} The cost-of-living increases were paid out of Nevada’s general treasury instead of the workers’ compensation insurance fund, and, therefore, the court found that Nevada could legitimately "confin[e] payments to those most likely to spend [them] within . . . the state."\footnote{173}{\textit{Fisher}, 610 F.2d at 637.} The classification of residents versus non-residents was rationally related to this end because the legislature could use many factors to support this conclusion, such as the cost to administer the program to out-of-state residents and a better understanding of the needs of in-state residents as opposed to out-of-state residents.\footnote{174}{\textit{Id.} The court did not say if there was any evidence that the legislature actu-}
2. The Dissent

Judge Hufstedler began her dissent by stating that workers' compensation benefits are not the same as welfare and should not be treated as such when considering constitutional issues surrounding eligibility requirements. Throughout her opinion, she reiterated that the very nature of workers' compensation is to compensate a worker for past injury, not simply to provide for the general welfare of a person in need.

Judge Hufstedler took on the three flaws that the majority addressed. While she agreed that a person's current state of residence is in the best and most appropriate position to provide for his or her general welfare, she said that this situation was "emphatically not the case before this court." In the case of workers' compensation, historically, the state in which the resident worked when injured had the responsibility of making such a provision, as it relates to the injury occurring within the state. Therefore, the person's "present connection" with a particular state is not important when considering eligibility; the "past connection" of being injured while working in the state triggers benefits. Because of this, Judge Hufstedler argued, a requirement that the recipient also have a "present connection" restricts the right to travel by forcing the injured worker to stay in the state to receive his or her full compensation.

Judge Hufstedler also refuted the majority's characterization of this issue as one not involving a durational aspect. She again referred to the two connections the Nevada statute required: a "past connection" (working or residing in Nevada at the time of injury in order to become initially eligible) and a "present connection" (current residency in Nevada to receive the cost-of-living increase). She pointed out that this was no different than the requirement in

ally used these factors to support its decision to pass this statute. However, the possible reasons the court put forth do not have to be the actual reasons for the legislation; all that is required in the lowest level of scrutiny is that the court can conceive a rational justification. CHEMERINSKY, supra note 97, at 764.

175. Fisher, 610 F.2d at 637 (Hufstedler, J., dissenting).
176. "Disability and death benefit pensions are designed to compensate injured workers and their survivors for their loss of earning power caused by industrial injuries." Id. at 641.
177. Id.
178. Id.
179. Id.
180. Id. at 640.
181. Id. at 641.
Shapiro that a welfare recipient have been a resident of California at two distinct points in time: at the time of application and twelve months prior.\textsuperscript{182}

Finally, Judge Hufstedler asserted that the cost-of-living increases were most certainly of a "fundamental nature," and the denial of them resulted in a "significant penalty . . . on the exercise of the right to travel."\textsuperscript{183} The Fishers relied upon the workers' compensation payments in obtaining the basics of day-to-day living, and the denial of the cost-of-living expenses in the face of steep inflation would clearly cause severe hardship.\textsuperscript{184}

Since Judge Hufstedler firmly believed that the denial of the cost-of-living increase was indeed a penalty on the exercise of the right to travel – no different than in Shapiro, Maricopa, and Dunn – she urged that the court strike down the statute unless it was proved "necessary to promote a compelling governmental interest."\textsuperscript{185} Judge Hufstedler quickly concluded that Nevada's stated interest – to make life better for some of its citizens for as little cost as possible – was hardly compelling, and therefore the statute should fail.\textsuperscript{186}

\section*{B. McEnerney v. United States Surgical Corp.\textsuperscript{187}}

Carol McEnerney was injured on the job in 1994, and she received partial disability benefits until their expiration on January 31, 1997.\textsuperscript{188} She then became eligible for forty-six weeks of additional benefits pursuant to Connecticut's General Statutes § 31-308a\textsuperscript{189} and began receiving $271.05 per week.\textsuperscript{190} McEnerney relocated...
icated to Florida so she could live with her son in a better climate, and Connecticut terminated the additional payments, even though she was eligible to collect payments for 15.72 more weeks.\textsuperscript{191} She appealed to the commissioner and the workers' compensation board, but both found that she was ineligible for continued payments because she was no longer "willing and able to perform work" in Connecticut, as required by the statute.\textsuperscript{192}

In its evaluation of McEnerney's constitutional argument,\textsuperscript{193} the court first questioned whether the statute imposed a penalty on those workers' compensation recipients who leave Connecticut to reside in another state.\textsuperscript{194} After acknowledging the long history of the right to travel, the court cited the three components of the right enumerated in \textit{Saenz}.\textsuperscript{195} Then, without explanation, it settled on a definition of the right to travel that limits application to "how a citizen is treated in her new state of residence."\textsuperscript{196}

The court then asserted that the Supreme Court had already decided this issue in \textit{Califano v. Torres}.\textsuperscript{197} In \textit{Torres}, a Connecticut resident was denied his Supplemental Security Income benefits after he moved to Puerto Rico.\textsuperscript{198} The Court held that the right to travel doctrine did not "require[ ] that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came."\textsuperscript{199} Further, the doctrine would not "require a State to continue to pay those benefits indefinitely to any persons who had once resided there."\textsuperscript{200} The Connecticut court

duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.


190. \textit{McEnerney}, 805 A.2d at 819.
191. \textit{Id}.
192. \textit{Id}.
193. McEnerney's complaint also argued that the statute was not applied correctly, prompting the court to first interpret "willing and able to perform work in this state." \textit{Id}. at 820-21. The court found that, based on the language of the statute, the commissioner was justified in terminating the benefits. \textit{Id}.
194. \textit{Id} at 822.
195. See supra text accompanying note 142.
197. \textit{Id} (citing \textit{Califano v. Torres}, 435 U.S. 1 (1978)).
199. \textit{Id} at 4.
200. \textit{Id}.
construed the *Torres* decision as holding that the right to travel never entitled a benefit recipient to continue receiving those benefits from the former state of residence.\(^{201}\) Since McEnerney's case represented exactly that situation, the court held that her right to travel was not implicated, and therefore, Connecticut did not need to demonstrate a compelling state interest.\(^{202}\)

*McEnerney* exemplifies rigid application of the *Saenz* components.\(^{203}\) In this case, a clear penalty on the right to travel did not fit into one of those components. In the next section, this Note will argue that the application of the right to travel doctrine to workers' compensation, as seen in *Fisher* and *McEnerney*, is flawed. It will further argue that the three components in *Saenz* unnecessarily exclude protections for citizens leaving former states of residence. Part IV goes on to suggest an alternate approach to issues involving the right to travel.

## IV. Analysis

### A. Issue Not Decided by Califano v. Torres

*McEnerney* relied heavily on *Torres* for its proposition that former states of residence can never be required to continue to provide benefits for residents who have moved,\(^{204}\) but *Torres* did not decide the exact issue presented.

*Torres* can be distinguished on several different levels. First, *Torres* involved a benefit recipient who left the United States instead of moving to another state.\(^{205}\) The Court clearly stated that the right to international travel was not fundamental, but instead was "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment," which could be burdened to an extent.\(^{206}\) The right to interstate travel has been designated as fundamental and can be traced to an early recognition that travel among the United States was necessary to encourage growth and trade within the country and to allow citizens of all states to take part in the centralized government, no matter where it was located.\(^{207}\)

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202. *Id.* at 823. The court did not discuss the rational basis test because neither party included that analysis in its brief. *Id.* at 823 n.9.
203. See supra note 142 and accompanying text.
206. *Id.* at 4 n.6.
Second, the benefit at issue in Torres was Supplemental Security Income ("SSI"), a federal program benefit that was not available to persons residing outside of the United States.\textsuperscript{208} Unlike workers' compensation, SSI required need and specific residency as initial prerequisites.\textsuperscript{209} To permit Torres to take her United States SSI benefits with her to Puerto Rico would allow her to reap a benefit unavailable to other residents of Puerto Rico. The Court hinted in dicta that the same proposition would apply to the states.\textsuperscript{210}

Indeed, this makes sense for programs like welfare and special education.\textsuperscript{211} Allowing a former resident of one state – California, for example – to continue to receive welfare benefits from that state after moving to another state – like Wyoming – would give that person an advantage over other residents of Wyoming. While long-time residents of Wyoming would only have the benefit of Wyoming's welfare program, the new resident could decide which program would be most beneficial to him.

Also, in this example, California would not have an interest in funding the livelihood of a resident of Wyoming, and it is far more appropriate for a person's home state to evaluate the needs of that person.\textsuperscript{212} This argument, that the former state has no interest in the citizen after he leaves and has no obligation to determine the citizen's need, is made in Fisher.\textsuperscript{213} While this argument is clearly applicable to welfare and similar social assistance benefits, the following discussion will show why it cannot apply to workers' compensation.

The Supreme Court in Torres left the door open for cases where it might be appropriate to allow someone to take his benefits with him when he moves to another state.\textsuperscript{214} Workers' compensation should be one of those cases because initial eligibility is not based on residence; it is based on injury.\textsuperscript{215} So, continuing with the example above, if a worker is injured in California and moves to Wyoming, he would not be getting any special advantages over other residents of Wyoming because the means of comparison

\textsuperscript{208} Torres, 435 U.S. at 2.
\textsuperscript{209} Id. See supra Part I.B.2.
\textsuperscript{210} Torres, 435 U.S. at 4.
\textsuperscript{211} Cf. Michael C. v. Radnor Township Sch. Dist., 202 F.3d 642 (3d Cir. 2000).
\textsuperscript{212} See Fisher v. Reiser, 610 F.2d 629, 633 (9th Cir. 1979).
\textsuperscript{213} Id. at 633.
\textsuperscript{214} Torres, 435 U.S. at 5 ("If there ever could be a case where a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel, this is surely not it.").
\textsuperscript{215} See supra Part I.D.
would necessarily be different. The real question would be whether he was getting benefits superior to other people injured while working in California, since eligibility is not based on where one lives, but instead on where one is injured. Conversely, taking away that worker’s benefits solely because he left California would put all those who were injured in California and stayed there in a much better position, and only because they did not elect to exercise their right of travel. Such a result is a classic example of a state action that would be found unconstitutional under Equal Protection.

Additionally, the level of benefits provided through workers’ compensation is not based on the individual’s need; it is based on arbitrary amounts and time limits established by statute. Since there is no need for any state – the former state or the current state of residence – to determine the needs of the recipient, the argument that the current state of residence is in a better position to make that determination falls short of proving anything.

Third, Torres dealt with a program funded by public federal funds. In the case of workers’ compensation, it is not the state itself providing the benefits; instead it is the employer, either directly or through its insurer. In the absence of insurers – and in many states, large employers may qualify to be self-insured – the employers directly pay for medical expenses and the allowable benefits. Once again, the argument that it is more appropriate for a state to care for its own fails because the state is not providing the funding for the benefits. Employers pay into workers’ compensation funds or to their insurers based on the risk that one of their employees will be injured, regardless of where those employees reside.

B. “Three Components” Aren’t Enough

The recent right to travel jurisprudence does not give enough weight to the “first component” of travel that ensures free movement among the states. Indeed, the Saenz Court did a disservice to the right to travel by splitting it into three components. This attempt at a bright line division has led to some confusion and to a

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216. See supra note 81 and accompanying text.
217. See supra notes 57-58 and accompanying text.
218. See supra Part I.D.
220. See Wolff, supra note 145, at 330 (“However, Saenz did not unify [the right to travel] cases under the Privileges or Immunities Clause. Quite to the contrary, the Court solidified the fractionalized right to travel by articulating the three components which make it up . . . .”).
gap — an important part of the right to travel is left unprotected by
the three components.

A situation could arise, as in *McEnerney*, where a citizen of
one state wants to relocate permanently to another state, and is pe-
nalized, not by the new state, but by the former state.221 Yet, this
situation would not be considered a “right to travel” issue under
*Saenz* because it does not fit neatly into the three components.222
While this situation should fit into the first component of the right
to travel – the right to move between the states – the *Saenz* Court
concluded that a state does not infringe on the first component un-
less it imposes a physical or administrative obstacle to interstate
border crossings.223 This narrow interpretation appears to permit
“moving fees” and other non-physical impediments imposed on citi-
zens wanting to leave a state – the very exactions that first impi-
cated the right to travel.224 Such a view is contrary to the whole
history of the right to travel. *Crandall v. Nevada* invalidated inter-
state travel fees, a historical equivalent to taxing or denying bene-
fits to a citizen today who has decided to move to another state.225
The view that imposing fees or denying benefits is not an obstacle
to interstate movement226 does not consider economic realities.
People on the economic edge depend on every dollar they have; a
monetary penalty for exercising a right may prevent an indigent
person from exercising that right.227

Penalties for leaving a state could presumably fit into the third
component – the right to be treated the same as other residents –
but the *Saenz* Court chose to limit that component only to dispa-

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222. *McEnerney, 805 A.2d at 822.*

223. *Saenz, 526 U.S. at 500-01.*

224. *Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43-49 (1867)* (holding as unconstitu-
tional a fee levied on all passengers leaving Nevada).

225. *Id. at 36.*

226. *Saenz, 526 U.S. at 501 (“Given that [restricting the amount of welfare bene-
fits a new resident may receive] imposed no obstacle to . . . entry into California, we
think . . . that the statute does not directly impair the exercise of the right to interstate
movement.”)).

227. Recall that actual deterrence is not necessary for a finding that the right to
travel was infringed; the mere possibility that someone would be deterred is enough.
*See supra* notes 128-29 and accompanying text.
rate treatment by the new state. This component ignores the possibility that a former state could penalize its citizens for moving away, effectively trapping them inside the state. The early cases outlawing fees for traveling to other states were not limited to fees imposed by the state entered; Crandall invalidated fees charged when a citizen left the state of Nevada. Whenever someone relocates, two states are involved, and both are equally capable of penalizing the moving citizen for exercising that right. Regardless of which state imposes the penalty, a United States citizen is still penalized for exercising his or her right to move from one state to another. Whether the former state of residence imposes the penalty on the way out or the new state of residence imposes one on the way in, the citizen still must pay for exercising his or her right. Coming or going, relocation is relocation.

The Saenz components are simply not broad enough to cover every type of burden on the right to travel. The Courts that articulated this right did not intend for it to be so narrowly construed; they envisioned free unimpeded travel to and from states and relocation at will. A penalty placed on citizens solely because they move to another state clearly obstructs that freedom. If the first component is limited only to actual movement across state lines, and the other two components only deal with how people are...

228. Saenz, 526 U.S. at 502 (defining the third component as “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State”).


232. “[I]nterstate travel is not a one-way road.” Fisher v. Reiser, 610 F.2d 629, 640 (9th Cir. 1979) (Hufstedler, J., dissenting).

233. The right at issue in the modern cases . . . is not simply a right to travel to or through a state but rather a right to move there – the right . . . to relocate . . . . To a large extent America was founded by persons escaping from environments they found oppressive . . . . [A] dissenting member [of a community] . . . should have the option of exiting and relocating in a community whose values he or she finds more compatible.


234. See Crandall, 73 U.S. (6 Wall.) at 49 (“We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”) (quoting The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849)). See also United States v. Guest, 383 U.S. 745, 758 (1966).

235. E.g., Crandall, 73 U.S. (6 Wall.) at 43-50 (fee charged to leave the state of Nevada was an unconstitutional infringement on the right to travel).
treated by their host or new home state, what protects people from penalties imposed by the state they are trying to leave?

While the *Saenz* components are convenient for identifying various Constitutional doctrines that might protect the right,\(^{236}\) the right should be viewed as more simple and broad, with the constitutional basis varying according to the context.\(^{237}\) The situation in which the right is implicated, not the right itself, should determine what constitutional source provides the test to be used. Therefore, in a situation where visitors are being treated differently than residents, the Privileges and Immunities test should be used. Likewise, in situations where new residents are treated differently than long-time residents, an Equal Protection analysis would be appropriate.\(^{238}\)

Applying an Equal Protection analysis to the *McEnerney* situation, the court could have looked at whether a classification was used that implicated the right to travel, instead of declining to implicate the right to travel because a *new* state was not penalizing a *new* resident.\(^{239}\) A classification that hinged on the exercise of the right to travel was clearly used – of the people injured while working in Connecticut and eligible for supplemental benefits, the class of recipients who moved and were no longer able to work in Connecticut were treated differently than those who did not move.\(^{240}\) Since the exercise of a fundamental right, the right to travel, was the basis for the classification, "its constitutionality [should have been] judged by the stricter standard of whether it promotes a compelling state interest."\(^{241}\) This does not mean that the statute using the classification would be automatically unconstitutional; it simply means that the statute should have to pass a more rigorous test.

C. A New Approach for Workers' Compensation Cases

Since the Supreme Court has not ruled on the issue of restricting workers' compensation benefits based on residency, and be-

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236. One scholar has questioned the necessity to establish a Constitutional source. See Turner, *supra* note 106 (asserting that a firm grounding in the Constitution gives legitimacy to the right to travel and arguing that the right has more than one source).

237. *Id.*


239. See *supra* note 196 and accompanying text.


cause it does not fit neatly into other prior decisions, a new approach must be considered. This approach should take into consideration the unique characteristics of workers' compensation. First, courts must not view workers' compensation strictly as welfare. In so doing, the Supreme Court must reconsider the scope of the *Saenz* components. Indeed, they were developed in a case considering welfare benefits – assistance granted by the *state* only to those in dire need. The components do not appear to contemplate benefits regulated by the state and paid for by private employers in return for a shield from liability. In the case of workers' compensation, states are doing much more than providing for the needs of injured employees. The states are also protecting the interests of employers in the state by providing a more predictable and inexpensive means for compensating those employees who are injured on the job.

The more appropriate approach for workers' compensation statutes that treat non-residents differently than residents is a return to the *Shapiro*, *Dunn*, and *Maricopa* analysis. If a workers' compensation statute is based on a classification that penalizes the beneficiary's right to travel and to choose the state in which he or she resides, then the classification should be subject to strict scrutiny. Thus, unless the classification is necessary to achieve a compelling state interest, it must fail.

The fairness and flexibility of such an analysis can be seen by applying it to the two workers' compensation/right to travel cases discussed in this Note. First, the Nevada program in *Fisher* would most likely be upheld, but not for the reasons stated in the Ninth Circuit's opinion. Rather than attempt to exclude workers'

242. See *supra* Part I.C.
243. See *supra* Part I.B.
244. See *supra* notes 136-37.
245. An application of this approach to the Alaska case, decided under the Alaska Constitution and discussed *supra* note 153, is also illustrative. The Alaska statute, as written at the time of the *Alaska Pacific Assurance* case, would not, and did not survive the Equal Protection analysis used. However, the Alaska legislature modified the statute to still treat non-residents differently, but in a way that is less discriminatory than its predecessor. *Alaska Stat.* § 23.30.175(b). The compelling state interest that Alaska promoted with this statute was encouraging workers to seek recovery from their injuries and return to employment. The concern was that if injured employees could take their Alaska benefits to other states with much lower costs-of-living, they would have no incentive to return to work. Instead of an arbitrary decrease in benefits, the new program decreases benefits only to the extent that the actual cost of living in the recipient's new state of residence is less than that of Alaska. As such, the decrease does not represent a penalty, since the injured employee will presumably have the same purchasing power, regardless of where he resides.
compensation from the right to travel doctrine because it is different than welfare and other state provided services, the court could have simply applied the Equal Protection analysis to reach the same result. Because the Nevada state treasury was the source of the cost of living increases, Nevada had a compelling interest in providing additional support for its own citizens. A state should not be compelled to use its treasury to care for citizens of other states.

Application of the Shapiro Equal Protection analysis to McEnerney, however, would yield a different result. The additional benefits denied to out-of-state residents were not paid by Connecticut's state treasury – they were additional payments the employer had to provide. The state cannot claim an interest in caring for its own when it is not the entity providing the care. Additionally, if the stated reason for the provision is to lower costs of workers' compensation insurance for employers, denying certain benefits to non-residents is not the necessary, most non-discriminatory way to accomplish that goal. Reducing some benefits across the board would produce the same result, as would devising a more stringent review process to reduce fraud.

CONCLUSION

In short, an analysis that does not take into consideration the broad purposes of this country's workers' compensation system does a disservice to workers and creates a class of people – victims of industrial accidents – who are restricted in their exercise of a fundamental right. The fundamental right to travel freely among the states is firmly imbedded in this country’s history and jurisprudence. Hence, McEnerney’s interpretation of the current doctrine, which allows states to penalize workers' compensation recipients for moving to another state, is at odds both with the history of the right to travel and the purposes of the workers’ compensation system in the United States. Using strict scrutiny review to evaluate workers’ compensation provisions that treat injured employees who move to other states differently will protect the employees’ right to relocate while permitting states to craft statutes that are fair to both employers and employees.

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