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Liberal Nationalism

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Abstract. The recent Supreme Court decision in *Saenz v. Roe* struck down a California welfare law that imposed residency requirements on recent arrivals to the state. In vindicating the mobility rights of migrants, the Court breathed new life into the Fourteenth Amendment's Privileges or Immunities Clause. This Article suggests that, however misconceived the decision might appear from the perspective of welfare law, it usefully serves to promote a common American identity on which nationalist sentiments crucially depend. The core nationalist symbol for Americans is the idea of constitutionally-protected liberties that I call liberal nationalism

A liberal nationalist understanding of the Privileges or Immunities Clause has four implications for constitutional interpretation. First, it suggests that the mobility rights the *Saenz* court upheld deserve the high degree of protection they received in that case. Second, the argument from nationalism offers an explanation for cases where the Supreme Court has been faulted for failing to protect national symbols such as the flag. More than the flag, constitutional liberties are a national symbol for Americans, and in upholding the right to deface the flag on free speech grounds, the Court has merely preferred one patriotic symbol to another. Third, a nationalist perspective suggests that basic liberties should enjoy constitutional protection at the national level and should not be entirely returned to the states. But for the argument from nationalism, a strong case could be made for a very thin set of national constitutional liberties, or even for state opt-out rights. Finally, nationalist concerns suggest a need for caution before removing contentious issues from political deliberation by turning them into constitutional rights. In politics, there are only winners and losers, and there is no great shame in being a loser; but in American constitutional law the losers can be faulted for a want of loyalty to core American values, and this must weaken American nationalism.

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Liberal Nationalism

F.H. Buckley

It is said that the United States is more than a nation; it is an idea. But it is more than an idea; it is a nation.

John O'Sullivan

Three years ago I argued that the transfer of responsibilities for welfare law from federal to state governments was benign, and that the provisions of the 1996 welfare reform law that did this should be upheld.[1] In particular, I argued (with my co-author) that states should be permitted to prescribe their own residency requirements, as these are a reasonable response to the fear of welfare-motivated migration.

Last year, in *Saenz v. Roe*,[2] the Supreme Court struck down a California welfare law that imposed a residency requirement on new arrivals. The California law was not draconian: it simply placed a ceiling on welfare payments, which were not to exceed the exit state's payout levels for the first twelve months after the recipient arrived in California. Nevertheless, the Supreme Court set aside the law, and in doing so breathed new life into the Fourteenth Amendment's Privileges or Immunities Clause, which had been eviscerated by the *Slaughter-House Cases* in 1873.[3] After that case, the Clause essentially disappeared from U.S. constitutional law. Now it is back, and might well assume a major importance in constitutional deliberation. Beyond the narrow issues addressed in *Saenz*, however, its content remains shrouded in mystery.

This Article suggests a novel principle of constitutional interpretation that assists in explaining the *Saenz* decision and the new understanding that must now be given to the Privileges or Immunities Clause. In other countries,

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[1] F.H. Buckley & Margaret F. Brinig, Welfare Magnets: The Race for the Top, 5 Sup. Ct. Econ. Rev. 141 (1997).

[2] 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (May 17, 1999).

[3] 83 U.S. 36, 21 L. Ed. 394 (1873).

dynastic houses and cultural icons serve as a focal point for nationalist or patriotic sentiments.[4] By contrast, America does entirely without the former and increasingly without the latter. Nationalism is itself a rather suspect doctrine, "the political doctrine that dares not speak its name," in Michael Lind's ironic phrase.[5] Yet Americans are highly patriotic,[6] and America is not without its national symbols. Of these, the most important is perhaps the sense that America has a special mission to promote liberty. Moreover, the American conception of freedom is highly legalistic, and focuses upon the liberties guaranteed all Americans by the Constitution.[7] In particular, the freedoms

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[4] While I use "patriotism" and "nationalism" interchangeably, they mean different things. Patriotism is the virtue of an individual, and nationalism more the popular sentiment of a group. In addition, patriotism refers to a state and nationalism to a culture or nation-state. One may be a patriotic Canadian and still subscribe to the *deux nations* view of the country. Nationalism also refers to a belief in the right of national self-determination. See Michael Ignatieff, Blood and Belonging: Journeys into the New Nationalism 145 (New York: Farrar, Straus & Giroux, 1993). For the purposes of this article, however, it seems to me more confusing to distinguish than to conflate the two terms.

[5] Michael Lind, The Next American Nation: The New Nationalism and the Fourth American Revolution 6 (New York: Free Press, 1995). For an introduction to the place of nationalism in the American intellectual tradition, see Michael Lind, Hamilton's Republic: Readings in the American Democratic Nationalist Tradition (New York: Free Press, 1997).

[6] Americans are reported to be amongst the most patriotic people in the world. Seymour Martin Lipset, American Exceptionalism 20, 51-52 (New York: Norton, 1996).

[7] For studies that stress the uniqueness of American nationalism's identification with constitutional ideals of liberty, see Seymour Martin Lipset, American Exceptionalism 20-21 (New York: Norton, 1996); Liah Greenfield, Nationalism: Five Roads to Modernity 401-23, 484

promised by the Declaration of Independence and guaranteed by the Bill of Rights have assumed the status of what historian Pauline Maier calls "American Scripture."[8]

In what follows, I suggest that a nationalist understanding of constitutional liberties might plausibly inform the Privileges or Immunities Clause.[9] The Fourteenth Amendment was enacted after the Civil War, at a time when patriotic sentiments were particularly strong, and a nationalist account of the Privileges or Immunities Clause is consistent with the framers' intentions. *Saenz* invites a reconsideration of the Clause and of the manner in which liberal nationalism might shape the contours of American constitutional law.

A nationalist understanding of basic rights has four implications for constitutional interpretation. First, it assists in understanding the special importance accorded to the migrant's mobility rights, as few things sap nationalist sentiments more than explicit or implicit barriers to interstate travel. This was the narrow point on which residency requirements for migrants were struck down in *Saenz* was decided, and rightly so on nationalist theories.

Second, a nationalist theory of constitutional liberties provides an explanation for cases where the Supreme Court has been faulted for failing to protect national symbols such as the flag. When courts uphold, on free speech grounds, the rights of protestors to burn an American flag, they do not trivialize national symbol; instead, they prefer an an abstract fundamental icon--the Bill of Rights--to a less central symbol--the flag or the Pledge of Allegiance.

(Cambridge: Harvard, 1992); Yehoshua Arieli, Individualism and Nationalism in American Ideology (Cambridge: Harvard, 1966). See further text at notes XX-XX. On the unique place of the Constitution in American popular culture, see Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (New York: St. Martin's, 1994).

[8] Pauline Maier, American Scripture: Making the Declaration of Independence (New York: Vintage, 1997).

[9] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."

Third, a nationalist perspective suggests that constitutional liberties deserve protection at the national level and should not be turned over entirely to the states. This might seem a point of largely theoretical importance. While the Supreme Court has shown itself increasingly sympathetic to principles of federalism, the move to devolution has come around the edges: core national rights do not seem threatened. Nevertheless, theoretical arguments have practical bite when counter-arguments are unpersuasive. For why should basic freedoms not be left for state legislators and state constitutions? On models of competitive federalism, state competition in the provision of basic rights would plausibly result in a race to the top, won by the state with the most benign set of laws. The suggestion may seem a radical one; but it is no more radical than the Canadian constitution, which gives provinces the right to opt out of Charter protections. This is not unlike how basic freedoms were understood for most of American history, and was certainly how the *Slaughter-House* court saw the matter.

What this analysis of constitutional liberties misses, however, is the idea of nationalism, and the costs that the abandonment of a national symbol would impose. The Fourteenth Amendment's framers understood the appeal of nationalism, and campaigned for the Amendment's passage by emotional appeals to patriotism. If we are to interpret a constitutional text by seeking the framers' original intent, then the Privileges or Immunities Clause should not be seen as an empty vessel. Instead, it should be read, along with its sister clause establishing a national citizenship, as guaranteeing a set of core freedoms that every American might enjoy. The *Saenz* decision therefore invites a reconsideration of the Privileges or Immunities Clause that more faithfully reflects the nationalism of its framers.

Fourth, a nationalist understanding suggests a need for caution before turning contentious political questions into constitutional rights. The border between the political and the constitutional will depend on the respective competence of legislators and courts. More than most countries, America withdraws issues from the political arena and assigns them to the courts, and this might reasonably be thought to tax the competence of the bench. In addition, taking a contentious issue from the political arena and turning it into a constitutional right may weaken nationalist sentiments. In politics there are winners and losers and there is nothing particularly dishonorable about being a loser. In constitutional debates, however, the loser's argument is fundamentally illegitimate. Because constitutional rights are a national symbol, there is something un-American about taking the wrong side on a constitutional question. This is something all sides should care about if nationalism is valuable in itself.

I discuss the *Saenz* decision in Part I. Part II argues that basic rights are a national icon, and that nationalism played an important role in the passage of the Privileges or Immunities Clause. American nationalism is not a matter of ethnic or religious ties but of a common allegiance to libertarian principles enshrined in a national constitution. Part III argues that this vision of liberal nationalism is worthy of support, and Part IV suggests how it might reshape our understanding of constitutional law principles. I conclude in Part V.

I.The Saenz Case

California is one of the wealthiest states in the Union. It is also one of the most generous, in its welfare payouts. In recent decades, however, the state's rapid population growth has prompted fears of excessive sprawl, horrendous commute times and general overcrowding, and this in turn has led many Californians to wonder how the state might repel some migrants. For example, popular sentiment that overcrowding was a problem and that it was partly attributable to high welfare benefits sparked a grass roots rebellion in 1994--Proposition 187-- against welfare benefits to undocumented aliens.

Californians also worried about welfare-induced migration from other states. In 1992 the state amended its Aid for Families with Dependent Children (AFDC) legislation to limit new arrivals to the welfare payouts they would have received in the state of their prior residence. This is called a *two-tier* plan, for it discriminates between new arrivals and long-time residents.

A.Two-Tier Plans

Two-tier welfare programs are motivated by a concern that high payouts will attract welfare migrants. There is some empirical evidence and a great deal of anecdotal evidence of this.[10] Migrants are lured by a variety of locational

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[10] Margaret F. Brinig & F.H. Buckley, The Market for Deadbeats, 25 J. Legal Stud. 201 (1996) reported a significant welfare predictor for both in-migration (positive) and out-migration (negative), with a non-trivial elasticity in both cases. See also Rebecca M. Blank, The Impact of State Economic Differentials on Household Welfare and Labor Force Behavior, 28 J. Pub. Econ. 25 (1985); Robert Moffitt, Incentive Effects of the U.S. Welfare System: A Review,

advantages; good schools, low crime, low taxes. It is not unreasonable to suppose that some migrants are also attracted by the prospect of high welfare benefits, or repelled by low welfare benefits. Over time, therefore, one might expect a general shift of welfare recipients to "welfare magnet" states.

Welfare migration might give rise to a second form of strategic behavior, this time at the state and not the individual level. A state that fears it might become a welfare magnet might cut its welfare benefits to repel welfare-motivated migrants. Suppose that a state determines its payout policies by first setting a per capita amount and then paying this out to everyone who meets objective qualification standards. In a world of closed borders, this might result in a relatively stable welfare budget. With open borders, however, high payout states might find this policy a budget-breaker. The welfare magnet that wants to maintain a constant total budget in a world of open borders might then react in one of two ways. It might either cut per capita benefits or limit availability through tougher qualification requirements. In either case, the result might be what Harvard economist Paul Peterson has labeled a "race to the bottom."[11] As State $_A$ cuts its welfare benefits to repel welfare-seekers from State $_B$, State $_B$ might respond in kind, leading to a downward spiral in which each state cuts its benefits down to nothing in an effort to repel welfare migrants.

In a prior study my co-author and I found no evidence that states cut welfare payouts as a response to higher caseloads or increased migration.[12] As a theoretical matter, there is a possibility that fears of welfare migration might prompt a state to trim its welfare budget. But even then, two-tier welfare programs might address this problem. They permit a high payout state to keep benefit levels up without the fear of becoming a welfare magnet, since two-tier programs discourage welfare-motivated migration at the individual level. When the misincentives at the state and individual levels may be so easily addressed, the unproven concerns about a "race to the bottom"

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30 J. Econ. Litt. 1 (1992).

[11] Paul E. Peterson, The Price of Federalism 108-28 (New York: Twentieth Century Fund, 1995); Paul E. Petersen & Mark C. Rom, Welfare Magnets: A New Case for a National Standard (Washington: Brookings, 1990).

[12] Supra note X. Studies that report the contrary have serious design flaws. Id.

would not appear troubling.

The California plan required the approval of the federal government, and in due course the Bush administration granted a waiver to allow it. However, the plan was almost immediately enjoined by the District Court as an impermissible fetter on the individual's migration rights,[13] and this decision was affirmed by the Ninth Circuit Court of Appeals.[14] On appeal to the Supreme Court, the matter was vacated as unripe, since the federal government (after the change in administration) had withdrawn its waiver of the two-tier plan.[15]

There things remained until Congress enacted its welfare reform plan, the Personal Responsibility and Work Opportunity Reconciliation Act, in 1996. The federal welfare reform act, a major plank of the Congressional Republicans' 1994 Contract with America, replaced the AFDC with the Temporary Assistance to Needy Families (TANF) program, and shifted welfare responsibilities from the federal government to the states. The statute specifically authorized two-tier plans along the lines of the 1992 California plan, dispensing with the need for federal waivers.[16] Accordingly, the state announced that it would reinstitute its two-tier policies on April 1, 1997. On that day, the *Saenz* plaintiffs filed their action, challenging the California plan and the portion of the 1996 welfare reform act that authorized two-tier plans.[17]

Most commentators expected the California law to be upheld. After the 1996 federal welfare law, the Court would have to override both state and federal legislation if it were to strike down the two-tier plan. Instead, the California plan was set aside and the federal legislation was found inoperative insofar as it authorized two-tier plans. Writing for a seven-person majority, Justice Stevens held that two-tier plans impermissibly fetter a "right to travel" that, if not found in the text of the Constitution, was nevertheless embedded in the Court's jurisprudence. Mobility rights

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[13] Green v. Anderson, 811 F.Supp. 516 (E.D. Ca. 1993).

[14] 26 F.3d 95 (1994).

[15] Anderson v. Green, 513 U.S. 557, 130 L.Ed. 2d 1050, 115 S. Ct. 1059 (1995).

[16] 42 USCS § 604(c).

[17] One of the issues for determination, which I do not consider in this Article, was whether Congressional action cured the constitutional problem. The Court held that it did not.

were most clearly upheld in a prior two-tier decision, *Shapiro v. Thompson*,[18] where migrants were denied *all* welfare benefits for a year after their arrival in the new state. The two-tier plan in *Saenz* was not nearly so drastic, but this was a distinction without a difference for a Court whose eye was fixed on symbolism rather than economic substance.

> Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits.... 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.[19]

On this reasoning, even a $1 discount for the new arrival imposes an impermissible penalty by signaling that he is something less than a first-class citizen.

B. Mobility Rights

Mobility rights, in the Court's view, embrace three components, of which one only was affected by the California plan. First, a state cannot prevent a citizen of one state from entering its borders, as the federal government may do with respect to aliens under the immigration power. Oklahoma may not set up border patrols to screen migrants from Texas. Nor may a state criminalize the act of bringing impecunious migrants across state lines.[20] Such laws erect a direct barrier to migration, however, and two-tier welfare plans are nothing like that. Second, American citizens have the right "to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state."[21] Yet as the migrants in *Saenz* sought to become permanent and not temporary residents of California, this right was not implicated either. Instead, the two-tier plan was struck down under the third branch of mobility rights, the right of migrants who elect to become permanent residents "to be treated like other citizens" of

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18 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).

19 119 S. Ct. at 1527.

20 Edwards v. California, 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164 (1941).

21 119 S. Ct. at 1525.

their new state.[22]

The Court held that there is a qualitative difference between the protection afforded under the second and third branches of mobility rights. A state may discriminate between permanent residents and temporary visitors, where there is a substantial basis for the discrimination (such as reducing tuition for in-state students). But there is no acceptable basis for discriminating amongst permanent residents on the basis of how long they have resided in the state. "Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresidents's exercise of the right to move into another State and become a resident of that State."[23] For permanent residents, mobility rights are absolute.

Mobility rights are not explicitly mentioned in the Constitution. Nevertheless, the first two heads of the right to travel are uncontroversial. Since the immigration power is reserved to the federal government, states lack the power to deny entry to migrants from other states or to aliens lawfully admitted into the United States.[24] The mobility rights of temporary residents (the second component of the right to travel) are also implicitly protected, through the Privileges and Immunities clause of Article IV, § 2 of the Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

How this protects the non-resident visitor was considered in *Paul v. Virginia* in 1869:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with

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22 Id.

23 119 S. Ct. at 1526.

24 Lest this be thought a necessary feature of all federal regimes, one should note that the federal government that most closely resembles the United States gives one province--Québec--a substantial say in the choice of immigrants who express a desire to settle in that province. See F.H. Buckley, "The Market for Migrants," in J.S. Bhandari and A.O. Sikes, Economic Dimensions in International Law: Comparative and Empirical Perspectives 405, 440 (Cambridge: Cambridge, 1997).

citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.[25]

Though stated in the language of individual rights, this is also a principle of interstate comity under which each state secures for its citizens the same rights when they travel in other states that it concedes to visitors from such other states. For this reason, the Art. IV Privileges and Immunities Clause is conventionally referred to as the Comity Clause.

In *Saenz*, the Court unanimously found that the Comity Clause protected the temporary visitor to another state. However, the Clause less clearly extends to permanent migrants and the residency requirements of entry states, for while it endows the New Yorker with certain rights whilst he visits Virginia, it has less to say about those who, having left New York, are now Virginia residents. That is left, thought the Court, for the Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....

These provisions have largely lain dormant. When the *Shapiro* court impeached a two-tier plan in 1969, it did so by invoking the Equal Protection Clause. In *Saenz*, however, the Court invoked the Fourteenth Amendment's Privileges or Immunities Clause, and this invites a reconsideration of its purpose. (Following convention, I shall refer to the first quoted sentence as the Citizenship Clause and the second as the Privileges or Immunities Clause--although I shall seek to conflate the two).

C.The Privileges or Immunities Clause

What is the point of largely repeating the Comity Clause in the Privileges or Immunities Clause? The legislator does not speak in vain; less so the Constitutional draftsman. Yet the overlap between the two Clauses is so close that an eminent scholar has proposed that the Privileges or Immunities Clause be treated as if it were obliterated by an ink

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[25] 75 U.S, 168, 180.

blot.[26] What does it do that the Comity Clause does not do? Moreover, since the *Slaughter-House Cases* in 1873,[27] the Privileges or Immunities Clause has been thought a dead letter, for reasons that case made clear.

The *Slaughter-House Cases* upheld Louisiana legislation that created a slaughter-house company, permitted local butchers to use its facilities for set fees, and prohibited all slaughtering elsewhere in the area. Local butchers argued that the grant of the monopoly abridged their Privileges or Immunities, and, writing for the Court, Justice Miller seemed at first sympathetic to their argument. The core of the Clause, said Miller J., was citizenship, the citizenship denied a fugitive slave in the *Dred Scott* case. Dred Scott could not be a citizen of a slave state; and there was no such thing as American citizenship apart from the individual's citizenship of a state. That, said the learned judge, was the lacuna that the Fourteenth Amendment addressed, by creating an American citizenship. "It is quite clear ... that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[28]

Yet what follows from the creation of an American citizenship? What are the rights of he who can say *civis americanus sum*? And might these rights be prescribed by the federal government, trumping inconsistent state laws? Miller peered into the abyss of unconstrained federal paramountcy and immediately recoiled.

Was it the purpose of the fourteenth amendment by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?[29]

The questions answered themselves, thought Justice Miller. How could Congress be granted an unfettered power to

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[26] Robert H. Bork, The Tempting of America: The Political Seduction of the Law 166 (New York: Touchstone, 1990).

[27] 83 U.S. 36, 21 L. Ed. 394 (1873).

[28] 83 U.S. at 70.

[29] 83 U.S. at 76-77.

set aside state laws in a federal system of government? When the effect of a claim of Congressional power:

is to fetter and degrade the State governments by subjecting them to the controls of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[30]

What the learned judge meant was just the opposite, of course: that such an argument must necessarily fail. Otherwise, the federal government might usurp all state powers through the Privileges or Immunities Clause.

Justice Miller did not think that the Citizenship and Privileges or Immunities Clauses were entirely devoid of content. An American citizen has the privilege to invoke specifically federal protections, such as the protection of the federal government when he is abroad, the writ of habeas corpus, and the right to vote in federal elections. Under the Privileges or Immunities Clause, state have no competence to abridge these rights.[31] But as such rights do not include the right to slaughter animals, the impugned Louisiana legislation was upheld.

Prior to *Saenz*, therefore, the Privileges or Immunities Clause divided legislative powers into two watertight compartments of unequal size. In the very small compartment of American citizenship rights, state governments had no competence to legislate; and in the vastly larger compartment of state law, the Privileges or Immunities Clause did not in any way fetter state legislatures. Not surprisingly, the Privileges or Immunities Clause was little invoked. In the 136 years between the *Slaughter-House Cases* and *Saenz*, only one case found that a state law had violated

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[30] 83 U.S. at 78.

[31] As all such rights might properly belong to citizens under Art. IV's Comity Clause, however, it is not clear what the Privileges or Immunities Clause added. For an argument that the Slaughter-House Cases wholly emasculated the Privileges or Immunities Clause, see Charles L. Black Jr., A New Birth of Freedom 65-66 (1997). For a contrary view, see K.C. Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 Yale L.J. 643 (2000).

the Clause and that case was reversed five years later.[32]

What is remarkable is that, elsewhere in the ship, the scope of federal powers expanded beyond all measure. In the area of civil rights, this expansion came through the incorporation of portions of the Bill of Rights and the judicial protection of fundamental constitutional rights, and not through the Privileges or Immunities Clause, which is where a plain reading of the Constitution would have led one to look for federal civil rights law. Justice Miller's fear that state governments would be "degraded" has largely come to pass, and his argument that the Privileges or Immunities Clause should be construed narrowly has considerably less bite today than it did in 1873.

The intriguing question posed by *Saenz* is how broad the scope of the Privileges or Immunities Clause might be. Might it implicate constitutional principles and rights that have nothing to do with mobility rights? In his dissent, Justice Thomas posed the question squarely. The majority appeared to breathe new life into the Privileges or Immunities Clause, he noted, without reevaluating its meaning or seeking to understand what the framers intended.[33] There is little reason to suppose that the framers thought that privileges or immunities meant mobility rights and nothing else. The question how far the Clause extends, and whether it will expand or narrow existing substantive rights, can therefore be expected to arise again.

In what follows I propose a novel reading of the Privileges or Immunities Clause that fairly emerges from a study of the framers and their times. Like Justice Thomas and a large number of constitutional scholars,[34] I suggest that the

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[32] Colgate v. Harvey, 296 U.S. 404, 56 S. Ct. 252, 80 L. Ed. 2998 (1935); overruled in Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940).

[33] 119 S. Ct. at 1538.

[34] Id. See further Jacobus tenBroek, Equal Under Law 189-90 (New York: Collier 1965); Amar, supra, 178-79; Michael Kent Curtis, No State Shall Abridge (Durham: Duke, 1986); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 28 (Cambridge: Harvard, 1980); Laurence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future--Or Reveal the Structure of the Present, 113 Harv. L. Rev. 120, 184

Clause might plausibly incorporate the set of basic rights enjoyed by American citizens. Unlike them, however, I argue that basic constitutional liberties are constitutive of the American identity, and deserve support as a symbol of American nationalism.

While this argument is novel, the concern for national identity has never been entirely absent from constitutional deliberation. The *Saenz* court itself noted the desirability of a constitutional jurisprudence that is informed by nationalist sentiments. Justice Stevens quoted *Paul v. Virginia* on the value of mobility rights: without them America would be "little more than a league of States" as opposed to "the Union which now exists."[35] And in the penultimate sentence of his opinion, he adopted a paean to national unity. "The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'"[36]

II.A Nationalist Theory of Rights

A.The Historical Context

In examining what the Privileges or Immunities Clause might mean, one might reasonably begin with the constitutional debate that led to passage of the Fourteenth Amendment. Conservative scholars have argued that the framers sought only to incorporate the Civil Rights bill of 1866, and that the Privileges or Immunities Clause must be seen as an equalitarian measure meant to remove the barriers to citizenship rights and legal capacity that Southern states sought to impose on African-Americans.[37] So viewed, the Clause does not bar a state from

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(1999); Kimberly C. Shankman & Roger Pilon, Rethinking the Privileges or Immunities Clause To Redress the Balance Amongst States, Individuals, and the Federal Government, 3 Tex. Rev. Law & Pol. 1 (1998); Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993).

35 119 S. Ct. at 1526 (quoting 75 U.S. 168, 180).

36 Id. at 1530 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).

37 Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of

restricting the liberty of *all* of its citizens, as long as the law does not discriminate among classes of citizens. On historical grounds, this narrow reading of the Clause has been questioned by many scholars,[38] who have argued that the framers sought to give it broader substantive content. In this Section, I consider a novel argument for a substantive interpretation that extends beyond anti-discrimination norms, an argument that emerges from prior scholarship but that has not been advanced as a ground for an expansive view of the Clause. I shall argue that the framers, imbued with the patriotism that followed the North's victory in the Civil War, sought to anchor the hard-won idea of American nationhood on the substantive national liberties of all American citizens.

When the framers of the Fourteenth Amendment campaigned for its support, they voiced the strong patriotic sentiments of the victors in a long and bloody war.[39] The Civil War had just ended, and the work of national union

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Rights?, 2 Stan. L. Rev. 5 (1949). More recently, John Harrison has argued that the Privileges and Immunities Clause should be confined to antidiscrimination norms. John Harrison, Reconstructing the Privileges and Immunities Clause, 101 Yale L.J. 1385 (1992). See also Raoul Berger, The Fourteenth Amendment and the Bill of Rights (Norman: Oklahoma, 1989); James E. Bond, The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania, 18 Akron L. Rev. 435 (1985).

[38] Supra note X.

[39] The number of Civil War dead remains greater than the number of Americans killed in all prior and subsequent wars. The Union lost 360,000 men out of a population of 20 million; Southern losses were proportionately higher still. Ten percent of the North's citizens served in the Union forces. Union veterans organized themselves as "The Grand Army of the Republic" to preserve the memory of the fallen and the ideals of freedom for which they had striven, and by the 1866 Congressional elections they were a powerful national force. Cecelia O'Leary, To Die For: The Paradox of American Patriotism 28-41 (Princeton: Princeton, 1999).

had begun. The war was fought to preserve the Union, but from it emerged a very different kind of nation, with a new kind of self-understanding and patriotism. The War had indissolubly linked American nationhood with the ideals of freedom through Lincoln's "new birth of freedom."[40] Henceforth it would be the business of the national government to protect freedom through an expanded sense of the rights of national citizenship. As Eric Foner noted, what emerged from the conflict was a "new empowered national state and the idea of a national citizenship enjoying equality before the law."[41]

The themes of nationalism and national rights were frequently invoked in the Congressional debates over the Privileges or Immunities Clause. Its principal draftsman, Congressman John Bingham (R. Ohio) explicitly adopted a nationalist understanding of civil rights:

[T]his very provision of the bill of rights, ... more than any other provision of the Constitution, makes that unity of government which constitutes us one people, by which and through which American nationality came to be.... Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states?[42]

Who could oppose the Amendment, asked Bingham:

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[40] A review of letters from the field concludes that, to a remarkable extent, Union soldiers saw the defense of liberty as a central purpose of the War. James M. McPherson, What the Fought For 1861-65 (Baton Rouge: LSU, 1994); James M. McPherson, For Cause and Comrades: Why Men Fought the Civil War 19-21, 105-06 (New York, 1997). See also Karl J. Hess, Liberty, Virtue, and Progress: Northerners and Their War for the Union (New York: NYU, 1988).

[41] Eric Foner, The Story of American Freedom 106 (New York: Norton, 1998).

[42] Congressional Globe, 39th Cong, 1st Sess. 1090 (Feb. 28, 1866). See also Charles Sumner, Are We a Nation?, in 16 Collected Works 7-65 (Boston: Lee and Shepard, 1870-83) [1865].

Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizens of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?[43]

This was the sense in which the dissenting judge in the *Slaughter-House Cases* understood the Privileges or Immunities Clause. American citizenship was not "an empty name, but had connected with it certain incidental rights, privileges and immunities of the greatest importance."[44]

These immunities included the right to travel, not an abstract right but the specific one of white Northern Unionists to travel unmolested to the South. In addition, the sense of national rights embraced broader substantive privileges, such as the rights of assembly and free speech that Southern Unionists complained were denied them in 1866. Was this the cause for which the War had been fought, asked the veterans; who cheered when they were told, by Senator Yates (R. Ill.), that "We are now on the proud basis of Union, for the full freedom of speech and freedom of discussion on every foot of American soil."[45]

A letter from a Southern Unionist to the *New York Tribune* made plain the contemporary understanding of the Privileges or Immunities Clause's mobility rights:

For years before the War, almost everywhere in the South, northern born men were mobbed; some even put to death for uttering abolitionist sentiments.... The rights of American citizens, not only to enjoy their rights, but to protection in the full enjoyment of them, is now the dogma of the hour.... This is what the Flag means.... [B]e assured that this great mass of free people, whose rights, whose hopes and destinies, are all wrapped up in and secured by this great chart of liberty, have studied it well, and most especially those clauses which relate to their right to migrate from one state to another, and to be secure in every place in all the high behests of an American

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43 Congressional Globe, 39th Cong, 1st Sess. 1089 (Feb. 28, 1866).

44 83 U.S. at 116 per Bradley J.

45 Quoted in Curtis at 138.

citizen.[46]

Similarly, Congressman Columbus Delano (Rep. O.) noted:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of Constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders.... We are determined that these privileges and immunities of citizenship by the amendment of the Constitution ought to be protected.[47]

For the men of 1866, the Union victory was still precarious. Union forces still occupied the South, but prominent Confederates had been elected to high political office in Georgia and South Carolina, and local Republicans felt beleaguered. Republican leaders foresaw the day when the troops would depart, and the Fourteenth Amendment would be needed to take their place.

[T]he Union men of Tennessee to-day have no security except from the armed presence of the United states Government there. And when the State shall be restored, and the troops of the Government withdrawn, they will have no security in the future except by force of national laws giving them protection against those who have been in arms against them.[48]

There is room for disagreement about the framers' understanding of the Fourteenth Amendment. Several of the framers made expansive claims about the Privileges or Immunities Clause,[49] while others took a narrower view of its

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[46] Id. at 132.

[47] Quoted in Alfred Avins, The Reconstruction Amendments' Debates 177-78 (Richmond: Virginia Commission on Constitutional Government, 1967).

[48] Congressional Globe, 39th Cong, 1st Sess. 1093 (Feb. 28, 1866) (Sen. Bingham).

[49] Along with his more radical colleagues, Sen. Bingham argued that the Privileges or Immunities Clause would derogate from state powers and give Congress the power to enforce the Bill of Rights in the states. See Cong. Globe, 39th Cong., 1st Sess. 1089-90 (Feb. 28, 1866);

scope.[50] Few of the framers would have expected the Clause to embrace the modern set of constitutional liberties, since it was seldom suggested that the Fourteenth Amendment would constrain northern states in 1866.[51] Nevertheless, it seems clear that the Privileges or Immunities Clause was not addressed solely to present or even contemporary issues of racial justice. The draftsmen also sought to vindicate the rights of all American citizens, white and black, by creating a national citizenship in the Citizenship Clause and giving it content through the Privileges or Immunities Clause. Such privileges included mobility rights, but they also embraced substantive rights that protected the migrant after he moved. The northern migrant could not be prevented from moving to the south; nor could he thereafter be prevented from voicing his opinions and assembling to express them in his new state.

B.Are Constitutional Rights a National American Symbol?

Whatever the intent of the framers of the Fourteenth Amendment, the scope of the Privileges or Immunities Clause was soon abridged by the *Slaughter-House Cases*. In the decades that followed, the flag, the Union, or the Bill of Rights might have served as focal points of patriotism, but not a set of national constitutional protections that constrained state legislators. Had that decentralized constitutional regime persisted, the argument from nationalism that I am advancing would not be persuasive. But it did not persist. Since the Second World War, the scope of state legislative authority has shrunk through the incorporation of portions of the Bill of Rights.

As this happened, patriotic sentiments focused more closely upon the national than state governments, and Americans began to look to the national government as the guarantor of their freedoms. The Second World War had itself much to do with this, with its call for national service in a military that purposely united soldiers from different states in the same units, dissolving regional barriers as never before. The country's war aims were also identified

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Cong. Globe, 39th Cong., 1st Sess. 2542 (May 10, 1866).

[50] For a balanced overview of the framers' intentions, see Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863-1869 93-120 (Lawrence: Kansas, 1990); for a less balanced view that emphasizes their conservatism, see Berger, supra note X.

[51] Joseph James, The Framing of the Fourteenth Amendment 167 (Urbana: Illinois, 1965).

with constitutional liberties, through President Roosevelt's Four Freedoms (particularly as portrayed by Norman Rockwell).[52] Before the judicial revolution of national rights, the popular revolution took place in the hearts of the American people, as John Adams said of the American Revolution.

The importance of constitutional liberties as a nationalist icon has so frequently been noted that the point might seem trivial.[53] "[T]he American Constitution is unlike any other," said historian Hans Kohn. "It represents the lifeblood of the American nation, its supreme symbol and manifestation."[54] Other countries had their common cultures or religions. What America had was an idea. Thus Robert Penn Warren wrote, "to be an American is not ... a matter of blood; it is a matter of an idea--and [American]history is the image of that idea."[55] And what was the idea? Not simply liberty or liberty under law, for those were also English ideas. The special American contribution, that defined the nation itself, was the idea of constitutionally-protected liberty. This was Wendell Willkie's idea of America in his 1943 bestseller *One World*.

Our nation is composed of no one race, faith, or cultural heritage. It is a grouping of some thirty peoples possessing

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[52] For a compelling account of the power of libertarian rhetoric during the War, see Foner, supra note X, at 219-40. The change in the balance of power between state and federal governments began before the Second World War. During the Progressive Era and the Great Depression, it became fashionable to favor "scientific planning" of the economy by the national government. Yet a strong current of support for States' Rights remained until World War II. See Michael Kammen, Sovereignty and Liberty: Constitutional Discourse in American Culture 157-88 (Madison: Wisconsin, 1988).

[53] See supra note X.

[54] Hans Kohn, American Nationalism: An Interpretive Essay 8 (New York: Macmillan, 1957).

[55] Robert Penn Warren, The Legacy of the Civil War: Meditations on the Centennial 78 (New York: Random House, 1961).

varying religious concepts, philosophies, and historical backgrounds. They are linked together by their confidence in our democratic institutions as expressed in the Declaration of Independence and guaranteed by the Constitution.[56] It has been repeated in countless stump speeches and high school debates, and according to the most sophisticated of today's pollsters continues to define this country.[57]

The genius of American nationalism is liberal nationalism,[58] where the core icon is not blood or earth but a constitutional ideal of liberty. This quite reverses the way in which nationalist symbols operate in most other countries. Ernest Gellner argued that the growth of European nationalism was a response to the wound of modernity that followed the shift from an agricultural to an industrial economy. Nationalism united an alienated society, wrote Gellner, with "*Gesellschaft* using the idiom of *Gemeinschaft*." The deserted village was reinvented in the nation-state, and "a mobile anonymous society simulat[ed] a closed cosy community."[59] In America, however, where a constitutional icon takes the place of *la patrie*, *gemeinschaft* uses the idiom of *gesellschaft*, and the community is formed by its laws.

C.Universal and Particular Rights

When basic liberties are national symbols, they might be seen from either a universal or a particular perspective. On a *universalist* theory of rights, their content is determined through an abstract deliberation about the rights owed to all men, without regard to their nationality. By contrast, a *particularist* theory of rights need not claim that its stock of rights is appropriate in every state or society, and might defend a conception of rights for a particular polity

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[56] Wendell L. Willkie, One World 192 (New York: Simon & Schuster, 1943).

[57] See Everett C. Ladd, The Ladd Report 149-51 (New York: Free Press,1999).

[58] The phrase is Yael Tamir's. See Yael Tamir, Liberal Nationalism (Princeton: Princeton, 1993).

[59] Gellner, Nationalism at 74. Charles Taylor is broadly sympathetic to Gellner's functionalism. Charles Taylor, "Nationalism and Modernity," in John A. Hall (ed.), The State of the Nation 191 (Cambridge: Cambridge, 1998).

only.[60]

An older generation of American constitutional scholars that had lived through the Second World War was more likely to have a particularist conception of rights. They had been asked to make enormous sacrifices when their country was threatened, and patriotic sentiments remained strong. Thus Charles Black asked "Can we really bear to say, even (and above all) to ourselves, that the unity of this Union is a unity only in governmental power and economic exchange, but is not a moral union in the observance of human rights?"[61] And, answering his question, he argued:

Ours is a nation that founded its very right to exist on the ground of its commitment to the securing of nobly envisioned human rights in very wide comprehension--a country that now bases its claim to the world's regard on a questing devotion to the securing of human rights.[62]

Unlike universalist rules, particularist constitutional guarantees do not seek a justification in a rule of reason common to all men. Instead, they derive their authority from the duty to support the fundamental institutions of

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[60] A particularist rule is agent-relative and not agent-neutral, as those terms are used by Derek Parfit. An agent-neutral duty is not contingent with respect to time or place; an agent-relative rule imposes different duties on different people. Derek Parfit, Reasons and Persons 55 (Oxford: Oxford, 1984). From a utilitarian perspective, agent-relative rules like the special duty to support one's family or country are morally binding if abandoning such rules can be expected to diminish social welfare. One way of thinking about this is to ask whether it is a good thing that we have the predisposition to favor our nation over other countries, a subject I take up in the next Section.

[61] Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 156 (New York: Grosset / Putnam, 1997).

[62] Id. at 1.

one's country.[63] Nevertheless, a particularist attachment to a charter of rights requires a degree of moral commitment to them as rights, and not simply to them as a national symbol. An American who says that the right of free speech should not be abridged and adds "but that's just what we happen to believe around here" shows a lack of loyalty to a national symbol.[64] That is why particularism resembles universalism when (unlike flags) the symbol has its own moral content. But it does not follow that a particularist devotion to a Bill of Rights must collapse into universalism. The particularist might see his country's charter as uniquely appropriate for his own country, and not readily exportable. Or he might think that it is an optimal set of rights for everyone but reserve judgment about prescribing for citizens of other countries.

Once again, the metaphor of a race is instructive. To say that I think a particular runner deserves to win does not mean that I should wish to call off the race and simply hand him the prize. I will want the race to be run in any event, not merely because it is enjoyable but also because it provides new information about who is best. In the same way, I might think that the Bill of Rights represents the perfection of legal reasoning but still seek the verification that comes from the laboratory of international competition in the provision of constitutional protections.

III.Five Objections

The study of national symbols is not an exact science. It is not a matter of logic but of imprecise and even contested sentiment. Revolutionary traditions provide a patriotic symbols for most Frenchmen, but not so long ago many of their compatriots identified with the forty kings who in a thousand years made France.[65] There is also something less than unanimity about national icons in America, where conservatives might object to my suggestion that

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[63] Michael Walzer defends this understanding of fidelity to national rights in Spheres of Justice: A Defense of Pluralism and Equality 313-14 (New York: Basic, 1983

[64] Jeremy Waldron, Particular Values and Critical Morality, 77 Calif. L. Rev. 561, 576 (1989).

[65] The motto of Action Française, Charles Maurras' royalist journal.

constitutional liberties serve as a national symbol. Instead, they might see a common cultural heritage in literature and art as a more fundamental focal point of national identity. Alternatively, they might prefer to identify with federalism and America's tradition of decentralized liberty. For their part, liberals are apt to dismiss all appeals to nationalism. On their view, constitutional liberties are valuable for themselves, on abstract principles of right, and not because they happen to be a set of *American* rights. In what follows, I shall argue that conservatives are wrong to deny that constitutional liberties are a national symbol; and that liberals are wrong to deny the value of national symbols.

A.The Cultural Objection

In most countries, a common cultural heritage provides a central national symbol. In his pioneering studies of nationalism, Ernest Gellner made even stronger claims about the need for common cultural bonds. "[A] high culture pervades the whole of society, defines it, and needs to be sustained by that polity. *That* is the secret of nationalism."[66] What Gellner had in mind was not folk culture but *Kultur*, the high culture of a national art and literature.

The importance of cultural bonds in European nations is generally conceded. Taking *Beowulf* from a literature curriculum would uniquely weaken national sentiments in England. In America, however, multiculturalists deny the importance of homogenous cultural bonds, which have become highly controversial. For example, conservatives such as Peter Brimelow argue that American has a national culture which relatively few of its immigrants share, and that the failure to screen immigrants on the basis of culture weakens nationalist sentiments.[67]

These kinds of arguments are often advanced by illiberal nativists, and thus have fallen in disrepute. Nevertheless,

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66 Ernest Gellner, Nations and Nationalism 18 (Ithaca: Cornell, 1983).

67 Peter Brimelow, Alien Nation: Common Sense about America's Immigration Disaster (New York: Random House, 1995). Though the prescription might vary, the desire to preserve America's cultural heritage as the cement of national unity cuts across traditional political lines. Arthur M. Schlesinger Jr., The Disuniting of America: Reflections on a Multicultural Society (New York: Norton, 1992).

the desire to preserve a national identity, in Québec, France or Israel, may be consistent with democratic and liberal principles.[68] A nation that seeks to preserve its language might thus adopt a measured policy of favoring immigrants who speak the language, while still asserting a devotion to liberal principles. If, moreover, such a nation has a generous refugee policy, it would be difficult to fault its immigration policies from a liberal perspective. In defending a communitarian vision of the state, therefore, Michael Walzer argues that, subject to liberal constraints, America might have been justified in screening for homogenous immigrants had it remained a homogenous nation.[69] However, this has not happened, argues Walzer: conservatives such as Brimelow are factually wrong about the cultural unity of America, for America has become a pluralist society; and any attempt to screen immigrants on the basis of national origin would unjustly privilege one class of natives over another.[70]

My analysis suggests a second way in which Brimelow's argument might fail. If constitutional liberties are a core national symbol, and if the cultural screening of immigrants is inconsistent with the understanding Americans have of their country, then Brimelow's defense of nationalism would perversely weaken national sentiments. One could

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[68] Will Kymlicka, Liberalism, Community and Culture (Oxford: Oxford, 1989); Tamir, supra note X. It might also justify balancing an open-door immigration policy with strong efforts to assimilate immigrants in a national melting pot. "It is one of history's little ironies that no polyglot empire of the old world has dared to be so ruthless in imposing a single language upon its whole population as was the liberal republic 'dedicated to the proposition that all men are created equal'." Gerald Johnson, Our English Heritage 119 (Westport: Greenwood, 1973).

[69] Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 40 (New York: Basic, 1983).

[70] One of the ironies of the conservative position is that cultural conservatives have often been the fiercest critics of American culture. See Robert M. Crunden (ed.), The Superfluous Men: Conservative Critics of American Culture 1900-1945 (Wilmigton: ISI, 2d ed. 1999); or see any issue of The New Criterion.

not exclude aliens on cultural grounds without weakening that which it means for natives to be American.

B.The Devolutionary Objection

The second objection to my nationalist account of constitutional liberties is that it conflicts with a conservative image of America as a federal country in which state governments possess expansive legislative authority. If a decentralized form of federalism is the core nationalist symbol, then broad substantive rights under the Privileges or Immunities Clause would weaken, not strengthen, nationalist sentiments.

One is permitted to be skeptical about this objection. If the claim is that the core nationalist icon is the federal system (as opposed to one's individual state), then the argument seems implausible. One might feel an attachment to a state or to libertarian ideals, but not to a system of government. If federalism might suffice, then why not proportional representation or an elected Senate? Why not the electoral college? And why would the American feel loyalty to the United States, rather than to a country with a healthier federal system, such as Canada?

Suppose next that the core icon is not the federal system, but rather the individual state. This would seem intuitively more plausible. When Lee resigned his commission in the Union army in 1861, it was because he thought Virginia and not federalism threatened. And this points to a flaw in the devolutionary objection. Strengthening a sense of loyalty to a state or province (Virginia or Québec) ordinarily weakens, not strengthens, one's loyalty to the central government. One might approve this result for a variety of reasons, including the belief that the end result will be a more just or free society, but not out of *national* patriotism. It is not in our nature to love a thing and to wish it weak. Could one ever suppose that Lee loved the Union more than Lincoln? To love a thing is to wish it strong, and we love our countries most when they are girded for war, and in doing so we betray weaker loyalties. We forget that we are Virginians or Yorkshiremen and discover a new and more encompassing imagined community.[71]

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[71] The celebrated phrase is that of Benedict Anderson, Imagined Communities (London: Verso, rev. ed. 1991). "[T]he essence of a nation," said Renan, "is that all of the individuals have much in common, and also that they have all forgotten many things." Ernest Renan, "Qu'est-ce qu'une nation?" reprinted in Homi K. Bhabha (ed.), Nation and Narration 8, 11 (New York: Routledge, 1990).

What is likely behind this objection is the concern that a nationalist explanation of the Privileges or Immunities Clause might result in an excessive expansion of federal power, and that the result would be a less attractive country. We might fear the consequences of an excessive attachment to our nation, if this meant that the Privileges or Immunities Clause would suddenly swallow up all state private law. This was Justice Miller's concern in the *Slaughter-House Cases*, but the scope of federal power has expanded so greatly since then that breathing new life into the Privileges or Immunities Clause might little affect the balance of federal-state powers. On a plausible reading of the Clause, for example, Privileges and Immunities might refer only to fundamental rights, such as those of the Comity Clause as described by Justice Bushrod Washington in *Corfield v. Coryell* (1825):

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their being free, independent, and sovereign. What these fundament principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[72]

This was the sense in which Blackstone understood the phrase,[73] and it is one that gives content to the Privileges or Immunities Clause while preserving the federal character of American government.[74] So understood, a state has the unfettered discretion to enact non-fundamental private law rules, while fundamental individual rights are placed beyond the scope of legislative interference, by either the federal or state governments.

C.The Objection from Universalism

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[72] 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825).

[73] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 169 (New Haven: Yale, 1998).

[74] See supra note X.

Let us turn from conservative to liberal objections to the nationalist explanation of constitutional liberties.[75] Nationalism might first be thought to promote hostility to members of other nations and to provoke the kinds of conflicts seen in the former Yugoslavia.[76] Better Tito than Milosovitch, one might reasonably think. Even if nationalism is not pernicious, it might seem pointless when constitutional liberties serve as a national icon. Why not support liberty directly, the liberal might ask, rather than employ nationalism as a crutch to inculcate a respect for constitutional norms? This is doubtless what Robert Goodin and Philip Pettit had in mind when they excluded nationalism from the topics to be covered in their collection of essays on political philosophy. "Nationalism ... does not figure, on the grounds that it hardly counts as a principled way of thinking about things."[77]

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[75] Here, as elsewhere, political labels may mislead. The conservative imperialist will also object to nationalism (better Franz-Joseph than either Tito or Milosovitch), as will the traditionalist such as Christopher Dawson who regrets the loss of European or Christian unity. Nevertheless, the labels are useful, for the rise of nationalism can be seen as a conservative counter-revolution against the Enlightenment project and eighteenth century universal ethics. See Isaiah Berlin, The Roots of Romanticism (Princeton: Princeton, 1999); Ernest Gellner, Nationalism (New York: NYU Press, 1997).

[76] For statements of the anti-nationalist position. see Martha C. Nussbaum, "Patriotism and Cosmopolitanism," in Joshua Cohen (ed.), For Love of Country: Debating the Limits of Patriotism 3, 15 (Boston: Beacon, 1996); Paul Gomberg, Patriotism Is Like Racism, 101 Ethics 144 (1990).

[77] Robert E. Goodin & Philip Pettit, "Introduction," in A Companion to Contemporary Political Philosophy 1, 3 (Oxford: Blackwell, 1993). For an amusing review of the the Goodin-Petit book, see John Gray, Notes toward a definition of the political thought of Tlön," in Enlightenment's Wake: Politics and Culture at the Close of the Modern Age 11 (London:

Let us address the second concern first. If nationalism is the powerful sentiment that I take it to be (at least for nationalists), then the respect for liberal principles is strengthened when they become a national symbol. Similarly, the denial of human rights is the more painful when it offends the nationalist's allegiance to his country.

As for the first concern, the objection that nationalism is pernicious is speculative, as is any response to it. Moreover, to defend nationalism in the abstract, one cannot rely on arguments that focus on loyalty to a particular country. In the Great War Max Weber argued that Germany should win because it defended *Kultur*, while Émile Durkheim supported France in the name of *civilization*.[78] Both could not have been right; but to defend nationalism I must applaud the patriotism of both. If (being a francophile) I argued that Durkheim's patriotism was benign and Weber's not, then I would be defending French culture and not patriotism.

Nevertheless, there is reason to think that the benefits of nationalism outweigh its costs. There are four reasons why we might want both Durkheim and Weber to be patriotic. First, while wars are fought on nationalist grounds, patriotism plausibly decreases the likelihood of conflict by increasing the costs of aggressive war. The patriot can be readily enlisted to defend his homeland; but persuading him to invade another country may be a harder sell. Non-patriots might fight for private ends, for glory or material gain, but not so effectively as the patriot who defends his country. So viewed, patriotism increases the costs of imperialist or aggressive wars by reducing the probability of success. When the war requires mass armies (or mass support through taxation), securing patriotic backing is critical in the war effort, and the bias towards defensive wars will reduce the overall likelihood of war.[79] The success of the

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Routledge, 1995) (likening the academic liberal's list of pressing political problems to those of an imaginary world).

[78] The example is taken from Alasdair MacIntyre, Is Patriotism a Virtue 3 (Lindley Lecture, University of Kansas, 1984).

[79] From the perspective of the political leader, this might be seen as a self-binding device that elicits stronger loyalty from his citizens because they have less reason to fear that their nationalism will be manipulated. George Fletcher notes that, on the return to civilian rule in

Russian forces in the "Great Patriotic War" is consistent with this thesis.

The extent to which nationalism increases or decreases the likelihood of war depends in part on the ties that bind co-nationals together. When these are ethnic loyalties, as in the former Yugoslavia, nationalism may result in quite merciless wars. But with liberal nationalism, where norms of freedom serve as national icons, nationalism is more likely to reduce the possibility of conflict. Patriotic symbols like the Bill of Rights or the Declaration of Independence contain their own internal barriers to an adventuresome foreign policy, when a war is seen to deprive the enemy of his freedom or independence. All this is speculative, of course, for where the enemy is seen as repressive and illiberal, as its enemies looked to revolutionary France, even liberal nationalism has a belligerent side.

The second defense of nationalism is that an homogenous culture economizes on scarce mental resources. More than anything, nationalism fosters an homogenous culture, high and low, and what a common culture may offer, to those who were formerly *bretons* or *lorrainois*, is the ability to deal with each other across increased distances with lower transaction costs. Dialects disappear and a single language emerges, with all of the gestures and facial clues that are the common currency of exchange in a conversation. "To 'do business with each other'," notes Charles Taylor, or "operate a system of courts, run a bureaucratic state apparatus and the like, we need millions who can communicate without difficulty in a context-free fashion."[80] One could do all this without a common culture, but only at far greater expense, for culture permits us to economize on the scarcest of resources--the higher consciousness of deliberation and reflection.[81]

1983, Argentina's new leaders replaced the military's oath of allegiance. Formerly they swore their loyalty to their country; afterwards they swore to uphold the country's liberal constitution. George P. Fletcher, Loyalty: An Essay in the Morality of Relationships 62-63 (New York: Oxford, 1993).

[80] Taylor at 192.

[81] Big brains are very expensive organs, relative to the rest of our body. They take 22 times as much energy as an equivalent amount of muscle requires when at rest. Steven

The third defense of nationalism is that it is one of the particularistic emotions, like love of family and friends, that bind us to others, and that constitute the sense of solidarity or community that is one of the most basic human goods. Solidarity is not only an instrumental good, useful in permitting the parties in exploiting opportunities for gain, but also an ultimate good. Ignoring such bonds drains life and ideals of the particular content that alone gives them point.[82]

Because local loyalties--Burke's "little platoons"-- are normally stronger than more encompassing ones, it might be thought that nationalism perversely weakens the sense of solidarity by loosening sub-national allegiances. What this forgets is that, in a federal state, different levels of government call for a different kind of allegiance. Ties to one's city are doubtless important, but one does not pay parking tickets out of a sense of urban loyalty. Where loyalty to a state matters most is in wartime, when the highest personal sacrifices are asked of one, and since the responsibility for national defense is efficiently assigned to the national government, central governments have a special need for the loyalty of their citizens.

The fourth defense is that, by bonding us more closely to our fellows, nationalism increases altruistic impulses and reduces free riding.[83] We are more willing to perform acts for the general good--serving in the military, contributing

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Mithen, The Prehistory of the Mind: A Search for the Origins of Art, Religion, and Science 11 (London: Thames and Hudson, 1996). At rest, the nervous system consumes about 20% of the body's oxygen system, but only 2% of the body's mass. Paul M. Churchland, Matter and Consciousness: A Contemporary Introduction to the Philosophy of Mind 36-37 (Cambridge: MIT Press, 1986).

[82] Sir Isaiah Berlin, The Crooked Timber of Humanity 245 (Princeton: Princeton, 1990).

[83] This resembles the third defense of nationalism, for both regard ties of solidarity to fellow-citizens as beneficial. The difference is that the third defense saw solidarity as an ultimate human good, while the fourth defense sees it as an instrumental good, and valuable

to charity--when we feel a kinship to those around one. This promotes the trust that is the cement of our society. Without trust our friendships would becomes affairs of momentary convenience, on which no plans, no projects for future cooperation, could be formed. We rely so often upon friends and associates that we often forget we are doing so. We scatter our promises about, without paying much attention to what we are doing. We make seemingly trivial promises, to meet for lunch or to return a call, on whose performance deep friendships depend. And we make unspoken promises that are the foundation of trust: I will take your side; I will not betray you.

The need for trust is obvious in social and family promises. Less obviously, trust is of crucial importance in business dealings that cannot be reduced to a single contract. Consider the relationship between a large law firm and one of its major clients that generates millions of dollars a year for the firm. There is no formal long-term arrangement between them, however, but only a series of repeated one-shot retainer agreements. On any day, the size of these billings is dwarfed by the expected value of future business dealings, since clients seldom transfer their business from one firm to another. What gives the relationship stability is not the individual retainers but rather the personal relationships and trust built up over the years between firm and client.

To the extent that nationalism promotes trust amongst co-nationals, it may be uniquely valuable in highly mobile societies such as the United States. In several empirical studies I have found that personal bankruptcy and divorce rates are paradoxically higher in politically conservative Sunbelt states.[84] The most plausible explanation is that these are high migration states, and that the social stigma of promise-breaking is weaker when one is not rooted in a community. Thus the sense that Americans have that they are all members of a more encompassing nation, and that this binds them to each other, might usefully promote trust.

In response, the anti-nationalist might object that the nationalist's heightened sense of loyalty to his nation comes at the cost of reducing his allegiance to more encompassing groups, such as Canada (in the case of the *québécois*), the

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insofar as it permits co-nationals to exploit opportunities for gain.

[84] Margaret F. Brinig & F.H. Buckley, No-Fault Laws and At-Fault People, 18 Int. Rev. Law & Econ. 325 (1998); F.H. Buckley & Margaret F. Brinig, The Bankruptcy Puzzle, 7 J. Legal Stud. 187 (1998).

Austro-Hungarian Empire or mankind in general. One kind of solidarity waxes, the other wanes. But this objection rests on two questionable premises. The first is in thinking that the most remote and universal ties always outweigh local ones. The alternative to national bonds is often not universal bonds but no bonds at all. Nationalism might have unpleasant side effects, such as trade barriers with Third World countries. But the abandonment of nationalism is less likely to result in free trade with Africa than the erection of trade barriers between Virginia and Maryland.

The second difficulty is in thinking that solidarity may exist without rivalry. I root for the local high school, and against the other team. I choose one religion in preference to another. Without religious preferences, I am simply irreligious. It is a mistake to think that only the most encompassing communities count, and that local allegiances are suspect because they treat the outsider as an alien. What this forgets, in a world of natural rivalries, is that we cannot take the side of one community without taking sides against another.

D.The Objection from Impossibility

Let us assume that nationalism is benign. More precisely, let us assume that it is the cooperative solution to a Prisoners' Dilemma (or PD) Game. If we had a choice, however, would we choose to be patriotic?[85] Perhaps not, since the patriot bears risks that the non-patriot conveniently shirks. The patriot enlists in the services to defend his country; the non-patriot nimbly avoids doing so. Yet we might all be better off if we live in a society of patriotic people.

On this view, anti-nationalists are defectors who seek the special payoffs available to those who live in nationalistic societies without being nationalists themselves. Such people benefit from the patriotic sacrifices of others, without bearing the private costs of patriotism. A convenient cosmopolitanism may sometimes look smug and self-serving. Yet if anti-nationalism is an individually rational strategy, why is anyone patriotic?

There are at least two ways in which socially benign emotions of patriotism might take hold. First, we might have improperly characterized the nature of the game. The payoffs might not resemble a PD game; instead, it might turn out to be a game of "Bi-product Mutualism" in which cooperation dominates defection for all parties: whatever the

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[85] The reference is to Robert H. Frank, If Homo Economicus Could Choose His Own Utility Function, Would He Want One with a Conscience?, 77 Am. Econ. Rev. 593 (1987).

other party does, it is always better to cooperate.[86] Bi-Product Mutualism is the game of the Invisible Hand, in which the search for private advantage is socially beneficial and cooperative gains are a spillover benefit of individually-rational behavior. The temptation to defect disappears, and with it the fear that nationalist sentiments will be underproduced. This might happen when the private benefits associated with membership in a national community (such as ease of communication) cannot be exploited without a substantial human capital investment in the culture, and feelings of patriotism follow as a bi-product.[87] These results are modeled in the following diagrams.

Diagram 1The Patriot's Dilemma

How efficient nationalism might fail to take hold because cosmopolitanism is individually rational

Player 2

Player 1

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[86] See Lee A. Dugatkin, Cooperation Among Animals: An Evolutionary Perspective 33 (New York: Oxford, 1997)

[87] Which raises the question why our emotions are structured in such a way that we cannot receive nationalism's benefits (shared language and customs) without also incurring its burdens (the willingness to defend one's nation). However, the revival of group selection theories in evolutionary biology suggests an explanation for a benefits-and-burdens view of nationalism. "New" or trait group selection theories model how cooperative norms might evolve when the increased productivity of groups with many cooperators outweighs the private benefit to being selfish. Such theories are very tentative and have yet to be tested, but nevertheless suggest a way in which cooperative emotions such as nationalism might take hold. See Lee Alan Dugatkin, Cooperation among Animals: An Evolutionary Perspective 165 (New York: Oxford, 1997); David S. Wilson and E. Sober, Re-introducing Group Selection to the Human Behavioral Sciences, 17 Behav. and Brain Sci. 585-654 (1994).

	Nationalism	*Cosmopolitanism*
Nationalism	3,3	-5,4
Cosmopolitanism	4,-5	0, 0

Diagram 2 Bi-product Mutualism

How nationalism might be both efficient and individually rational

Player 2

Player 1

	Nationalism	*Cosmopolitanism*
Nationalism	5, 5	1, 1
Cosmopolitanism	1, 1	1, 1

The second way in which nationalist sentiments might take hold is through a change in the payoff structure of the game when nationalist sentiments can be credibly signalled. When nationalism can be identified, cosmopolitanism can be detected and punished, and this may eliminate the temptation to defect. In Israel, for example, top civilian jobs are apparently denied to those who refused to serve in their country's armed forced.[88] And non-patriots were formerly handed a badge of shame, like the white feathers of the Great War. The strategic structure of the game might then change to one of Bi-product Mutualism, in which a cooperative nationalism is individually rational for all players.

As Michael Spence has shown, private information might be credibly signaled by the willingness to bear a cost.[89]

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[88] See Yael Tamir, "Pro Patria Mori: Death and the State," in Robert McKim & Jeff McMahan (eds.), The Morality of Nationalism 227, 239 (New York: Oxford, 1997).

[89] Suppose that, for whatever reason, it is costly to reveal information, and suppose further that these signaling costs are differentially born by true and false signalers: signaling is

The costs are easy enough to spot when war is declared and the patriot is called on to defend his country. But how does one signal patriotism *before* that time?

A bare statement that one is a nationalist will not suffice because the non-patriot can costlessly mimic the signal, and will do so as long as people are rewarded for their nationalism. Signaling gains will then disappear: no signal will be believed and no one will bother to signal.

Nevertheless, the patriot might credibly pre-commit to make sacrifices for his country before wartime through a deep and lasting emotional commitment to his country. Ernest Gellner reported that tears came to his eyes when he heard Czech folk songs, and the American nationalist might similarly be affected by his country's flag or national anthem.[90] In addition, an instinctive and emotional defense of constitutional liberties is also a badge of American

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costly for both, but much more costly for the false signaler. Where these costs exceed his expected gains from signaling, he has no incentive to signal. However, it may be otherwise for true signalers who have lower signaling costs and whose signaling gains might exceed signaling costs. Game theorists call this a *separating equilibrium*: only the true signaler has an incentive to signal, and his signal is therefore credible. In a *pooling equilibrium*, by contrast, true and false signalers have the same signaling incentives and cannot be told apart on the basis of their signaling decision. See Michael A. Spence, Job Market Signaling, 87 Quarterly Journal of Economics 355 (1973). See Eric Rasmusen, Games and Information: An Introduction to Game Theory 205-11 (Cambridge: Blackwell, 2d ed. 1994).

[90] The principal manner by which emotions are signaled is through facial expressions. Facial signals reveal our deepest feelings to others, and permit them to make reliable inferences about our future behavior. The pioneer work on facial signaling was done by Charles Darwin in The Expression of the Emotions in Man and Animals 202 (New York: Oxford, 1998) [1872]. See also Paul Ekman & Erika L. Rosenberg, What the Face Reveals 201 (New York:

nationalism. The patriot's defense of national American liberties is an affair of the heart as well as the mind, and this helps to explain the passion with which the "Culture Wars" are fought.[91]

Signaling theories are generally speculative, in the absence of hard empirical evidence. The informational content of the signal might weaken in two ways. First, when the patriot regards his country's constitutional rights as flawed (abortion rights for the Catholic or Orthodox Jew), he might reject them as patriotic symbols. Second, the nationalist might fear that misbehaving politicians will manipulate his patriotism. Today a person might wish to become a prudent nationalist; but he knows that becoming patriotic will change his preferences and lead him tomorrow to behave in ways that today he thinks foolhardy. Today he can distinguish between just wars and jingoistic adventures; tomorrow it might not be so easy. He is like the man who signals a credible romantic commitment by letting himself fall in love, all the while knowing that there is a positive probability that he will be jilted. Where the risk is worth running, the emotional commitment is rational, for it helps to persuade his lover that she may trust him; but where the risk is excessive it is more sensible to keep one's emotions in check. So too, a prudent

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Oxford, 1997); Paul Ekman, Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage (New York: Norton, 1985).

[91] As Eric Posner notes, there are a variety of possible equilibria. Eric A. Posner, Social Norms, Social Meaning, and the Economic Analysis of Law, 27 J. Legal Stud. 765 (1998). This is particularly so when we allow for differential abilities to signal falsely. One possible equilibrium is a society formed of a large majority of true signalers and a small minority of "exceptionally good liars." The former will specialize in lie-detection and the latter in false signaling. Where the payoffs from the two strategies are the same, the parties are in equilibrium, since no one has an incentive to switch from one strategy to the other. For evidence about differing abilities to hide one's emotions, see Robert J. Edelmann, The Psychology of Embarrassment (Chichester, UK: Wiley, 1987).

cosmopolitanism will commend itself when the agency costs of political misbehavior are high.[92] In all of these ways, the signal might unwind.[93]

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[92] This analysis resembles the Becker-Murphy model of "rational addiction." See Gary Becker & Kevin Murphy, A Theory of Rational Addiction, 96 J. Pol. Econ. 675 (1988), reprinted in Gary Becker, Accounting for Tastes (Cambridge: Harvard, 1996). As in Becker-Murphy, past consumption of nationalism increases the instantaneous *marginal* utility of new nationalist experiences, without producing the negative internalities where past consumption decreases the instantaneous *total* utility from current consumption. In this sense, the addiction is "benign."

[93] The signaling costs of allegiance to constitutional liberties might also be socially wasteful, in the sense that such costs exceed the social benefits of signaling. Suppose that the gains from promoting nationalism are exceeded by the costs that result from an inefficient constitutional right. In that case, all parties are better off if they move to a pooling equilibrium, in which allegiance to a flawed set of rights is not taken to signal patriotism. However, the parties might be unable to coordinate around a pooling solution, since the private payoff from supporting the constitutional rights might exceed the private benefits of abandoning them. See Sam Rea, Arm-breaking, Consumer Credit, and Personal Bankruptcy, 22 Econ. Inquiry 188 (1984). These costs are described as "self-censorship" by Timur Kuran, who notes that an oppressive regime is more likely to survive when no individual is willing to voice political criticism. Timur Kuran, Private Truths, Public Lies (Cambridge: Harvard, 1995). The costs of the House of Windsor as a signaling device might then seem a bargain, when compared to the costs of excessive constitutional protections.

The simplest response to these objections is that, as a matter of fact, people in general (and Americans in particular) are patriotic, and are willing to make sacrifices for their country. As such we need not trouble ourselves unduly with the argument from impossibility.

E.The Objection from Indeterminacy

One of the difficulties of the argument from nationalism is its apparent vagueness. Even if nationalism matters, and constitutional liberties are a national symbol, how can one tell national rights apart from lesser rights that are left for the states to prescribe? In the *Slaughter-House Cases*, Justice Miller described national rights as those which "owe their existence to the Federal government [and] its National character."[94] But which are these? And if one cannot tell the two kinds of rights apart, how can the idea of nationalism assist in constitutional analysis?

The simplest response to this objection is a *tu quoque*: as vague as nationalism standards might be, they would seem as clear as other constitutional principles that courts and constitutional scholars have applied or suggested. Privacy standards are no more certain in their application, and Public Choice theories of competitive federalism have been raised in defense of very different welfare law policies (as we saw in Part I). There is a lengthy literature on the Takings Clause of the Constitution in which the empiricist will search in vain for testable propositions.

Secondly, even if the argument from nationalism is speculative, it is wrong to dismiss it out of hand when anti-nationalist claims are equally speculative. What it comes down to is weighing of the external costs of weakening nationalist bonds. Those who reject the nationalist's arguments must be taken to argue that, as a matter of fact, nationalist concerns impose trivial costs. This is an empirical claim, and it is no less speculative than that of the nationalist. The liberal nationalist asserts that downgrading constitutional liberties would impose positive spillover costs in weakening a national symbol; the anti-nationalist assigns a zero weight to such costs. In principle, there is no reason to award the palm arbitrarily to the anti-nationalist or to insist that the nationalist bears the sole burden of proof.

Thirdly, nationalism standards are not devoid of content, as it happens. They have a clear application to mobility rights and usefully inform the analysis of broader constitutional issues. However, a nationalist perspective cannot be narrowly legal. Lawyers cannot prescribe national symbols. They cannot define a particular right as constitutive of

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[94] 83 U.S. at 79.

the American identity. They must be sympathetic listeners, and not dogmatic teachers. They must know that their decisions affect a national symbol, and that constitutional rules that embitter a large number of fellow citizens may impose a substantial cost in weakening the bonds of national allegiance. As I shall argue in the next Part, this argues for prudence in constitutional design, and those who believe that Supreme Court decisions in recent decades have not been notable for their prudence might consider nationalism a powerful analytical tool.

In sum, a variety of objection might be made to my account of constitutional liberties as an American nationalist icon. However, these arguments are speculative, and none of them deliver the kind of knock-down blow that renders the nationalist account of the Privileges or Immunities Clause implausible. In the next Part, I ask what the implications of this might be, as a matter of constitutional interpretation.

IV.The Constitutional Implications

A nationalist understanding of the Privileges or Immunities Clause has four implications for constitutional interpretation. First, it suggests that the mobility rights the *Saenz* court upheld deserve a very high degree of protection. Second, it assists in understanding cases where the Supreme Court has been faulted for offering insufficient protection for national symbols such as the flag. Third, it suggests that constitutional liberties deserve protection at the national level, and should not be entirely turned over to the states. Otherwise, a strong case could be made for a very thin set of national constitutional liberties, or even for state opt-out rights on the model of the "Notwithstanding" clause of the Canadian Charter of Rights. Fourth, it suggests a further need for caution in turning contentious political questions into constitutional rights. In politics, there are only winners and losers, and there is no great shame in being a loser; but in American constitutional law the losers can be faulted for a want of loyalty to core American values, and this will weaken nationalist sentiments.

A.Mobility Rights

The constitutional Privilege most directly implicated in *Saenz* was the right of Americans to travel from one state to another. But while the Court accorded a very high degree of protection to mobility rights, it is clear that every state has implicit migration policies. In adopting a piece of domestic legislation, they not infrequently have an eye to its effect in migration markets, and will seek to attract desirable and repel undesirable migrants. Some of these policies are efficient; other not. It would be impossible to proscribe all such laws, nor would one wish to do so.

State migration policies are of two kinds.[95] First, fiscal and welfare policies may attract or repel migrants, depending on their income levels. A high-tax and high-welfare state will attract welfare seekers and (given progressive tax policies) repel high income earners. A low-tax and low-welfare state, by contrast, will repel welfare seekers and attract high income earners. In this way state clientele effects might develop, in which liberal and conservative states trade off voters in the manner of Mr. and Mrs. Jack Spratt at table.

The second form that state migration policies might take is non-fiscal private or public law rules. For example, many states fashion their education policies with an eye to their effect on migration. Bad schools mean fewer citizens and reduced income and property tax revenues. A state might also adopt non-fiscal laws to repel unwanted migrants, for example by tough sentencing policies for criminals. In all these ways, a state's domestic laws might be shaped by the competition for migrants.

Diagram 3Non-Fiscal State Migration Policies

	Efficient	*Inefficient*
Laws that attract migrants	Frontier Thesis	The market for deadbeats
Laws that repel migrants	Efficient criminal laws	Laws that weaken nationalism

State migration policies that seek to attract migrants might be either efficient or inefficient. The leading account of an efficient competition for migrants is Frederick Jackson Turner's Frontier Thesis.[96] Turner described a process in which western states, with fewer geographical advantages, competed for people through liberal laws and democratic institutions. Faced with the loss of valuable natives, eastern states responded by adopting similar legal regimes; and the process, said Turner, reached back into the Old World, which liberalized its laws to reduce emigration by

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[95] See F.H. Buckley, "The Market for Migrants," in J.S. Bhandari & Alan O. Sykes, Economic Dimensions in International Law: Comparative and Empirical Perspectives 405 (Cambridge: Cambridge, 1997).

[96] Frederick Jackson Turner, The Frontier in American History (reprint 1986) [1893].

valuable subjects. Unlike Paul Peterson's account of a race to the bottom, this is distinctly a race to the top, won by states that offer the most benign set of laws.

In other respects, however, the race might be to the bottom. I have elsewhere noted how states might inefficiently seek to attract "deadbeat" migrants through laws that permit them to discharge legitimate obligation owed to exit-state creditors.[97] The entry-state gets more migrants; and they are wealthier since they have left their creditors behind them. The resultant competition for laxity in insolvency or divorce law is a race for the bottom, won by the state with the most generous discharge policy.

The efficiency consequences of state policies that repel migrants might also be mixed. To the extent that efficient criminal sanctions in an entry state deter criminal migrants who live in exit states with excessively lax sentencing laws, the tougher laws of the entry state might usefully impose an added cost on wrongdoing. But barriers to entry might also be value-decreasing, and one way in which this might happen is by weakening nationalist sentiments. The example I have in mind is Québec's restrictive 1977 language legislation, Bill 101. The law provided that anglophones who were raised in a province outside Québec and who moved there had to send their children to an all-French school, even if they were in high school. The denial of linguistic rights was largely symbolic, since there was substantial net anglophone out-migration at the time. Few anglophones from the rest of Canada wished to move to a province that sought to curtail their rights and secede from their country. As such, one might have expected that few non-Quebeckers would object to this restriction. Yet it was greatly resented. The Alberta farmer who had not the slightest intention of visiting Québec understood that he was not wanted there, and the thought rankled. The lingering bitterness over Bill 101 helps to explain the defeat of the Meech Lake constitutional accord and the present constitutional impasse in that country. To say that the issue is largely of symbolic importance is to miss the point, for symbols of nationhood are prized public goods, and the weakening of Canadian nationalism has imposed enormous financial costs on the country.[98]

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[97] Margaret F. Brinig & F.H. Buckley, The Market for Deadbeats, 25 J. Legal Stud. 201 (1996); F.H. Buckley, The American Fresh Start, 4 S. Cal. Interdisciplinary L.J. 67 (1994).

[98] Of course, a Québec nationalist would have a very different perspective on Bill

On a nationalist understanding of rights, mobility rights are of paramount importance. A country with internal border guards is not a nation, and even implicit barriers to interstate travel weaken the sense of national identity that keeps a country together. That is why the Canadian Charter's Notwithstanding Clause does not extend to mobility rights: a province cannot derogate from the right of a Canadian citizen to enter into, reside or gain a livelihood in any province. Moreover, s. 23 of the Canadian Charter--the "Canada Clause"--trumped Bill 101 by providing that anglophones who move to Québec from another province have the right to send their children to English-speaking schools. As Canadian provinces enjoy a remarkable degree of autonomy from federal legislation, these restrictions stand out, as a recognition of the fundamental importance of the bonds of nationhood.

The strict interpretation that *Saenz* gave to mobility rights, in striking down a two-tier plan, should also be understood from a nationalist perspective. State laws that discriminate between long time residents and new arrivals might in some respects be sensible (like California's two-tier welfare plan), but nevertheless come at a cost. Like Bill 101, they weaken national bonds, and therefore deserve the strict scrutiny they received by the *Saenz* court.

A nationalist perspective explains the contours of the *Saenz* court's interpretation of mobility rights. While the Privileges or Immunities Clause protects the rights of U.S. citizens, the question in *Saenz* was when a person becomes a *state* citizen, and it does not follow that a state must be denied the power to legislate on that issue through reasonable residency requirements. As the *Saenz* court noted, "the right to travel embraces the citizen's right to be treated equally in her new state of residence."[99] But that leaves open when he becomes a citizen of the new state. Similarly, in the *Slaughter-House Cases* itself, Justice Miller suggested that one of the privileges under the Privileges or Immunities Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of the State."[100] He did not, in short, suggest that the question of bona fides must be resolved solely by absolute federal standards, but instead invited a nuanced examination of locational choice in which a measure of discretion might be granted to

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101 and the Charter.

[99] 526 U.S. at XXX.

[100] 83 U.S. at 80.

state legislatures. From a nationalist perspective, however, the *Saenz* court's insistence on federal paramountcy is eminently sensible. It is the federal and not the state government that must call upon the loyalty of its citizens in times of national crisis; and it is the federal government that is chiefly concerned with the preservation of the sense of national identity that unites Americans and fosters their nationalism.

This also explains why a lesser degree of federal scrutiny is imposed when states deny benefits to *temporary* visitors, with state residency requirement upheld when they condition university tuition breaks,[101] standing to sue for divorce,[102] and voting in primary elections.[103] These laws do not trench on a sense of national identity. Virginia may impose an out-of-state tuition premium on Marylanders who attend a Virginia university without sending a signal that they are second-class citizens. Barriers to permanent visitors, that persist after the decision to settle in Virginia, are however another matter.

Like all rules that impose bright-line solutions to nebulous problems, the *Saenz* court's distinction between temporary and permanent visitors may be under- and over-inclusive. A one-year residency requirement for in-state tuition benefits might impose a penalty on the mature adult who seeks to settle in the new state as well as the seventeen year old freshmen, and a constitutional rule that permits this result might be under-inclusive. The ban on California's two-tier welfare plan might also seem be excessive, as I argued three years ago,[104] and the *Saenz* result over-inclusive. But a bright line rule might be the best one can hope for, if nebulous standards would prove impracticable. In such a case, the only question is whether the benefits of enforcement outweigh the costs of under- and over-inclusiveness, and this must depend on the importance of the interest to be protected. I have argued that American nationalism, while overlooked by the constitutional scholar, is of enormous importance. If so, the *Saenz* court's defense of American citizenship and the new life it gave to the Privileges or Immunities Clause might seem a

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[101] Starns v. Malkerson, 401 U.S. 985, 28 L. Ed. 2d 527, 91 S. Ct. 1231 (1971); Sturgis v. Washington, 414 U.S. 1057, 38 L. Ed. 2d 464, 94 S. Ct. 563.

[102] Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975).

[103] Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973).

[104] Supra note X.

prudent response to a national concern.

B.The Protection of National Symbols

Seeing constitutional freedoms as a national American symbol assists in understanding Supreme Court decisions that have been faulted for offering insufficient protection to the symbols of national unity and patriotism,[105] In *Texas v. Johnson*,[106] a Texas statute that criminalized flag-burning was found to violate First Amendment guarantees of free speech. However, it is a mistake to think that the Court was insensitive to national symbols, for First Amendment rights, stated in the broadest possible fashion, are themselves a symbol of the nation. "If there is a bedrock principle underlying the First Amendment," said the Court, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

For support, the *Johnson* court turned to *West Virginia Board of Education v. Barnette*, where Justice Jackson stated "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[107] In *Barnette*, decided in the middle of World War II, the Supreme Court held that a Jehovah's Witness could not be compelled to salute the flag. This too was more a vindication than a denial of American symbols, since the defense of liberty was the greatest of American symbols.

Such cases feature a clash of symbols in which an abstract fundamental symbol--the Bill of Rights--takes priority over a concrete and less central icon--the flag or the Pledge of Allegiance. Behind this clash are more fundamental differences in outlook, between the rationalist and the romantic, Whig and Tory, and Protestant and Catholic. From one perspective, the destruction of images might look like mere iconoclasm, but what this misses is the struggle (not without religious significance) between competing icons.

C.The Limits of Devolution

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105 Eric Rasmusen, The Economics of Desecration: Flag Burning and Related Activities, 27 J. Legal Stud. 245 (1998).

106 Texas v. Johnson, 491 U.S. 397 (1989).

107 319 U.S. 624 (1943).

The principle of nationalism also has bite in the allocation of responsibilities between the federal and state governments. But for nationalism concerns, a persuasive case may be made for letting each state set its own policies with respect to such matters as free speech, gun control and religious expression. This might happen through a return to the constitutional vision that prevailed in and after the *Slaughter-House Cases*, where federal civil rights law was relatively thin and the Fourteenth Amendment did not incorporate any part of the Bill of Rights.

Recent Supreme Court decisions, such as *Printz*[108] and *Lopez*,[109] suggest that principles of federalism must be accorded new respect. Nevertheless, a devolutionary vision of civil rights runs strongly against the grain for most Americans. "States' Rights," secession and John C. Calhoun's Nullification doctrine are thought to have been left on the dustbin of history, fatally linked to highly illiberal racial policies. It is therefore useful to note that other countries have maintained a liberal tradition without an American-style set of substantive national civil rights. The American liberal's claim that any move towards devolution in civil rights will lead down a slippery slope to moral tyranny betrays a profound ignorance of comparative constitutional law.

Of all countries, Canada affords the most useful comparison for the American constitutional lawyer. With America, Canada shares a common border and legal heritage, and both have federal systems of government. Yet the two countries are leagues apart when it comes to constitutional liberties. Prior to 1982, the Canadian Constitution did not enshrine a Charter of Rights, and when the Charter was enacted in that year its rights were made subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[110] The phrase

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[108] Printz v. United States, 521 U.S. 898 (1997) (striking down portions of the Brady Handgun Violence Protection Act that required state government officers to assist in enforcing the federal law).

[109] United States v. Lopez, 514 U.S. 549 (striking down the Gun Free Zone Act of 1990).

[110] Canadian Charter of Rights and Freedoms, s. 1, Constitution Act, S. Can. 1982, enacted as Canada Act, 1982, 31 Eliz. II, c. 11 (U.K.). In recent decisions, an activist Canadian

(which recalls the proviso of Justice Washington that we saw above) was designed with the express purpose of excluding the civil rights absolutism that characterizes American constitutional law. In addition, the Charter's Notwithstanding Clause (s. 33) permits a province to declare that a piece of legislation is valid even though it contravenes the Charter's Fundamental Freedoms, Legal Rights or Equality Rights. By countenancing an opt-out of its rights, the Canadian Charter more closely resembles the Nullification doctrine and John C. Calhoun's constitution than the modern American version. In addition, the implicit recognition of provincial secession rights in Canada has not had a parallel in American constitutional law for at least 135 years.

There is a lengthy debate in the Public Choice literature on the optimal division of powers in a federal state. Such studies have examined whether the responsibility over such matters as welfare, corporate and environmental law is more efficiently assigned to the federal or state governments. However, the question of which level of government should have the power to enact substantive civil rights laws has received very little attention.[111] This omission is surprising, since the devolutionary Canadian regime would appear superior to the centralized American one on abstract principles of Public Choice.[112]

Supreme Court has called into question the weight that will be accorded to this clause. For example, the Court held that the Alberta Human Rights Code should be deemed to ban discrimination on the basis of sexual preference, even though both the Code and the Charter were silent on the matter. Vriend v. Alberta, Ca. Sup. Ct. LEXIS 19, April 2, 1998.

[111] For a notable exception, see Nelson Lund, Federalism and Civil Liberties, 45 U. Kansas L. Rev. 1045 (1997).

[112] As Madison understood, in Federalist No. 45. Of course, constitutions should not be erected on abstract principles. A country's history matters, and the American experience with civil rights must give the devolutionist pause before he recommends a Canadian solution. Yet the assumption that a Supreme Court will invariably get it right, and that state legislatures have a built-in disposition to enact illiberal laws, seems facile and naive. Virtually all state civil rights

There are three reasons why the power to protect basic rights might more plausibly be assigned to state than to national governments. First, diverse laws would permit Americans to settle in jurisdictions whose policies match their preferences. Where preferences are non-homogenous, the diversity of outcomes means that migrants can sort themselves out by voting with their feet, and this would increase preference satisfaction. Capital punishment supporters can settle in Virginia, opponents in Maryland. Where migration is costless, and there are no constraints on state opt-out rights, Charles Tiebout has shown that the exit option of migration results in optimal government services.[113]

Second, state competition in the provision of basic rights might usefully signal which set of rights is superior, as

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legislation would likely fall within general liberal bounds. The Canadian experience since 1982 (where the Notwithstanding Clause has been invoked only twice) suggests that state opt-outs in America would not be the fearsome thing today that they were in the time of Senator Calhoun. See P.W. Hogg & A.A. Bushell, The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All), 35 Osgoode Hall L.J. 75 (1997). To the extent that differences might arise, states could be expected to fall on both sides of the mean, with some states taking the more liberal position on such issues as gun control and the death penalty.

[113] The modern theory of voting with one's feet dates from C.M. Tiebout, A Pure Theory of Local expenditures, 64 J. Pol. Econ. 416 (1956). For a review of more recent scholarship, see Dennis C. Mueller, Public Choice II 154-70 (1989). Migration flows are substantial in the United States. In the 1990 census, about 40% of Americans were living in a state other than the one in which they were born. Kristin A. Hansen, 1990 Selected Place of Birth and Migration Statistics for States, Table 1 (Bureau of the Census, 1991).

seen in Frederick Jackson Turner's Frontier Thesis.[114] We might therefore expect states to compete for valuable migrants through their civil rights laws. States that indulge in a taste for discrimination would likely be punished on migration markets, and states with superior laws rewarded, as they were in Turner's time. This may yield valuable information about the best set of basic liberties. The stock of American constitutional liberties today includes such sharply contested issues as abortion and school choice, where reasonable men can and do differ. Once one abandons the assumption that the best set of liberties can be determined through abstract ratiocination by an academic clerisy, it becomes important to look for evidence as to optimal laws. Locational choices made by citizens who vote with their feet provides one of the best sources of evidence about the relative merit of differential state laws, and this evidence is lost when rights are nationalized.

The third reason why basic liberties should be a state law matter, on theories of Public Choice, is that legislative authority should be assigned to the level of government that captures all of the benefits and bears all of the costs of its laws.[115] On this basis, the power to raise an army to defend the country should be assigned to the national government.[116] But the benefits and burdens of basic civil rights would seem at first glance to be felt primarily by in-state residents. Whether Virginia subsidizes parochial schools will matter a great deal to Virginia parents, and much less to Californians. Thus the arguments for assigning the responsibility for enacting such laws to the state level would appear as strong here as they are for basic contract law.

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[114] Supra text at notes XX-XX.

[115] See Albert Breton & Anthony Scott, The Economic Constitution of Federal States 37-39 (Toronto: Toronto, 1978).

[116] A point that John Marshall realized as an officer in an underfunded Revolutionary army. Marshall's federalism was born of the conviction that "state particularism and national weakness were as deadly as British musket fire." R. Kent Newmyer, "John Marshall, Political Parties, and the Origins of Modern Federalism," in Harry N. Scheiber (ed.), Federalism: Studies in History, Law, and Public Policy 19 (Berkeley: Institute of Intergovernmental Studies, 1988).

There is nevertheless one cost to the devolution of basic rights which has almost entirely been forgotten, and this is the weakening of nationalist bonds. Nationalism is a public good, whose benefits spill across state lines to reach national borders. When constitutional rights are a national symbol, and where there are substantial regional differences in civil rights law, this may impose the external costs of weakening nationalist sentiments. Lincoln understood this, for he felt the strains that slavery placed upon the loyalty sentiments of abolitionist Whigs in antebellum America. In a letter to James Speed he wrote:

I confess that I hate to see [slaves] hunted down, and caught, and carried back to their stripes, and unrewarded toils; but I bite my lip and keep quiet. In 1841 you and I had together a tedious low-water trip, on a Steam Boat from Louisville to St. Louis. You may remember, as I well do, that from Louisville to the mouth of the Ohio there were, on board, ten or a dozen slaves, shackled together with irons. That sight was a continual torment to me; and I see something like it every time I touch the Ohio, or any other slave-border. It is hardly fair for you to assume, that I have no interest in a thing which has, and continually exercises, the power of making me miserable. You ought rather to appreciate how much the great body of the Northern people do crucify their feelings, in order to maintain their loyalty to the Constitution and the Union.[117]

When the differences in civil rights are profound, as Lincoln noted famously, the nation is a house divided that cannot stand. But even where the differences are less great, the sense of common nationhood might weaken when devolution results in a checkerboard of basic rights and the vision of a national icon is blurred. Like Canadian provinces,[118] American states might refrain from effecting broad changes in basic rights, since liberal norms are deeply embedded in every region of the country. However, the threat to a national symbol argues for prudence in the devolution of constitutional rights.

D.Leaving Politics for the Legislatures

When basic rights are accorded constitutional protection, courts sometimes succumb to the temptation to expand

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[117] Quoted in Edmund Wilson, Patriotic Gore: Studies in the Literature of the American Civil War 110 (New York: Norton, 1994) [1962].

[118] Supra note X.

their scope, arrogating greater authority to themselves and shrinking the boundary of the political. Many scholars have suggested that American courts have overstepped the bounds of their competence, judicializing what are essentially political questions. Courts stand above democratic debate, and might clumsily choke off public deliberation on an issue. Once cast as a constitutional right, a legal result is ossified and not so readily corrected as a legislative mistake. Legislatures also have far greater ability than courts to marshal information about the likely effects of a legal rule.[119]

All of this argues for prudence before constitutionalizing a political issue. In addition, when constitutional rights are a national symbol, there is a further cost. Charles Taylor has noted the corrosive effect of constitutional debates that turn into cultural wars. Losers find themselves marginalized, their deepest beliefs dismissed as irrelevant or even un-American. Though an outsider, Taylor sympathized with their frustration:

I suspect that a good part of the anger comes not from the measures themselves, but from what they see as the attitudes lying behind these measures. That is because they identify the "liberal" philosophy which has dictated these measures as in its very essence dismissive, and even sometimes contemptuous of what their lives are centered on. They are not only being asked to make a sacrifice, they are being told that they are barbarians even to see this as a sacrifice.[120]

In Lincoln's time, the corrosive issue was slavery; in our time it is abortion and the problems of church and state. If

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[119] For statements of prudential objections to judicial activism, see Alexander Bickel, The Supreme Court and the Idea of Progress 175 (New York: Harper & Row, 1970); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 187-206 (New York: Simon & Shuster, 1990); James Buchanan, Book Review, Good Economics -- Bad Law, 60 Va. L. Rev. 483 (1974).

[120] Charles Taylor, "Living with Difference," in Anita L. Allen & Milton C. Reagan, Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy 212, 216 (Oxford: Oxford, 1998)

those on the losing side of the constitutional debate are seen as "un-American,"[121] their sense of patriotism may waiver and national bonds may weaken.[122]

This argument from nationalism may therefore be seen to cut both ways. It suggests a prudential limit to devolutionary trends, and thus might appeal to liberals; but it also suggests the desirability of a thinner set of basic rights and the need to maintain a wall of separation between the constitutional and the political, and this will appeal to conservatives.

V.The Strange Death of Liberal Nationalism

The *Saenz* decision suggests that academic lawyers might usefully reconsider their understanding of American constitutional rights. Such rights are ordinarily seen from a universalist perspective, as a statement of the rights that all individuals should be granted, without regard to their nationality. I have argued for a narrower conception of constitutional privileges and immunities, as patriotic icons particular to this country. Americans would appear to reserve their deepest feelings of loyalty not to pure symbols, such as the flag, but to their understanding of constitutional rights and to the belief that their country has a unique commitment to their protection.

This analysis of national rights has four implications for the contours of constitutional freedoms. First, it suggests that the mobility rights the *Saenz* court upheld deserve the high degree of protection they received in that case. Second, it assists in understanding cases where the Supreme Court has been faulted for offering insufficient protection for national symbols such as the flag. Third, it suggests that basic liberties should enjoy constitutional protection at the national level and that there is a prudential limit to current devolutionary trends. Fourth, it suggests

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[121] Jay Silberman, Wrong Fix for D.C. Public Schools, Wash. Post, June 11, 1995, at C8; Mario Caruso, "Un-American", Chicago Tribune, March 8, 1991 at C22.

[122] For example, several commentators in First Things magazine argued that the Bill of Rights is illegitimate because it sanctions abortion. See Mitchell S. Muncy (ed.), The End of Democracy?: The Celebrated First Things Debate With Arguments Pro and Con (Dallas: Spence, 1997).

a need for caution in turning contentious political questions into constitutional rights. In politics, there are only winners and losers, and there is no great shame in being a loser; but in American constitutional law the losers can be faulted for a want of loyalty to core American values, and this would plausibly weaken the bonds of allegiance.

Nationalist principles were deeply ingrained in a previous generation of constitutional scholars. In the modern academy, however, the nationalist voice is stilled, and the liberal nationalism of Washington, Hamilton, Lincoln and Theodore and Franklin Roosevelt forgotten. On the left, nationalism conflicts with preferred modes of discourse, which are abstract and universalist, and is seen as burdened with questionable political baggage. On the right, the emphasis on quantitative methods darkens windows that open only to qualitative judgement. Not everything that counts can be counted, said Einstein, but this warning is often ignored. Matthew Arnold made a similar point. There are many things we do not understand, he observed, unless we understand that they are beautiful. So too, in the study of constitutional law, there are things we do not understand unless we understand that they are loved.