The Rediscovery of Nationalism

F.H. Buckley

Abstract. The recent Supreme Court decision in Saenz v. Roe perversely struck down a California two-tier welfare law that placed a ceiling on TANF payouts to recent arrivals in the state. In so doing, 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 promotes a common American identity on which nationalist sentiments crucially depend, and that this is how the Privileges or Immunities Clause should be understood. More than the flag, the basic stock of constitutional protections of individual liberty are a symbol of the country for American patriots.

As an abstract sentiment, patriotism are plausibly regarded as benign. Moreover, we are not without some control over our fixed preferences, and it may be individually rational to choose to be patriotic. One of the advantages of constitutional protections as a patriotic symbol is that they serve as a bonding device for political leaders, limiting the uses for which a country may ask its citizens to make patriotic sacrifices. Nevertheless, there is a possibility of excessive constitutional protections as a consequence of over-signalling.

George Mason University School of Law
3401 N. Fairfax Dr., Arlington VA 22201
fbuckley@gmu.edu
and Université Paris II Panthéon
35, ave. MacMahon, 75017 Paris

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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 in these pages that the devolution of welfare responsibilities was benign, and that the provisions of the 1996 welfare reform law that transferred welfare powers from the federal government to the states should be upheld. In particular, I argued (with my co-author) that two-tier state residency requirements were a reasonable response to the fear of welfare-motivated migration.

The size of welfare payouts varies from state to state, particularly under the Temporary Assistance to Needy Families (TANF) program (formerly called the Aid for Families with Dependent Children or AFDC program). TANF programs may be either one- or two-tier. A one-tier law offers the same welfare benefits to recent arrivals from another state as it does to long-time residents. A two-tier system discriminates between them: payouts to new arrivals are capped at the benefit level they received in their exit state until they have been in the new state for a period of time, usually twelve months. When a state moves from a one- to a two-tier system, recent arrivals from low payout states receive lower benefits, and this might deter some of them from relocating.

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. Migrants are lured by a variety of locational 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 Petersen has famously labeled a “race to the bottom.”

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.

Seen in this light, two-tier welfare programs usefully address the problem of strategic behavior at both the state and individual levels. They permit a high payout state to keep benefits levels up without the fear of becoming a welfare magnet. The state may do this because the two-tier program discourages welfare-motivated migration at the individual level. When the misincentives at the state and individual levels may be so easily addressed, the concerns about a “race to the bottom” would not appear troubling.

Two-tier programs would thus seem benign from both an efficiency and a distributional perspective. By reducing the adverse incentive costs of welfare-motivated migration, two-tier laws serve efficiency norms. And by addressing concerns about a race to the bottom, two tier rules permit a state to maintain high welfare payouts, and thus serve distributional goals.

If it wasn’t broke, why fix it? In a federal system, conservatives are apt to support constitutional fetters that prevent states from enacting inefficient laws, and oppose rules that prevent states from passing efficient legislation. For their part, liberals such as Professor Peterson argue for a constitutional regime that increases welfare payouts. One might therefore have expected that both sides would be content with two-tier policies. Yet in *Saenz v. Roe*, the Supreme Court recently struck them down. What makes the decision all the more puzzling is that the decision rested on the long-dormant Privileges or Immunities Clause of the Constitution. A review of the case suggests a reconsideration of American constitutional liberties as a patriotic symbol, and invites a review of the economics of nationalism.

1. **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 led to fear of excessive sprawl, horrendous commute times and general overcrowding, and this in turn 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 migrants from other states. In 1992 the state enacted a two-tier welfare plan. It amended its AFDC legislation to limit new arrivals to the welfare payouts they would have received in the state of their prior residence. The plan required the approval of the federal government, and in due course the Bush administration granted a waiver to allow it. However, the two-tier plan was almost immediately enjoined by the District Court as an impermissible fetter on the individual’s migration rights, and this decision was affirmed by the Ninth Circuit Court of Appeals. 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.
There things remained until Congress enacted its welfare reform plan, the Personal Responsibility and Work Opportunity Reconciliation Act, in 1996. The federal welfare reform bill, a major plank of the Congressional Republicans’ 1994 Contract with America, replaced the AFDC with the 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. Accordingly, the state announced that it would re-institute its two-tier policies on April 1, 1997. On that day, the plaintiffs filed an action that challenged the California plan and the portion of the 1996 welfare reform act that authorized two-tier plans.

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 were most clearly upheld in a prior two-tier decision, Shapiro v. Thompson, 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. 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.

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. But this implies a direct barrier to migration, 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.” Doubtless this right will be welcomed by New Yorkers who travel through the South on their way to Florida, to say nothing of Midwesterners in New York. 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 their new state.

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 beyond local prejudice. 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’ exercise of the right to move into another State and become a resident of that State.”

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. The mobility rights of temporary residents (the second component of the right to travel) are also implicitly protected, though 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 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.

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 Privileges or Immunities Clause, and this invites a reconsideration 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).
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 blot. What does it do that the Comity Clause does not do? Since the Slaughter-House Cases in 1873, 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.”

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?

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

What the learned judge meant was just the opposite, of course: that such an argument must necessarily fail.

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. 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 the Clause and that case was reversed five years later. 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 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.

The finding in Saenz that the impugned two-tier plan violated the Privileges or Immunities Clause was therefore unexpected. While the Privileges or Immunities Clause protects the rights of U.S. citizens, the question in Saenz was when does 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. State residency requirement have indeed been upheld to condition university tuition breaks, standing to sue for divorce, and voting in primary elections. 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.” 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 state legislatures. As the Saenz court noted, “the right to travel embraces the citizen’s right to be treated equally in her new state of residence.” But that leaves open when she becomes a citizen of the new state.

The case for granting state legislatures the authority to impose residency requirements is nowhere stronger than when the bona fides of the migrant is itself in question. Migrants might behave strategically in either of two ways. First, the migrant might falsely assert a desire to settle permanently in his new state so as to exploit its benefits, while all the while intending to return to the exit state. Second, the migrant might be attracted to the new state by the very benefits for which it seeks to impose a residency requirement. The Saenz court recognized the need to screen for the first but not the second kind of strategic behavior, and distinguished between them under the two heads of the right to travel. The false desire to settle in the new state was assimilated to the second head of the right (the temporary visitor) and the true desire to resettle for strategic reasons was categorized under the third head (the permanent visitor).

As we have seen, the Saenz court permitted states to impose residency requirements under the second but not the third head of the right to travel. However, migrant motives do not divide up so nicely. Many people who cross state lines to attend college do move permanently to the new state. In particular, the student who moves to a new state to attend law school often intends to stay, given the networking benefits of practicing law in the state where one went to
law school. The same may be true of the woman who leaves her family with the intention of obtaining a divorce and who find that the costs of doing so have risen because she has crossed a state border.

The *Saenz* court sought to distinguish such cases from two-tier welfare plans by treating education and divorce as portable human capital investments, whose benefits do not depreciate when the migrant moves back to his original state. By contrast, stated the court, the benefits of higher welfare payouts in the new state are entirely consumed therein. However, this distinction may correlate poorly with the crucial temporary vs. permanent distinction. A student who moves to Virginia to spend four years in college may well reside longer in his new state than the welfare migrant. This is, after all, an empirical question, and as such one might expect to see the question revisited, with visitors asserting that they are permanent and not temporary for the purpose of claiming low tuition and other benefits. For welfare benefits, however, the Supreme Court sought to slam the door shut on the reverse argument, and to deny states any right to impose residency requirements. The court stated that the empirical evidence reviewed by the trial judge indicates that welfare migrants are relatively few in number, and also noted that California had represented that it was not motivated by the desire to deter welfare migrants but only sought to save money (a relatively paltry $10 Million a year). While this might appear to invite a reconsideration of the case, upon better evidence and different arguments, the court stated that any attempt to deter welfare migrants would be impermissible under the antidiscrimination norms of the Equal Protection Clause.

From both a theoretical and a practical perspective, then, the *Saenz* decision would seem unsatisfactory. While seemingly based upon the Privileges or Immunities Clause, as a matter of constitutional theory, the decision ultimately rests upon the more secure foundation of the Equal Protection Clause. From a practical perspective, the decision strikes down an attempt to address a not implausible problem of welfare reform. There is persuasive empirical evidence of welfare-induced migration, and this might lead some states to seek to preserve their welfare budgets through two-tier plans. 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. However, this result is consistent with clientele effects, in which conservative states seek to repel and liberal states seek to attract welfare migrants, who can be expected to vote for liberal political candidates. Thus the two kinds of states might trade off voters in the manner of Mr. and Mrs. Jack Spratt at table. But while clientele effects might be present for some states, other states (say California) might simply wish to preserve their welfare budgets, and when two-tier plans are banned such states might reduce payouts for all recipients, whether newly-arrived or not. Finally, the *Saenz* decision might interfere with state workfare policies. In many states, welfare recipients are given a locus penitentiae to find work, after which their welfare benefits are curtailed. On the expiry of the period in one state, the welfare-seeker in northern Virginia might have a strong incentive to move to Maryland to start the clock ticking again. Were two-tier plans permitted, Maryland could reduce the welfare payout to the lower Virginia level. After *Saenz*, however, Maryland might have to treat the new arrival as a first-time welfare recipient. The result might inhibit the state experimentation with welfare reform that has proven so successful since passage of the 1996 welfare reform law.

Thus the *Saenz* case illustrates the imprudence of relying on the Equal Protection Clause in a case that does not involve traditional disfavored classes, such as African-Americans. Where rights are denied African-Americans, then strict scrutiny may be an appropriate standard of review. But sensible legislative policies may be subverted when all state laws that distinguish
between classes of citizens are presumed to be tainted by an invidious discriminatory intent. The Court’s first instincts were correct, and the subsequent move from the Privileges or Immunities Clause to the Equal Protection Clause was a misstep. The case more properly invited an examination of the fundamental rights of American citizens, rather than an undiscriminating search for discrimination.

The Saenz decision therefore prompts a reconsideration of federal civil rights law and the place of the Privileges or Immunities Clause. Such a review is welcome today, since Justice Miller’s fears in the Slaughter-House Cases that an expanding law of federal civil rights would swamp the institutions of federalism has come to pass notwithstanding his attempt to preserve American federalism by depriving the Privileges or Immunities Clause of content. When I studied constitutional law in Canada, the first 800 page of our 880-page casebook was devoted to the division between federal and provincial relations; the last 80 pages reviewed the federal protection of civil rights, but as that was not an important subject we never got to it. Now, that is a federal country! By contrast, a review of modern American casebooks and academic literature might lead one to conclude that, like Great Britain, the United States is a unitary state in which the constitutional status of Virginia differs little from that of Scotland. Nevertheless, recent Supreme Court decisions, such as Printz and Lopez suggest that principles of federalism must be accorded new respect. The revival of federalism and the Saenz court’s rediscovery of the Privileges or Immunities Clause both invite a reexamination of the boundary between state and federal competence and a reexamination of the theory behind national civil rights law.

A reconsideration of the Privileges or Immunities Clause must begin with the Slaughter-House Cases. Justice Miller’s argument that Privileges or Immunities must be given either the narrowest or broadest possible construction is false as a matter of theory. The phrase might refer to fundamental rights only, 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 fundamental 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.

This was the sense in which Blackstone understood the phrase, and it is one that gives content to the Privileges or Immunities Clause while preserving the federal character of American government. 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, either by the federal or state governments.

2. The Historical Context
We will rally around the flag /
Shouting the battle cry of freedom.

Senator Richard Yates (R. Ill.)
Campaign Speech, 1866

When Senator Yates and other members of the Congressional committee that drafted the Fourteenth Amendment campaigned for its support, they voiced the strong patriotic sentiments that their audiences wished to hear. The Civil War had just ended, and the work of national union 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. Henceforth it would be the business of the national government to protect freedom through an expanded sense of the rights of national citizenship. What emerged from the conflict was a “new empowered national state and the idea of a national citizenship enjoying equality before the law.”

One of the era’s most popular works of fiction, Edward Everett Hale’s “The Man Without a Country”, movingly describes the solitude and anguish of a man deprived of a focal point for natural sentiments of patriotism. The story was published in the midst of the Civil War, and recounted the fate of an earlier secessionist, Philip Nolan, who was placed on trial for his part in the Aaron Burr conspiracy. In a fit of anger Nolan exclaims before the court martial that he hopes never to hear the name of the United States again. The court grants the wish. He is placed aboard a Navy vessel with instructions that he never hear the name of his country again, or ever return to it. Decades pass in this way, with Nolan keeping to his private cabin and shunted from one ship to the other. Each new captain receives the strange commission and observes it scrupulously. Finally Nolan’s end approaches and the captain enters the cabin. He sees an elderly, sick man in bed, and above him a great American flag and maps of his country, only slightly out of date. From snippets of overheard conversation, Nolan has followed his country’s progress with the passion of an unrequited love. His heart is filled with pride at his country’s expansion, and with sadness for the rumors of war he has heard.

One of the cardinal sins of bad historiography is anachronism, in which past actions are explained by reference to a very different set of present sentiments or ideologies. The modern historian who has not read Hale’s story or felt its appeal, and who reacts instinctively against an appeal to American patriotism, will not form an accurate understanding of the period immediately after the Civil War if he fails to account for the deep chord of patriotism that it struck.

The number of Civil War dead remains greater than the number of Americans killed in all subsequent wars. The Union lost 360,000 men out of a population of 20 million; Southern losses were proportionately higher still. Ten percent of its citizens served in the Union forces. From the war emerged a nation that, with Lincoln, sought a “new birth of freedom,” lest the fallen should have died in vain. 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. The G.A.R. first met in Illinois in spring 1866, but by the Congressional elections that fall they were a powerful, national force. They sought to extend Northern ideals of freedom throughout the country, for the benefit of whites as well as blacks. In the election, Southern Unionists complained that their lives were threatened and their rights of assembly and free speech abridged. Was this the cause for which the War had been fought, asked the veterans; who
cheered when they were told, by Senator Yates, 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.”

These themes were seldom absent in the Congressional debates over the Privileges or Immunities Clause. Who could oppose the Amendment, asked its principal draftsman, Congressman John Bingham:

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?

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.”

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. 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 citizen.

The mobility rights for Northerners who ventured south after the Civil War were an important political issue in the election of 1866, with Republican candidates tying the question to the proposed Fourteenth Amendment guarantees of American citizenship and its privileges and immunities. For example, 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.
In sum, we shall not understand the draftsman’s intent if we read the Privileges or Immunities Clause as 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. In the next Section we examine how the emphasis on nationalism might usefully inform the content of American civil rights law.

3. Universalist and Particularist Theories of Rights

This Section contrasts two ways of looking at civil rights law. In a universalist theory of rights, the content of civil rights is determined through an abstract deliberation of 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. Instead, it might defend a conception of rights for a particular polity only.47

Universalist conceptions of rights are rationalistic, and impatient with national or regional differences. If rights are owed to every individual, then historical contingencies are mere details. At its best, this kind of theorizing illuminates the moral heritage of every person; at its worst, it is intolerant and chauvinistic. Not infrequently, American constitutional scholarship seems to fall into the latter camp. The American liberal’s claim that any attempt to legislate general social norms, that any retreat from a right to partial birth abortions, will lead down a slippery slope to moral tyranny betrays a profound ignorance about comparative constitutional law. For such a person, the map of the world contains America and Iran, with nothing in between. Of all people, Canadians should be suspicious of such arguments. For if they were correct, then Canadians would be far less free than Americans, with their absolutist Constitutional guarantees of free speech and free exercise and free mobility and free elections. And yet, when they think on it, Canadians might reasonably conclude that they have no lessons in liberty to take from Americans. Not every power is taken to the limit. Many countries confer a broad authority upon lawmakers without thereby losing their liberty.

A. Constitutional Rights as a National Symbol

The Canadian conception of rights is distinctly particularist. Before 1982 the Canadian Constitution did not enshrine a Charter of Rights (though some specific rights, like those to confessional education, were found in the 1867 British North America Act). Moreover, Charter rights are made subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”48 The phrase, which recalls Justice Washington’s caveat in Corfield v. Coryell, was designed to exclude 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.49 By countenancing an opt-out of its rights, the Canadian Charter more closely resembles Nullification and John C. Calhoun’s constitution than the modern American version. In addition, the implicit recognition of provincial secession rights has not had a parallel in American constitutional law for at least 135 years.

The tolerance for regional differences in the stock of basic rights will strike most Americans (even as it strikes some Canadians) as peculiar. How can rights be thought fundamental unless they are mandated across the country? Indeed, the universalist will not stop
at national borders. If he truly believes that the First Amendment’s principles are of fundamental
importance in a free society, then he must condemn other societies--Quebec, Israel--that do not
maintain a wall of separation between church and state. The Canadian approach is more
accepting of differences. Since the Charter does not prescribe how Quebec must legislate in its
basic civil rights, it has less still to say about fundamental American or Israeli civil rights.

Particularism may commend itself for a variety of reasons. In a diverse country such as
Canada, a Notwithstanding Clause better respects regional differences in the way in which
fundamental rights are understood. In particular, where implicit secession rights are conceded,
opt-out rights are a needed safety-valve that usefully preserves Confederation. Moreover, once
one relaxes the assumption that an omniscient clerisy has the special power to identify the
optimal set of fundamental rights, particularism permits provincial competition in the provision
of civil rights law. For those who are less than certain that the peculiar conception of rights that
constitutes today’s (as opposed to yesterday’s and tomorrow’s) Bill of Rights, it would be
valuable to see what rights are provided through state laws. After all, when the stock of national
rights was thinner, in the nineteenth century, states competed for citizens by offering different
sets of rights. This was the competition described by Frederick Jackson Turner in The Frontier in
American History.\textsuperscript{50} Turner described a process in which frontier states, with fewer geographical
advantages, competed for people through efficient 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 to reduce emigration by
valuable subjects. Unlike 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.

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 primarily from the fact
that they are constitutive of the identity of citizens of a particular state. Thus a Canadian might
feel himself bound to support Charter rights because they define whom he is as a Canadian, even
as other institutions such as official bilingualism are now a feature of the Canadian identity. The
moral authority of such particularist rules rests on the patriotic duties of citizens to support their
country’s fundamental institutions.\textsuperscript{51}

Nevertheless, a particularist attachment to a national charter of rights requires a degree of
moral commitment to them as rights, and not simply to them as a Canadian or American set of
rights. 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.\textsuperscript{52}
That is why particularism resembles universalism when 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 has 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 palm. 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. I might be confident that my runner is best, but still be less than
certain of it. In the same way, I might think that the Canadian Charter of Rights represents the
perfection of legal reasoning but still seek the verification that comes from the laboratory of
national competition in the provision of constitutional protections. Thus the particularist must be
a pragmatic empiricist, the universalist an abstract rationalist.
B. Is the Bill of Rights a National American Symbol?

Americans are amongst the most patriotic people in the world. One of the first things the foreign observer notes in America are the conspicuous displays of patriotic symbols. Yet American laws have been faulted for offering insufficient protection to the symbols of national unity and patriotism. In *Texas v. Johnson*, for example, 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*. “If there is any fixed star in our constitutional constellation,” said Justice Jackson, “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.” In *Barnette* the Supreme Court had held, in the middle of World War II, 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, for the defense of liberty has always been the greatest of American symbols. During the Second World War, the Bill of Rights (as encapsulated in President Roosevelt’s Four Freedoms) moved to the forefront of the national consciousness. More than any scholarly analysis of the Incorporation doctrine, this explains why the Bill of Rights, and particularly the First Amendment, became identified with American nationalism. Before the judicial revolution of national rights, the popular revolution took place in the hearts of the American people.

The American conservative must therefore pause before proposing radical change to constitutional rights. He might think, for example, that devolution along Canadian lines is eminently sensible, or that, like the Canadian Charter, his country’s Bill of Rights should recognize such “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Yet as the most prominent feature of the American identity is an absolutist Bill of Rights, the move from an American Whiggish to a Canadian Tory conception of rights would weaken a national symbol and, more than burning an American flag, might weaken the patriotic sentiments of his countrymen. As Robert Penn Warren wrote, “to be an American is not ... a matter of blood; it is a matter of an idea--and history is the image of that idea.”

Not every constitutional debate raises questions about the patriotism of the participants, or their loyalty to core national values. Senator Kennedy’s swipe at the reign of terror he foresaw in “Robert Bork’s America” was politically effective but nonetheless illegitimate. Similarly, the charge that those who support public aid for private schools are “un-American” is wide of the mark. Nevertheless, a disagreement about core values may legitimately raise questions about one’s loyalty. Even before he supported his country’s enemies, Ezra Pound’s contempt for his country’s central libertarian values was less than patriotic. If the Bill of Rights is a national symbol, and if it we wish people to support their national symbols, then we must feel a little uncomfortable with the American who wholly rejects the Bill of Rights. He is like the Canadian who shows contempt for one of his country’s languages.
Paradoxically, the American liberal who defends an absolutist conception of rights on universalist principles seldom appeals to his reader’s patriotism. An older generation of liberals felt no such embarrassment. For example, Charles Black explicitly appeals to a sense of patriotism when he asks “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?” And, answering his question, he argues:

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.

There is a simple reason why the patriotic voice is stilled in the present generation of constitutional scholars. Patriotism matters most to those who serve in their country’s armed forces, and virtually no one who now teaches constitutional law has done so or has a close friend who has served.

Before a charter of rights can serve as a patriotic symbol, two things are necessary. First the vision of rights must be specific to the nation, like a flag, since a universal code cannot command the special loyalty to place that patriotism requires. Universalizing the American understanding of rights across all frontiers would destroy the national symbol. However, the constant search for new rights—Black’s “questing devotion”—makes it unlikely that this will happen anytime soon, even if the rights revolution were to go international. Second, the rights must attach to national citizenship, in the manner that the Citizenship and Privileges or Immunities Clauses would appear to contemplate. The Saenz decision may thus be seen as vindicating the nationalist conception of rights to which the draftsmen of the Fourteenth Amendment doubtless subscribed.

On a nationalist understanding of rights, mobility rights are of paramount importance. A country with internal border guards is not a nation. 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”—provides that anglophones who move to Québec from another province have the right to send their children to English-speaking schools. That right had been taken from them by Bill 101, Québec’s Charter of the French Language, in 1977. 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, and its reversal in s. 23 of the Canadian Charter widely cheered. 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. Perhaps, therefore, the strict interpretation that Saenz gave to mobility rights, in striking down a two-tier plan, was not entirely imprudent after all.

### 4. Rational Patriotism
There is one remaining puzzle. Assume that the Bill of Rights may serve as a patriotic symbol, and assume further that the state has an interest in promoting patriotism. Why should this make a citizen more likely to support the Bill of Rights? Why should an individual wish to be patriotic?  

A. Self-control over the Emotions

It might seem to make little sense to think of an individual choosing his emotions. Are we not schooled in patriotism as children by our parents and schoolteachers? Perhaps we are even hard-wired to support encompassing bodies such as our state or nation. However, a hard determinist view of the emotions is less than persuasive, for two reasons.

First, parents are ordinarily reliable proxies for their children, to the extent that emotions are consciously passed on from one generation to another. Like the rest of us, parents may get it wrong. However, they are very unlikely to implant emotions that they themselves know will harm their children. A parent will wish to impart a sense of patriotism, but not the excessive foolhardiness that gets his child killed in battle.

Second, we do have a measure of control over our emotions. Aristotle thought that we could mold our character through action, acquiring a settled dispositions to do an act by repeating it. Pascal gave a famous example of this, in describing the techniques of religious conversion. Suppose that I have persuaded you on rational grounds that you should believe in Catholicism, said Pascal. (Never mind that his argument--the wager--fails to do the trick.) The problem is that, even if it is rational to believe, I may not believe. I may know that I am better off if I believe, but that knowledge does not create belief. Ah, said, Pascal, then you must go to work on yourself. as you would on an animal. Shape your beliefs in the same way you train your dog, through repeated acts which in time become second nature. Say the beads, and move your lips when you do so. In time your body will produce the change in your sentiments which your reason was powerless to effect. Beyond this, the strong-willed man may train himself to abandon harmful emotions or cravings. By deliberating over optimal emotions and avoiding occasions of temptation, we might train ourselves to quit smoking, give up gambling or ease away from a dangerous jingoism.

B. The Social Benefits of Patriotism

If we had a choice, then, would we choose to be patriotic? 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 buys his way out of the draft (during the Civil War) or pulls strings to avoid it (during the Vietnam War). Yet we all may be better off if we live in a society of patriotic people.

To make this claim, however, I must first discard arguments that are centered on patriotism to a particular country, such as the United States. I must be able to show that I should loyally support my country and you should loyally support yours, even where they differ. 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. Both could not be right, but I must say that in both cases their patriotism was admirable. 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.

Is patriotism efficient? There are four reasons why we might want both Durkheim and Weber to be patriotic. The first is that patriotism 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. A purely abstract and rational explanation of life and ideals reduces both down to the lowest common denominator, and as Sir Isaiah Berlin noted, drains both of the particular content that alone gives them point.69 As Martha Nussbaum notes (without a trace of irony), “[b]ecoming a citizen of the world is often a lonely business.”70 The lament for the loss of community is strong today,71 but is not novel. Marx mourned the break-up of feudal hierarchies and communities with the passion of an Edmund Burke. “All that is holy is profaned,” said the author of The Communist Manifesto. “All that is solid melts into air.” In Ernest Gellner’s account of nationalism,72 the sense of attachment to the nation grew out of the Romantic Counter-Enlightenment, as a reaction to the disappearance of the bonds of feudalism and the onslaught of Modernism.

Two objections may be made to this defense of nationalism. First, the universalist might object that the patriot’s heightened sense of loyalty to his nation comes at the cost of reducing his sense of duty to more encompassing groups, such as Canada (in the case of the québécois), the Austro-Hungarian Empire or mankind in general. One kind of solidarity waxes, the other wanes. However, if the ties that count most are local ones, then this objection seems less than genuine. Indeed, this objection is usually stated as an argument for nationalism and against loyalty to one’s region or state within a federal country. It is no more plausible there, for solidarity and rivalry go hand in hand. I choose one religion in preference to another. I leave one Internet discussion group to join another. I root for the local high school, and against the other team. 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, and that local loyalties must always be accorded priority over broader ones when assessing solidarity.

The second objection to this defense of patriotism argues that ties of solidarity are only of instrumental worth. Suppose that we are formed with a natural desire for solidarity; and suppose further, as MacIntyre suggests, that we become moral citizens only through membership in a specific community. This simply pushes the inquiry back one stage, for now we might ask whether it is desirable that individuals should have a need to be rooted in a particular community. Whether thus argument has purchase depends on whether we see rootedness as an ultimate or an instrumental good.

Let us say that it is only an instrumental good. If so, the deeper good must be the trust that grows out of bonds of solidarity, and this provides the second defense of nationalism. Trust is a crucial element in the social norms that Jon Elster calls the cement of society. Without trust our friendships would become 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. When a problem arises, the officer of the client knows whom to call at the firm and what to expect from him. He can hear both what is said and what is left unsaid. For his part, the lawyer can evaluate the seriousness of the problem, and knows how to probe for additional information because long association provides a context for the query. This reduces the cost and strengthens the benefits of legal advice. Most importantly, the mutual expectation that the relationship will continue permits each party to trust the other.

The possibility of exploiting promissory gains often explains why friendships are formed in the first instance. This is obviously true of the professional friendships within a firm (with its grim “golf days”), but it is also true of the social networks and clubs that serve as voluntary insurance organizations. De Tocqueville noted that, more than Europeans, Americans were joiners: they appeared to have a penchant to form clubs around the most trivial causes. A naive explanation is that Americans are simply more gregarious than other people. A more plausible explanation is that Americans have a greater need for self-protection through club membership than members of a more hierarchical society. Within a hierarchy, a person can appeal to higher authorities for protection against opportunism; but in a more egalitarian and transient society, such as the United States, a person must make his own self-protective networks.

What is true for private clubs is also true (in a more diluted way) for nations. Gellner argued that the growth of nationalism was an efficient response to the shift from an agricultural to an industrial economy that disrupted hierarchical bonds and made men mobile. The peasant could move to the city and free himself from the social obligations that formerly had fettered him. But how could a masterless man be trusted, so as to be able to exploit the new opportunities that industrialism had created? What was needed was a new kind of bonding mechanism, in which an urban-dweller could make credible promises. Nationalism provided the answer, said Gellner, with “Gesellschaft using the idiom of Gemeinschaft” and “a mobile anonymous society simulating a closed cozy community.”

To the extent that nationalism serves this purpose, 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 higher in the politically conservative, high-migration states of the Sunbelt. The most plausible explanation is that these are high migration states, and the social stigma of promise-breaking is weaker when one is not rooted in a community. The sense that Americans might have that they are all members of a more encompassing nation, and that this binds them to each other, may usefully help to cure the wound of rootless modernity and promote trust.

The third defense of nationalism is that common cultures economize on scarce mental resources. More than anything, nationalism is a matter of 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. “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.”  

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. This is how Herder understood language, not as particular way of expressing universal values but an expression of unique values and ideas. But cultural differences also matter between ostensibly similar societies. A slightly raised eyebrow may be a powerful signal in Toronto, but might be taken for a tic in Chicago.

The fourth argument is that, by bonding us more closely to our fellows, patriotism increases altruistic impulses and reduces free riding. We are more willing to perform acts for the general good—serving in the military, contributing to charity—when we feel a kinship to those around one. The counter-argument here is that this comes at the cost of reducing ties to those beyond national borders. Tariff barriers are dismantled within the nation, but erected against foreign goods. And the dark gods of nationalism in the Balkans and Africa prop up corrupt regimes and bring war to a region. In rebuttal, the nationalist might ask “Compared to what?” The alternative to national bonds is not universal bonds but no bonds at all. Take away nationalism and we are less likely to have free trade with the Carribean than trade barriers between Virginia and Maryland.

Patriotism might even decrease the probability of conflict by increasing the costs of aggressive war. Suppose that the patriot can be readily enlisted to defend his homeland, but that persuading him to invade another country is a harder sell. He might fight for private ends, for glory or material gain, but not so effectively as the patriot who defends his country. 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. So viewed, patriotism increases the costs of imperialist or aggressive wars. The success of the Russian forces in the “Great Patriotic War” is consistent with this thesis, as is the Canadian defeat of American invaders in the War of 1812. To be sure, German patriotism in the Second World War was quite real and anything but benign. If patriotism entirely disappeared, however, we would also forego the patriotism of the Allied forces that defeated Germany.

C. Is Patriotism Individually Rational?

Let us assume, therefore, that nationalism is benign, and that patriotism is indeed a virtue. More precisely, let us assume that nationalism is the cooperative solution to a Prisoners’ Dilemma Game. The extreme cosmopolitan likens nationalism (like Zionism) to racism, but we assume that non-patriots are simply defectors who seek the special payoffs available to those who live in patriotic societies and are not patriotic themselves. Such people benefit from the patriotic sacrifices of others, without bearing the private costs of patriotism. In such a world, non-patriotism is individually rational. How then does patriotism survive?

There are three ways in which socially benign emotions of patriotism might take hold. First, the revival of group selection explanations in evolutionary biology suggests a way in which the difficulties of PD games might be overcome. “Old” group selection theories assumed that natural selection acts upon groups or species and not individuals, and that predecessor groups pass on socially valuable traits to their successors. But selection necessarily works at the level of the individual or mating pair and not the group, and this explanation came to be labeled the “group selection fallacy.” Recently, however, group selection theories have enjoyed a revival. “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.\textsuperscript{79} Trait group selection theories are very tentative, and have yet to be tested.\textsuperscript{80} Nevertheless, they suggest a way in which cooperative emotions may take hold.

Second, 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.\textsuperscript{81} 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 valuable norms will be underproduced. This might happen when the private benefits associated with membership in a national community (trust and ease of communication) cannot be exploited without a substantial human capital investment in the culture, and feelings of patriotism follow as a bi-product.

The third way in which the payoff structure of the PD game might change is through signaling. When patriotism can be credibly signaled, non-patriots can be detected and punished, and this may eliminate the temptation to defect. The strategic structure of the game might change to one of Bi-product mutualism, in which cooperation is individually rational for all players.

Let us suppose that credible signals of patriotism are rewarded and that non-patriots are punished. For example, top civilian jobs might be denied those who refused to serve in their country’s armed forces, as happens today in Israel.\textsuperscript{82} Or non-patriots might be publicly handed a badge of shame, like the white feathers of the Great War. At a minimum, the signal must be credible. A bare statement that one is patriotic will not suffice because the non-patriot can costlessly mimic the signal, and will do so as long as people are rewarded for their patriotism. Signaling gains will then disappear: no signal will be believed and no one will bother to signal.

As Michael Spence has shown, however, private information might be credibly signaled by the willingness to bear a cost.\textsuperscript{83} Let us suppose that, for whatever reason, it is costly to reveal information, and call these signaling costs. Suppose further that signaling costs are differentially born by true and false signalers: signaling is 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 is otherwise for true signalers who have lower signaling costs and whose signaling gains 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.

The principal manner in 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 rare person whose face never changes expression seems less than human. If he is not severely depressed, he is taken to signal complete indifference to other people.

What is special about facial expressions is that they are so hard to mimic.\textsuperscript{84} We show our anxiety when lying, for example. When our sins are detected, our blushes and downcast eyes may convict us; when accused falsely, as Hero was in Much Ado About Nothing, our innocence shines through. The demand for facial signals is particularly strong in low-trust societies. Luigi Barzini reported that Italians prefer direct negotiations for this reason. “They read in their opponent’s eyes (or catch in his voice or choice of words) the signs of his stubborn decision or hidden timidity.”\textsuperscript{85} Even in America, face-to-face negotiations remain of crucial importance despite the rise of new techniques of communication.
Like other strong emotions, patriotism might kick in and influence our behavior very abruptly. As Paul Ekman notes, “[q]uick onset is fundamental ... to the adaptive value of emotions, mobilizing us to respond to important events with little time required for consideration or preparation.” Strong emotions are also unbidden. We do not will an expression of sentiment; instead, it results in an unconscious physiological change, such as laughter or tears. Finally, strong emotions are public, and written over the most visible part of our body. From the perspective of evolutionary biology, there is no reason for the survival of facial expressions except as signals of our future behavior.

We might therefore credibly signal our patriotism through a proper show of emotion before national symbols. For example, Ernest Gellner reported that tears came to his eyes when he heard Czech folk songs, and the American patriot might similarly be affected by his country’s flag or national anthem. The failure to show any emotion might thus be taken to signal an absence of patriotism. The sincere patriots shows his emotion naturally; the false patriot can do so only by feigning an emotion he does not feel, and this imposes a special cost on him. The difference in signaling costs may provide the crucial non-mimicry constraint that makes facial signals a reliable badge of our private sentiments.

For facial signals to serve as a trust-building device, they must not only reveal private sentiments: these must also be durable. If our sentiments were wholly plastic, if an expression of feelings today gave no clue about tomorrow’s feelings, then facial expressions would not signal anything about patriotism or loyalty. Today’s great friend might readily betray one tomorrow, and we could never rely on him or form deep friendships. Nor would a show of patriotic sentiments provide any information about future patriotism.

We are not made that way, however. We are capable of durable preferences that cannot be abandoned without emotional pain. Such preferences impose a cost, to the extent that they constrain future choices. They might make it painful to betray one’s family, for example, and those who have gone through a divorce might have wished that it were easier to do so (“so that the healing process can begin,” as liberal clerics put it). But if it were painless to leave one’s wife, then divorce rates would be higher. Marriage rates might also be lower, since a man would find it harder to persuade a lady to trust his promises. Fewer people would marry, and fewer married couples would make the kinds of investments that are placed at risk through divorce—notably children.

Durable preferences are therefore a useful self-binding device. Binding oneself through preferences that are difficult to change restricts future choices, but permits one to exploit bargain opportunities that would otherwise be lost. Not everyone will find the trade-off desirable. The existentialist hero needed to keep his emotions in check to permit him to hit the road whenever he wanted; the playboy had to avoid entangling alliances to move easily from one woman to another. The result is a separating equilibrium, in which some people invest in stable preferences and others do not. The latter keep their options open, but sacrifice the long-term gains that depend on trust.

Durable preferences permit the patriot to exploit the private gains from patriotism, and if patriotism is privately rational these gains will exceed its costs. Two such costs may be identified. First, the individual might recognize that becoming a patriot will change his preferences, and that in the future he will be led to behave in ways that at present he thinks foolhardy. Today he wishes to become a prudent patriot; but he knows that once he develops patriotic emotions he might toss his prudence out the window tomorrow and risk his life in ways that today he thinks excessive. He is like the man who lets himself fall in love while knowing
that, after he does so, there is a positive probability that he will be jilted. From an ex ante
perspective the emotional investment is rational, but not costless.\textsuperscript{88}

The second cost arises from the possibility of misbehavior by his nation’s leaders. Before
the citizen decides to become patriotic he will rec
ognize that his implicit delegation of authority to the leaders places him at risk. Being patriotic
he will enlist in any war his country fights; but being patriotic he will be less able to distinguish
just from unjust wars than he was before he became patriotic. Before first becoming patriotic,
therefore, he will discount patriotic gains for the agency costs of political misbehavior. He might
decide to keep his emotions in check, or emigrate from, say, Wilhelmine Germany, to North
America. Alternatively, the subject might look for patriotic symbols like the Bill of Rights that
contain their own internal barriers to agency cost misbehavior. When the principal symbol of
national devotion is not a flag or a royal family but a set of abstract rights, this constrains the
misbehaving political leader who seeks to embark on a war that is inconsistent with the
libertarian ideals of these rights. From the perspective of the political leader, this might be seen
as a self-binding device that elicits stronger loyalty from his citizens.\textsuperscript{89}

Might an American’s allegiance to the Bill of Rights or the privileges and immunities of
American citizenship signal patriotism? Almost anything might serve as a focal point for
patriotism, when the signaling costs arise through facial signaling in its presence. If a flag may
serve as a focal point, so too may the Bill of Rights. In addition, allegiance to institutions that are
costly in themselves (like a royal family) provide stronger evidence of the emotional bond.
Wholly benign rights do not impose costs, but allegiance to an excessive set of rights signals a
special loyalty. Those who think the present set of constitutional protections are optimal might
not signal their loyalty to America by supporting them; but those who think the contemporary
understanding of constitutional rights is flawed but still revere the Bill of Rights (like African-
American servicemen in the Second World War) signal a deeper patriotism.\textsuperscript{90}

Such theories are speculative, however. The informational content of the signal may
unwind in a variety of ways. For example, if the constitutional set of rights is flawed some
patriots might come to see it as divisive and reject it as a patriotic symbol. The informational
content of the signal will then weaken. In addition, the signaling costs might be socially wasteful,
in the sense that the costs of an inefficient set of constitutional rights might exceed the social
benefits of signaling. 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. In that
case, the costs of the House of Windsor as a signaling device might seem a bargain.\textsuperscript{91}

5. Conclusion

The Saenz decision suggests the need to reconsider the special understanding that
Americans have of their 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 American constitutional privileges
and immunities, as patriotic icons and as 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 will seem more than a little romantic to many readers. Yet as I write this, on the last evening of the millennium, I might be forgiven for noting (as no one else has) that American patriotism has had a good run.


4 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (May 17, 1999).


6 26 F.3d 95 (1994).


8 42 USCS § 604(c).


10 119 S. Ct. at 1527.


12 119 S. Ct. at 1525.

13 Id.

14 119 S. Ct. at 1526.

15 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).

16 75 U.S, 168, 180.

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

83 U.S. at 70.

83 U.S. at 76-77.

83 U.S. at 78.

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).


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


83 U.S. at 80.

526 U.S. at XXX.

Supra note X.

Supra note X. Studies that report the contrary have serious design flaws. Id. at XX.

Bora Laskin, *Canadian Constitutional Law* (3d ed. 19XX). After the Canadian Constitution was amended in 1982, the federal protection of civil rights became a vastly more important subject, for better or worse.


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


Quoted in Curtis, supra note XX, at 138.


Id. at 30-41.

Curtis at 138.

Quoted in Curtis at 95-96.

83 U.S. at 116 per Bradley J.

Quoted in Curtis at 132.

Id. at 138-39.

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.
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 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.

The fact that the clause has seldom been invoked suggests that state opt-outs in America would not be the fearsome thing today 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).

Reprint 1986 (1893).

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)


319 U.S. 624 (1943).

Foner at 223. The centrality of the Bill of Rights in shaping American history has been insisted upon by many historians, and transcends political labels. See Gordon S. Wood, The Radicalism of the American Revolution (New York: Random House, 1993); Pauline Maier, American Scripture: Making the Declaration of Independence (New York: Vintage, 1997). However, the idea that liberty is a unifying theme in American history, which is asserted by the “consensus” school, is denied by “conflict” historians.


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 might 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.


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


Taylor at 192.

Taylor at 192.

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 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).


Suppose that members of the group are either cooperators $C$ or defectors $D$, and that there are several different groups with different mixes of members. After reproduction, each group dissolves and its members mix and reassemble in new groups. This process is repeated. The incentive to defect may be represented by $x$ and the benefits of cooperation as $y$. More specifically, let $x < 1$ equal $C$’s probability of survival relative to $D$ in all-$D$ colonies, and let $y > 1$ equal $C$’s effect on his colony’s chances of prevailing over the other colonies. In such cases, David Wilson has shown that the fitness of $C$ will exceed that of $D$ where $xy > 1$. David S. Wilson, Weak Altruism, Strong Group Selection, 59 Oikos 135-40 (1990). The cooperative gene has a better chance of being passed on when the private incentives to defect within a group (represented by $x$) are relatively small as compared to the benefits of cooperative norms between groups (represented by $y$). See further Lee Alan Dugatkin, The Evolution of Cooperation: Four Paths to the Evolution and Maintenance of Cooperative Behavior, 47 Bioscience 355 (June 1997); Lee Alan Dugatkin & H.K. Reeve, Behavioral Ecology and the “Levels of Selection”: Dissolving the Group Selection Controversy, 23 Advances in the Study of Behavior 101-33 (1993).


I am indebted to Peter Berkowitz for this information.


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).


George Fletcher notes that, on the return to civilian rule in 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).

Another example may be found in the debate amongst social conservatives over an editorial in *First Things* magazine that argued that the Bill of Rights was illegitimate because it sanctioned abortion. Those who opposed abortion and affirmed their loyalty to the United States constitution signaled a special patriotism. See Mitchell S. Muncy (ed.), *The End of Democracy?: The Celebrated First Things Debate With Arguments Pro and Con* (Spence, 1997).

See Rasmusen. 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). Of course, self-censorship is not a notable feature of American life.