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Articles

THE FORGOTTEN FUNDAMENTAL RIGHT TO FREE MOVEMENT

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ABSTRACT—There is a powerful fundamental right hiding in plain sight: the fundamental right to free movement. This right goes beyond the consistently acknowledged—though infrequently applied—fundamental right to interstate travel. The true scope of the Constitution's protection of movement through substantive due process safeguards local, interstate, and international travel. Though overlooked today, the fundamental right to free movement has deep roots in history and tradition, and in the decisions of numerous state and federal courts, including the Supreme Court.

This Article is the first to examine freedom of movement using the history and tradition test for unenumerated fundamental rights. This Article begins by tracing the right to free movement from the Magna Carta, through Blackstone's *Commentaries*, colonial America, early state constitutions, and the ratification of the Fourteenth Amendment. As this analysis shows, repressive governments have routinely sought to limit movement across and within boundaries. But the English and U.S. legal traditions are marked by repeated affirmations of the right—there is strong and persistent historical support for a fundamental right to free movement.

This Article then turns to judicial discussions of movement rights, both historical and contemporary. Drawing on several previously unconnected lines of decision, this examination surfaces a vibrant picture of the fundamental right to free movement recognized by the courts, including the U.S. Supreme Court.

Given its firm foundation and expansive reach, this is a right that should be applied regularly—to anti-gender-affirming-care or anti-abortion laws targeting travel, to quarantine restrictions locking down a community, and to any of the wide variety of other restrictions limiting free movement.

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INTRODUCTION

Public officials across the political spectrum are enacting a large and growing set of travel restrictions. On March 27, 2020, Monroe County, Florida, closed the Florida Keys to nonresidents for two months to limit the spread of COVID-19.[1] On May 31, 2020, Washington, D.C., issued a three-day curfew in response to the George Floyd protests, effectively prohibiting all movement within the entire city between 7:00 pm and 6:00 am.[2] And on

[1] Tiffany Duong, *Locals Only, Please*, KEYS WKLY. (Mar. 27, 2020), https://keysweekly.com/42/locals-only-please/ [https://perma.cc/KTT2-4QV6]. *See generally* Scott Souza, *RI Reopening: Travel Restrictions Set for Those Coming to State*, PATCH (June 29, 2020, 4:07 PM), https://patch.com/rhode-island/middletown/ri-reopening-travel-restrictions-set-those-coming-state [https://perma.cc/XVT7-MLWA] (describing similar restrictions in Rhode Island); *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020-2022*, BALLOTPEDIA, https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022 [https://perma.cc/KX47-MZ9Z] (describing similar restrictions in New York, Connecticut, and New Jersey).

[2] Tinius v. Choi, 77 F.4th 691, 696 (D.C. Cir. 2023) ("[N]o person . . . shall walk, bike, run, loiter, stand, or motor by car or other mode of transport upon any street, alley, park, or other public place within the District."). *See generally* Gloria Pazmino & Debora Fougere, *NYC Officially Under Curfew; Second Set for Tuesday Night, de Blasio Says*, SPECTRUM NEWS (last updated June 2, 2020, 1:33 AM), https://ny1.com/nyc/all-boroughs/news/2020/06/01/new-york-city-curfew-protests [https://perma.cc/

October 23, 2023, Lubbock County, Texas, banned any abortion-related transportation within the county, including to places where abortion is legal.[3] These are just a small sampling—contemporary travel restrictions abound in a wide range of contexts.

On the other hand, the Supreme Court has repeatedly recognized a "fundamental right" to travel.[4] Because of this recognition, one might think such restrictions are regularly challenged and struck down on right-to-travel grounds. But litigants rarely bring such claims and even more rarely win.

This is a puzzle, but it needn't be. The fundamental right to travel is poorly understood. In the words of commentators, it consists of "a fragmented, complex, and confusing mass of interlocking, overlapping theories," "a textual mess."[5] As a result, significant questions remain about every aspect of the right to travel, including when "as a threshold matter the [right] is even implicated at all."[6]

X5ZU-DQD2] (describing similar curfews in New York); Jason Braverman, *Curfews in Atlanta Continue Through Sunday with Earlier Start over Weekend*, 11ALIVE (June 3, 2020, 11:30 PM), https://www.11alive.com/article/news/local/city-of-atlanta-weekend-curfew-for-george-floyd-protest/85-196cef73-3063-4e71-bc12-a42626f0c967 [http://perma.cc/AU26-EBJM] (describing similar curfews in Atlanta); Jordan Culver, Tyler J. Davis, Trevor Hughes & Steve Kiggins, *'You Got to Put This to an End': State, City Leaders Plead for Peace as George Floyd Protests Bring 'Chaos' in Minneapolis*, USA TODAY (May 30, 2020, 5:28 AM), https://www.usatoday.com/story/news/nation/2020/05/29/george-floyd-protests-persist-minneapolis-white-house-lockdown/5287888002/ [https://perma.cc/26U9-5BM2] (discussing similar curfews in Minnesota); Press Release. ACLU SoCal. Commc'ns & Media Advoc., Curfews in L.A. City and County, and City of San Bernardino Cited in the Lawsuit (June 3, 2020), https://www.aclusocal.org/en/press-releases/aclu-black-lives-matter-la-sue-over-unlawful-curfews [https://perma.cc/FB6L-C8P8] (discussing similar curfews in Southern California).

[3] Lubbock County, Tex., Ordinance Outlawing Abortion Within the Unincorporated Area of Lubbock County (Oct. 2, 2023), https://img1.wsimg.com/blobby/go/4b2b0d23-d175-4bfb-a8d9-71911a3ad695/downloads/LUBBOCK%20COUNTY%20TX%20SCFTU%20ORDINANCE%20(10-02-2023).pdf?ver=1698155282187 [https://perma.cc/9P2J-Q74K]; Julia Harte, *Fight over Texas Anti-Abortion Transport Bans Reaches Biggest Battlegrounds Yet*, REUTERS (Oct. 24, 2023, 7:54 AM), https://www.reuters.com/world/us/fight-over-texas-anti-abortion-transport-bans-reaches-biggest-battlegrounds-yet-2023-10-23/ [https://perma.cc/CQ4E-NPB9]. *See generally* J. David Goodman, *In Texas, Local Laws to Prevent Travel for Abortions Gain Momentum*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/texas-abortion-travel-bans.html [https://perma.cc/9HBZ-9668] (describing similar laws in three other Texas counties); Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21, 23 (2022) (describing similar laws on gender-affirming care and physician-assisted suicide).

[4] *See infra* Part III.

[5] Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1557 (1989); Hon. Jay S. Bybee, *The Congruent Constitution (Part Two): Reverse Incorporation*, 48 BYU L. REV. 303, 364 (2022); *see also, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 394 (2022) (Breyer, J., dissenting) (identifying the pendency of the right to travel as one of the "host of new constitutional questions" raised by the majority).

[6] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1766 (2004) (delineating this "consequential" question in the First Amendment context).

This confusion has only grown following *Dobbs v. Jackson Women's Health Organization*.[7] History has been central in each of the Court's fundamental-rights cases, but *Dobbs* endorsed a particularly stringent version of the "history and tradition" test, thereby calling into question the pendency of all fundamental rights.[8] These rights, *Dobbs* seemingly held, must be located in the Magna Carta, Blackstone's *Commentaries*, and historical state constitutions—otherwise, they might not be "fundamental" after all.[9] Although courts and scholars alike have regularly recognized the fundamental right to travel, there have been few serious attempts to substantiate it or to define its scope—none of which use the most stringent version of the "history and tradition" test endorsed in *Dobbs*.[10]

This Article fills that substantial gap in the scholarly literature. Furthermore, in excavating the legal foundation supporting the widely acknowledged if little-understood (and therefore largely disregarded) fundamental right to travel, this Article uncovers a far greater right than what has been acknowledged in those few contemporary attempts to explore its scope. To the extent there was a standard (pre-*Dobbs*) contemporary articulation of the fundamental right, it was a narrow one: the fundamental right guards against restrictions on *inter*state travel.[11] Under this formulation, local restrictions on travel—city-wide curfews, regional travel bans, and so forth—are largely, if not entirely, permissible.

The fundamental right uncovered by this Article extends substantially beyond protecting only interstate travel. Its reach extends locally and even internationally as well. This broader right, best conceptualized as the fundamental right to free movement, is not novel. This is the right that would have been most familiar to Blackstone and to Americans from the time of the Revolution through (at least) Reconstruction.[12] But it is effectively a lost

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[7] 597 U.S. 215 (2022).

[8] *Id.* at 237 (discussing the history and tradition test).

[9] *See infra* Part II; *cf.* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 34 (2022) (similarly "categoriz[ing] . . . historical sources because, when it comes to interpreting the Constitution, not all history is created equal").

[10] *See, e.g.*, Jones v. Helms, 452 U.S. 412, 412, 418 (1981) (describing the fundamental right to travel, "whatever its source," as "well settled").

[11] *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 27–30, 39 (2023) (recognizing, without substantial accompanying analysis, support for the fundamental right to interstate travel while observing that "the [Due Process] clause's substantive dimension has been controversial"); Wright v. City of Jackson, 506 F.2d 900, 903–04 (5th Cir. 1975) (same); *cf.* Erin F. Delaney & Ruth Mason, *Solidarity Federalism*, 98 NOTRE DAME L. REV. 617, 630, 640 (2022) (discussing interstate travel rights as a requisite for the federalist structure).

[12] I use "movement" rather than "travel" to denote a wider set of activities. The act of migrating from one state to another entails "traveling," as does an evening stroll. But the word that best captures these

right. Though the fundamental right to free movement echoes strongly through contemporary cases, its full breadth and force are untapped today. This right should carry a great deal of power, but its abstruseness has relegated it to the dusty back shelf of constitutional obscura—even with respect to its protection of interstate travel.

This Article proceeds in three Parts. Part I situates the fundamental right alongside the Constitution's other protections of travel, illustrating in the process its indispensable role. Part II then proceeds with a detailed exploration of the history and tradition of free movement, from the Magna Carta to the ratification of the Fourteenth Amendment. To this end, Part II includes a catalog—the first—of state constitutional protections of movement at the time of the ratification of the Bill of Rights (Table 1) and at the time of the ratification of the Fourteenth Amendment (Table 2). Part III expands on this by excavating a post-ratification portrait of the right in the United States, including how the right has been recognized (expansively) in fourteen U.S. Supreme Court majority decisions and by numerous state supreme courts.

By threading together these varied discussions of free movement's constitutionality and casting a light on the right's robust history and tradition, this Article illuminates the right to free movement in its full breadth, substantiating that right under even the most stringent of the Court's historical inquiries.

I. THE CONSTITUTION'S RIGHTS TO TRAVEL

Though the Supreme Court has recognized the fundamental right to travel on multiple occasions, the right has garnered little scholarly attention and is rarely invoked by litigants.[13] To the extent that right-to-travel claims are brought, they are most commonly rooted in Article IV's Privileges and Immunities Clause or the Dormant Commerce Clause.[14] Yet, the Constitution protects travel in at least four ways: through the Privileges and Immunities Clause, the Dormant Commerce Clause, the First Amendment Assembly Clause, and as an unenumerated fundamental right.[15] These

activities is "movement"; travel is just one type of movement. *Compare Travel*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/travel [https://perma.cc/REX7-FWZV] (defining the term as "to go on or as if on a trip or tour: journey"), *with Movement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/movement [https://perma.cc/83SD-XM83] (defining the term as "the act or process of moving, *especially*: change of place or position or posture").

[13] *See, e.g.*, Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1385–89 (2021) (collecting sources and identifying this deficit).

[14] *Id.* at 1386–88.

[15] *Id.* at 1385–87; *see infra* Parts II–III.

protections are not redundant; each one casts a different shadow, applying to different parties and giving rise to different tests.

The Privileges and Immunities Clause and the Dormant Commerce Clause, for example, each target state discrimination: the Privileges and Immunities Clause prevents states from discriminating against citizens of other states, and the Dormant Commerce Clause prevents states from discriminating against interstate commerce.[16] Neither clause, therefore, is implicated by federal restrictions, and neither clause applies absent discrimination.[17] These clauses protect travel meaningfully, but their reach is thus limited.

Unlike those clauses, the First Amendment's Assembly Clause applies to both state and federal action. But because it protects free speech and petition, an even smaller subset of movement restrictions implicates the Clause. Moreover, movement-related restrictions on assembly are generally evaluated under the eminently survivable time, place, or manner test used in the context of free speech claims.[18]

On the other hand, the fundamental right safeguards travel writ large: as Parts II and III articulate, it protects local, interstate, and international travel. And as with other fundamental rights, it applies to both state and federal restrictions.[19] Thus, the fundamental right reaches a far greater range of travel restrictions than these other constitutional protections. Moreover, regulations on fundamental rights are subject to strict scrutiny review by the courts (meaning the regulation is presumptively invalid unless it furthers a compelling governmental interest and is narrowly tailored to achieve that interest).[20] Even when the fundamental right does not provide the only colorable basis for challenging a restriction on travel, it often will provide the strongest basis.[21]

To illustrate the essential role of the fundamental right to free movement, consider the curfews that cities widely employed in response to protests against police brutality following the death of George Floyd. Such restrictions plainly restricted free movement—they barred all travel by any

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[16] *See* Smith-Drelich, *supra* note 13, at 1386–87; Smith-Drelich, *supra* note 3, at 27–28.

[17] *See* Smith-Drelich, *supra* note 3, at 27–28.

[18] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994) (applying the time, place, or manner test to state action restricting assembly and contrasting with strict scrutiny).

[19] *Id.*

[20] Smith-Drelich, *supra* note 13, at 1383–86; *see, e.g.*, Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (holding that an Arizona law impinging on the right of interstate travel could only be sustained on a showing of a compelling state interest).

[21] This is not to say that the fundamental right displaces these other constitutional protections of travel. *See* Smith-Drelich, *supra* note 13, at 1386–88 (detailing circumstances in which one or more of the Constitution's other protections of travel will be most applicable).

means through entire cities for, often, the whole night.[22] But whether they violated any constitutional right to movement turns almost entirely on which source of the right is applied.

Such measures likely did not implicate the right to travel arising from the Privileges and Immunities Clause, for example. To the extent that these city-wide restrictions primarily limited the travel of residents of that city or its state—and that did appear to be their primary sweep—they did not violate Article IV: the Privileges and Immunities Clause only protects against state regulations that discriminate against citizens of other states.[23] The right to travel arising from the Dormant Commerce Clause, similarly, protects against regulations that discriminate against interstate commerce—and these largely local laws likely did not.[24] Finally, although these restrictions more directly implicated the Assembly Clause, most First Amendment challenges to curfews faltered under intermediate scrutiny, in part because courts construed them as primarily restricting nonexpressive conduct.[25]

The fundamental right to free movement, on the other hand, provides a robust basis for challenging city-wide curfews. As Parts II and III detail, pedestrian travel within a city, as well as travel via car, bus, train, carriage ride, etc., falls squarely within the range of movement protected by the fundamental right. And where these restrictions may have passed intermediate scrutiny, they are unlikely to survive strict scrutiny: these *city*-wide restrictions were not narrowly tailored.

This is but one example. From state or federal restrictions on travel for abortions and gender-affirming care, to pandemic-related lockdowns, to no-fly lists, there is an extensive catalog of recent travel restrictions that are vulnerable to a fundamental-rights challenge, but not necessarily other constitutional rights to travel.[26]

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[22] *See supra* note 2 (discussing the curfew restrictions).

[23] *See* Smith-Drelich, *supra* note 3, at 27–28 (analyzing the application of the right to similar laws); Cohen et al., *supra* note 11, at 34–35 (same).

[24] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152–53 (2023); Smith-Drelich, *supra* note 3, at 27–28. Right-to-travel claims rooted in the First Amendment Assembly Clause or the Fourteenth Amendment Privileges or Immunities Clause will likely be even more inapposite: Texas's restriction on intrastate travel for abortion has little connection to the sort of gatherings protected by the First Amendment, and the reach of the Fourteenth Amendment's Privileges or Immunities Clause—though likely including travel—is highly uncertain. *See* Smith-Drelich, *supra* note 13, at 1386 n.93.

[25] *See, e.g.*, Tinius v. Choi, 77 F.4th 691, 699 (D.C. Cir. 2023); *In re* N.Y.C. Policing During Summer 2020 Demonstrations, 548 F. Supp. 3d 383, 412–13 (S.D.N.Y. 2021).

[26] *See generally* Smith-Drelich, *supra* note 13 (applying these travel rights to pandemic lockdowns); Smith-Drelich, *supra* note 3 (applying these travel rights to gender-affirming-care- and abortion-related restrictions). This is not to say that the fundamental right displaces these other constitutional protections of travel. There are circumstances in which one or more of the Constitution's other protections of travel will be most applicable. *See id.* at 27–32 (outlining such circumstances).

II. "HISTORY AND TRADITION" OF FREE MOVEMENT

This Article next turns to the history and tradition of free movement. Despite the importance of history and tradition in the Court's fundamental-rights jurisprudence, this represents the first such examination.

The Court has long relied on "history and tradition" to shape its conception of fundamental rights, including in *Washington v. Glucksberg*, *Obergefell v. Hodges*, and, most recently, *Dobbs*.[27] *Obergefell*, for example, recognized that "[h]istory and tradition guide and discipline [an] inquiry" that also draws substantially on precedent and "on constitutional principles of broader reach."[28] *Dobbs* suggests an even more significant role for history: any unenumerated fundamental right, *Dobbs* held, must be firmly rooted in history and tradition.[29] *Dobbs* thus appears to transform an inquiry under which history *can* substantiate a fundamental right into one in which history *must* do so.[30]

Dobbs held up three cases as exemplars of its inquiry: *Timbs v. Indiana*, *McDonald v. Chicago*, and *Washington v. Glucksberg*.[31] *Timbs*, Justice Samuel A. Alito Jr. wrote, "traced the right back to Magna Carta, Blackstone's *Commentaries*, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment."[32] *McDonald* "surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right

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[27] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Obergefell v. Hodges, 576 U.S. 644, 664 (2015); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 238 (2022).

[28] *Obergefell*, 576 U.S. at 664 (2015) ("[This] method respects our history and learns from it without allowing the past alone to rule the present."); *see also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) (applying a similar approach particularly weighing "our laws and traditions in the past half century").

[29] *Dobbs*, 597 U.S. at 239 (citing *Glucksberg*, 521 U.S. at 721–22). This is a fraught test, which, as practical matter, largely excludes women, Black people, and Indigenous people, who were disenfranchised for much of the history and tradition considered. *See* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUST. L. REV. 901, 905–06 (2023). There are important questions regarding whether this test *should* be used that fall outside the scope of this Article.

[30] *Dobbs* left some uncertainty regarding whether its history-centric test or the more holistic inquiry used in *Obergefell* apply to other fundamental rights. *See Dobbs*, 597 U.S. at 262 (recognizing as "unfounded" the "fear that our decision will imperil those other [fundamental] rights" while distinguishing abortion on the basis of its "destr[uction of] a potential life").

[31] *Id.* at 2246 (citing Timbs v. Indiana, 586 U.S. 146, 146 (2019); then citing McDonald v. Chicago, 561 U.S. 742, 764, 767 (2010); and then citing *Glucksberg*, 521 U.S. at 721). In *Timbs* and *McDonald*, the Court considered whether enumerated rights (the Eighth Amendment excessive fines clause and the Second Amendment right to bear arms) were fundamental and therefore incorporated against the states. In *Glucksberg*, the Court considered whether there was an unenumerated fundamental right to assisted suicide. As *Dobbs* recognized, the test is the same "[i]n deciding whether a right falls into either of these categories." *Id.*

[32] *Id.* at 2246–47.

to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence."[33] And *Glucksberg* "surveyed more than 700 years of 'Anglo-American common law tradition'" in concluding that there was no fundamental right to assisted suicide.[34] Following *Dobbs*, it may be that courts will not recognize any right that falls short of these thresholds as fundamental.

Applying either version of the historical fundamental-rights inquiry—*Dobbs*'s narrow view or the broader approach used in *Obergefell*—reveals a fundamental right to free movement, including local, interstate, and international movement, that is "deeply rooted in [our] history and tradition."[35] Part II locates the right through that history, starting, in Section II.A, with the 1215 Magna Carta and William Blackstone's descriptions of English law. Section II.B turns to colonial- and revolutionary-era recognitions of the right to free movement, including in state charters and colonial backlash to English laws restricting the movement of colonists, in early federal statutes and treaties, and in early state constitutions. Turning to recognitions of the right around the Civil War and Reconstruction, Section II.C outlines the discussion of the right leading up to the Reconstruction Amendments, and its wide recognition in state constitutions at that time, demonstrating both early protections that the states retained and newer provisions to protect the fundamental right to free movement.

A. Free Movement in English History

1. The Magna Carta

First, the fundamental right to free movement can be traced to the 1215 Magna Carta, which recognizes strong movement-related rights in articles 41 and 42. Article 42 of the 1215 Magna Carta guarantees that "[i]t shall be lawful to anyone . . . to leave our kingdom and to return, safely and secure by land or by water."[36] Article 41 similarly reads: "All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and

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[33] *Id.* at 2247.

[34] *Id.*

[35] *Id.* at 2246.

[36] *Magna Carta, 1215*, NAT'L ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/ [https://perma.cc/B76T-TFK3] (excepting those "imprisoned or outlawed," natives of any "country that is at war with us, and merchants"); *cf.* Kent v. Dulles, 357 U.S. 116, 126 (1958) (recognizing that "[i]n Anglo-Saxon law that right [to travel] was emerging at least as early as the Magna Carta," citing Article 42 of the 1215 Magna Carta).

selling by the ancient and right customs, quit from all evil tolls."[37] These sweeping acknowledgments encapsulate international and domestic travel, and also the right to not travel—"to tarry there."[38]

Free movement was plainly important to the Magna Carta's drafters; they enshrined it in two separate articles. And for good reason. In the preceding years, the Crown had made several notable efforts to limit movement, both extraterritorially and within England. The Constitutions of Clarendon required that clergymen obtain a license from the king to leave the country—partially precipitating Thomas Becket (the former Chancellor of England and Archbishop of Canterbury) himself to flee the country in 1164.[39] Moreover, King John had taken to restricting "the movements of merchants and their goods, partly as a means of harassing the king's enemies, and partly as a means of raising money by charging for release from the constraints thus imposed."[40] This restriction was particularly severe for foreign merchants, who could not "enter England or leave it, nor take up his abode in any town, nor move from place to place, nor buy and sell, without paying heavy tolls to the King."[41] For the barons and merchant class at this time, these restrictions weighed heavily; prior to King John's loss of Normandy to France in 1207, transit for both business and leisure was common between England and continental Europe, with nobles regularly

[37] *Magna Carta, 1215*, *supra* note 36 (noting an exception to this for "such merchants as are of the land at war with us"); *cf.* José E. Alvarez, *The Human Right of Property*, 72 U. MIAMI L. REV. 580, 598 (2018) (focusing on property rights while noting: "As scholars of the founding period have pointed out, those who established the Republic revered the merchants' chapter [Article 41] of the Magna Carta"). Lord Edward Coke's "gloss" on this chapter adds a degree of reciprocity to this interpretation. Coke wrote: "the meanes for the well using, and intreating of merchant strangers in all the particulars aforesaid, is a matter of great moment . . . for as they be used here, so our merchants shall be dealt withall in other countries." Daniel Hulsebosch, *Magna Carta for the World? The Merchants' Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599, 1609 (2016) (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *58).

[38] *Magna Carta, 1215*, *supra* note 36. Possibly of note, "[King] John died shortly afterward, and William Marshall, regent of Henry III, republished the Charter without the guarantees of freedom of travel." Briehl v. Dulles, 248 F.2d 561, 568–69 (D.C. Cir. 1957), *rev'd*, *Kent*, 357 U.S. at 117.

[39] Henry Summerson, *The 1215 Magna Carta: Clause 42, Academic Commentary*, MAGNA CARTA PROJECT, http://magnacartaresearch.org/read/magna_carta_1215/Clause_42?com=aca [https://perma.cc/EC7M-LG3B]. "The king's lay subjects were probably liable to similar restrictions, and on very similar grounds, but the evidence is very meagre." *Id.*

[40] Henry Summerson, *The 1215 Magna Carta: Clause 41, Academic Commentary*, MAGNA CARTA PROJECT, http://magnacartaresearch.org/read/magna_carta_1215/Clause_41?com=aca [https://perma.cc/U39G-U4CQ].

[41] WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 399 (Burt Franklin, 2d ed. 1960) (1914). It is unclear whether Article 41 favored foreign merchants. *Id.* at 400–02. Regardless, it plainly applied equally to English and non-English merchants.

traveling between their many estates without significant impediment from the Crown.[42]

Articles 41 and 42 serve as a direct response to such threats, enshrining a broad right "to any person . . . to go out of our kingdom, and to return," as well as for merchants to "tarry there and to move about as well."[43]

2. Blackstone's Commentaries

Written over five hundred years later, William Blackstone's *Commentaries on the Laws of England* describes a strikingly similar view of the right to move freely to that in the Magna Carta.[44] That is no coincidence: the Magna Carta greatly influenced revolutionary-era Americans in large part because Blackstone centered it as the foundation of English liberties.[45] Because of his "profound" influence on the founding generation, the Supreme Court has afforded Blackstone's discussion of liberties substantial independent weight.[46]

In setting out his influential concept of personal liberty, Blackstone described the right to free movement: "Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatever place one's own inclination may direct."[47] Blackstone thus explicitly connected free movement (or "loco-motion") to "personal liberty"—one place in the U.S. Constitution where it has found its home.[48] This right is, in Blackstone's view, a "right strictly

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[42] *Id.* at 22.

[43] Viewed in this context, it is not clear whether Article 41's limitation to "merchants" has import beyond reflecting the limitations to which it responds. This points to a more general limitation of looking to the Magna Carta as an exclusive statement of rights: it was a response to perceived oppressions, so there were rights recognized at the time that were not encapsulated in the Magna Carta because there had been no recent threats to those rights. Articles 41 and 42 may thus not capture the extent of beliefs at this time regarding movement rights.

[44] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *134. These ensuing centuries were not free of travel restrictions. England saw a continuous push and pull of restrictions on movement and backlashes to those restrictions. *See, e.g.*, *Peasant's Revolt*, BRITANNICA (Aug. 6, 2024), http://www.britannica.com/event/Peasants-Revolt [https://perma.cc/SD4Q-FNYM] (detailing how the "first great popular rebellion in English history" was "main[ly]" in response to the Statute of Labourers, a 1351 law that limited the free movement of those seeking better working conditions). As with most of the rights recognized in the Magna Carta, consistent governmental respect for movement did not follow directly from its formal recognition.

[45] Coke was primarily responsible for this recognition. However, Blackstone's subsequent *Commentaries* were far more influential on the colonists. *See* Timbs v. Indiana, 586 U.S. 146, 164 (2019) (Thomas, J., concurring) (citing Alden v. Maine, 527 U.S. 706, 715 (1999)) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation").

[46] *Id.*

[47] 1 BLACKSTONE, *supra* note 44, at *134.

[48] *See infra* Section II.B.2.

natural; . . . the laws of England have never abridged it without sufficient cause; and . . . in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws."[49]

Blackstone also separately recognized several related components of the right to move freely when discussing "the prerogative of granting safe-conducts." "Safe-conducts" were essentially an early form of visas or passports, giving foreigners both permission and the freedom to move throughout England.[50] One of the earliest examples of a safe-conduct was that of the well-known Scottish poet John Barbour, whom the king granted the freedom "to come with three scholars in his retinue into our kingdom of England for the reason to study in the university of Oxford and . . . to stay and thereafter to return individually to Scotland in our protection and defense, in our safe and secure conduct."[51] As this example shows, both the permissive and the protective aspects of safe-conducts mattered: without a safe-conduct, a foreigner could not enter, travel through, or stay in England; and with a "safe-conduct" came the King's protection and a concomitant right to move or stay even where the less friendly locals might not otherwise approve.

Blackstone took these ideas even further by recognizing that at least some foreigners without safe-conducts should generally be permitted to move freely as well: "Great tenderness is shewn by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) but with regard also to the admission of strangers who come spontaneously."[52] Although Blackstone did not argue that this "tenderness" confers any rights against the king—such persons are "liable to be sent home whenever the king sees occasion"—it does come with some rights against others: "so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection."[53] This was, in effect, a recognition of the default position in England of

[49] 1 BLACKSTONE, *supra* note 44, at *134 (citation omitted); *see also* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE 388 editor's app. note E (2d ed. 1803) (describing this right to movement as a "*jus commune*," and remarking that "there can be no reason to doubt that it was the intention of the colonists to adopt [it]").

[50] Those granted safe-conduct, Blackstone writes, may "come into the realm, [or] can travel himself upon the high seas" even during times of war. *See* 1 BLACKSTONE, *supra* note 44, at *260.

[51] Jenny M. McHugh, *The Passport's Medieval Forebear: Grants of Safe-Conduct in Medieval Britain*, EPOCH MAG. (Nov. 30, 2021), https://www.epoch-magazine.com/post/the-passport-s-medieval-forebear-grants-of-safe-conduct-in-medieval-britain [https://perma.cc/VR6V-VMAQ].

[52] *See* 1 BLACKSTONE, *supra* note 44, at *259.

[53] *Id.* at *259–60.

guaranteeing free movement even for those foreigners who lacked the formal entailments conferred by a safe-conduct.[54]

Blackstone's *Commentaries* thus set out two tiers of movement-related rights in England. English residents had a natural right to free movement in England, possibly including the freedom to leave and return to England. On the other hand, the movement-related rights of foreigners persisted largely at the mercy of the king. But this second tier of rights was, nevertheless, reasonably robust, consisting of (1) rights conferred by safe conducts, which included the rights to enter England, to travel within England, and to stay within England; and (2) the right to the king's protection for "foreigners in distress" and "strangers who come spontaneously."[55] Each set of nonresident rights has modern salience for the free movement of those holding passports or visas, immigrants, and even asylum-seekers.[56]

Blackstone's *Commentaries* were greatly influential in America during the Revolutionary Era. As such, Blackstone's strong affirmation of multiple components of the right to free movement, which restates similar recognitions found in the Magna Carta, was likely reflected in the American public's views at the time of the founding.

B. Free Movement in Colonial-Era America

1. The Colonial Period

The right to move freely is not solely an English import. Early American history, specifically including the history of colonization and the ensuing war for independence, is marked by a particular commitment to free movement.

As a practical matter, the English landscape heavily constrained movement in England during the period of American colonization: England "was crisscrossed in every direction with thousands of high fences along the boundaries of every parish."[57] The "unhappiness and frustration caused by [such] restrictions on freedom of movement in England" were, according to one leading commentator, "strong incentives to go to the great open spaces

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[54] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 531 (2011) (discussing the protection England offered foreigners).

[55] *See* 1 BLACKSTONE, *supra* note 44, at *259. Blackstone also recognizes an accompanying freedom *not* to move: "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law." *Id.* at *137.

[56] As will be discussed, there is a robust English-American tradition of relatively unimpeded immigration and emigration, with these rights regularly enshrined in state constitutions, *see infra* Table 1; Table 2. Indeed, state and federal restrictions on such movement are relatively modern innovations; passports, for example, were not widely required for travel until World War I. *See infra* Section III.D.2.

[57] ZECHARIAH CHAFEE JR., THREE HUMAN RIGHTS IN THE CONSTITUTION of 1787, at 166 (1956).

in her American colonies."[58] And go they did; "by 1641, 300 ships had carried 20,000 settlers to America," nearly all from England.[59]

This great relocation was only possible because of another aspect of free movement: England gave its residents significant freedom to move to the Americas. England's permissive view toward emigration was reflected in Sir Humphrey Gilbert's Patent of 1587, which gave a broad grant of power to Sir Humphrey "and soe many of our subjects as shall willingely accompany him" to "travel thetherward or to inhabite there with him . . . [s]oe that none of the same parsons be such as hereafter shalbe specially restrayned by us our heirs or successors . . . ."[60] In effect, the Patent gave Sir Humphrey unlimited freedom to take whomever he wanted with him to America. Drafters copied this provision in the First Charter of the Virginia Company (which brought about the Jamestown colony) and in the Patent of the Council for New England (which led to the Pilgrims landing at Plymouth).[61] "Freedom of movement went into later charters" as well.[62] In fact, England's accommodating view toward emigration may explain the relative success of the English-American colonial enterprise itself. France did not have nearly so liberal of an emigration policy, and by 1660, New France consequently only had 2,000 inhabitants "when 85,000 white inhabitants of New England were reaching political and economic maturity."[63]

The liberal stance taken by England at this time regarding movement in general, and emigration specifically, appears to have been reflected in the practices of the American colonies, where free movement was the accepted and encouraged norm.[64] Thus,

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[58] *Id.*

[59] *American Colonies*, BRITANNICA (Aug. 2, 2024), https://www.britannica.com/topic/American-colonies/How-colonization-took-place [https://perma.cc/DAT5-QWZR].

[60] CHAFEE, *supra* note 57, at 173 (contrasting this with the far more restrictive Spanish or French colonial practices).

[61] *Id.*; *see also id.* at 142 (noting that subsequent patents and charters allowed this movement for not just "our Subjects" but "Scotchman" (Virginia Charter), "Strangers that will become our loving Subjects" (1620 addition to Plymouth Charter), and "foreigners" (Georgia Charter)).

[62] *Id.* As a result, "there was much more freedom of movement between the British Isles and our eastern seaboard at any time between 1607 and 1776 than exists in 1956." *Id.* at 174.

[63] *Id.* at 170. This continued through the time of Independence:

> At the time of the Constitution [freedom to come to this country] was the kind of freedom of movement which mattered most. It had brought two million persons to our shores from the British Isles alone and enabled many others to find refuge from oppression on the Continent of Europe.

Id. at 198.

[64] *Id.* at 177.

> [w]hen the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth."[65]

Indeed, in the few instances in which it appears that colonists may have sought to limit movement, such as to bar subjects of the king from their coasts, colonial governments issued formal proclamations affirming the freedom to move throughout those areas.[66] Rhode Island even incorporated such a provision into its Charter: Rhode Islanders had the right "to passe and repasse with freedome, into and through the rest of the English Collonies, upon their lawful and civill occasions."[67] Overall, most of "the charters seem to have taken internal freedom of movement for granted."[68]

There were two notable exceptions to colonial government recognition of internal freedom of movement: New York and the Carolinas. But, these more restrictive views on movement did not last long. A "Charter to Patroons in New Netherlands," issued by the Dutch West India Company in 1629, ostensibly limited early settlers in New York. This document "compelled servants to stay permanently with their own patroon," seemingly in an "attempt to pin settlers to an estate like mediaeval serfs."[69] These restrictions, to the extent they were ever even enforced, had been removed by the time "New York became an English colony."[70]

Similarly, the 1670 Fundamental Constitutions of Carolina forbade settlers from freely leaving the land of their lords.[71] However, the Fundamental Constitutions of Carolina never took effect.[72] Thus, to the extent that there had ever been notable disagreement about free movement in the Americas, the more permissive view appears to have won out long before the time of Independence.

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[65] Obergefell v. Hodges, 576 U.S. 644, 728 (2015) (Thomas, J., dissenting) (quoting Silas Downer, *A Discourse at the Dedication of the Tree of Liberty*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, at 97, 101 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

[66] *See* CHAFEE, *supra* note 57, at 177.

[67] *Id.*; *see also The Massachusetts Body of Liberties (1641)*, HANOVER HIST. TEXT PROJECT (Mar. 8, 2012), https://history.hanover.edu/texts/masslib.html [https://perma.cc/PH9G-V6D5] ("Every man of or within this Jurisdiction shall have free libertie . . . to remove both himselfe and his familie at their pleasure out of the same. . . . If any people of other Nations professing the true Christian Religion shall flee to us . . . , They shall be entertayned and succoured amongst us.").

[68] CHAFEE, *supra* note 57, at 177.

[69] *Id.* at 179.

[70] *Id.*

[71] *Id.* at 179–80.

[72] *Id.* at 180.

By far, the most significant limitations of the colonists' movement came in the years leading up to Independence via a series of English laws and policies, which the colonists so greatly detested that they appear to have played a significant role in sparking revolution. First, the Quebec Proclamation of 1763 commanded the governors of the colonies not to authorize any surveys or grants west of the Appalachian Mountains.[73] The 1768 Boundary Line Treaty and the Quebec Act of 1774 (which the colonists soon labeled among the "Intolerable Acts") subsequently expanded the Proclamation's restrictions on movement.[74] The Proclamation, the 1768 Boundary Line Treaty, and the Quebec Act in effect severely limited westward movement by residents of the Thirteen Colonies—any resettlement of that land, even when technically possible, would now entail movement to a different jurisdiction with different governance and different laws—which the colonists perceived unfavorably.[75]

England had also effected a more global restriction on American movement in 1764 by ending its period of "salutary neglect" of the Navigation Acts (which England had passed over a century earlier but only loosely enforced).[76] The primary consequence of this change was to greatly restrict where American ships could go: the colonists were only permitted to export their commodities—tobacco, rice, and sugar, for example—to England and not to any other European powers.

Moreover, in 1773, England effectively rescinded the Plantation Act of 1740, which it had designed to encourage immigration to the colonies by, among other things, giving the colonies the power to enact laws regulating

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[73] *Id.* at 181–82; Proclamation of 1763, *reprinted in* 7 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 663, 666–67 (1820) ("[W]e declare . . . that no governor . . . do presume . . . to grant warrants of survey, or pass any patents, for lands beyond the bound of their respective governments . . . ."); *see also The Royal Proclamation of 1763*, UPPER CAN. HIST., http://www.uppercanadahistory.ca/pp/ppa.html [https://perma.cc/DW4Z-2P75].

[74] Treaty of Fort Stanwix, Six Nations-U.S., Nov. 5, 1768, *reprinted in* 8 JOHN ROMEYN BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 135, 136 (E.B. O'Callaghan ed., 1857); 14 Geo. III c. 83 (Eng.); *Intolerable Acts*, BRITANNICA (last updated Sept. 14, 2024), https://www.britannica.com/event/Intolerable-Acts [https://perma.cc/4ENE-GBGV]. The Quebec Act was less geographically restrictive than the Quebec Proclamation: it permitted settlement of the area in which Pittsburgh is now located as well as some southern areas, including Kentucky. CHAFEE, *supra* note 57, at 182. The 1768 Boundary Line Treaty restricted colonial settlement on Six Nations lands west of Fort Stanwix in New York and down the Ohio River. Treaty of Fort Stanwix, *supra*.

[75] *See* CHAFEE, *supra* note 57, at 182. There was substantial colonial interest in westward expansion at this time, fueled in part by the "land swindle" of the 1768 Boundary Line Treaty, which drove the exploitation of lands that had recently been recognized as belonging to several Indian nations. *See* Timothy J. Shannon, *Speculators in Empire: Iroquoia and the 1768 Treaty of Fort Stanwix by William J. Campbell*, 111 REG. KY. HIST. SOC'Y 235, 235 (2013) (book review).

[76] *Navigation Acts*, BRITANNICA (last updated Oct. 10, 2023), https://www.britannica.com/event/Navigation-Acts [https://perma.cc/T8TX-M5BC].

naturalization.[77] The rescission effectively barred any colonial naturalization outright—thereby chilling, at least as a matter of formal policy, the movement of people to the colonies.[78]

The colonists' backlash to these movement restrictions would become part of the Founding of the United States. One of the primary complaints noted by the Continental Congress of 1774 was of the Quebec Act's "exten[sion]" of the limits of Quebec "so as to comprehend those vast regions that lie adjoining to the Northerly and Westerly boundaries of these colonies."[79] The unacceptable burden on movement caused by this extension subjected any "*English* subjects settled in that Province" to the "*French* Laws," as well as to the Quebec state church of Roman Catholicism.[80] This objection to the Quebec Act would ultimately become Grievance 20 of the Declaration of Independence, which decried the English monarchy "[f]or abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries."[81] By the point of Independence, the colonists framed their complaint regarding the Quebec Act primarily in terms of governance and religion, but the essential role of movement in this dispute never dissipated. At the core, the colonists sought a right to the unencumbered settlement of the more western parts of the continent.[82]

Similarly, Grievance 7 in the Declaration of Independence condemns the movement restrictions effected by the 1773 limitations on colonial naturalization powers and the 1768 Boundary Line Treaty (which, like the Quebec Act, had limited westward expansion)[83]: "[King George] has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others

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[77] Edward A. Hoyt, *Naturalization Under the American Colonies: Signs of a New Community*, 67 POL. SCI. Q. 248, 251 (1952) (describing the operation of the Plantation Act in tandem with established colonial procedures). The Preamble to the 1740 Act made its goal explicit: "[t]he increase of people is a means of advancing the wealth and strength of any nation or country." *1740: 13 George 2 c. 7: The Plantation, or Naturalization, Act*, STATUTES PROJECT, http://statutes.org.uk/site/the-statutes/eighteenth-century/1740-13-george-2-c-7-the-plantation-or-naturalization-act/ [https://perma.cc/5KVS-D63X].

[78] *See* Hoyt, *supra* note 77, at 265.

[79] Cont'l Cong., *Memorial to the Inhabitants of the Colonies*, N. ILL. UNIV. DIGIT. LIBR. (Oct. 21, 1774), https://digital.lib.niu.edu/islandora/object/niu-amarch%3A88015 [https://perma.cc/YZA2-T3V7]; CHAFEE, *supra* note 57, at 182.

[80] Cont'l Cong., *supra* note 79.

[81] THE DECLARATION OF INDEPENDENCE para. 22 (U.S. 1776).

[82] *He Has Endeavoured to Prevent the Population of These States; for That Purpose Obstructing the Laws for Naturalization of Foreigners…*, CLAREMONT INST., https://founding.com/he-has-endeavoured-to-prevent-the-population-of-these-states-for-that-purpose-obstructing-the-laws-for-naturalization-of-foreigners/ [https://perma.cc/3BHW-B2FY].

[83] Treaty of Fort Stanwix, *supra* note 74.

to encourage their migrations hither, and raising the conditions of new Appropriations of Lands."[84]

The limitations on movement caused by England's enforcement of the Navigation Acts also prompted a strong response from the colonists. The colonies actively worked to evade the restrictions of the Navigation Acts in the years leading up to war.[85] The Declaration of Independence even references the Navigation Acts in Grievance 16 by condemning England "[f]or cutting off our Trade with all parts of the world."[86]

Finally, the Boston Port Act, one of the other "Intolerable Acts," also significantly limited movement. In direct response to the Boston Tea Party, the British enacted the Port Act, which closed the Boston Port via a blockade enforced by the Royal Navy and the British Army. Although the effect of the closure was primarily limited to sea trade (food was allowed in and out), the colonists did not deem it a minor restriction. As one writer in the May 11, 1774 Boston Evening Post wrote about this blockade: "the town of Boston is to be punished with a severity of which the worst times of this country cannot furnish a single example."[87] The First Continental Congress largely agreed, declaring the Act "impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights."[88]

As this history shows, the American colonists' views on freedom of movement were broad, encompassing (at the very least) the freedom to come to and leave America, to move from one colony to another or through the American frontiers, and to move about and within a colony. They did not hold these views lightly: the very creation of the United States itself can be conceptualized as—at least in part—a backlash to those rare instances in which England limited free movement in the colonies.[89]

2. Early United States Law

Early U.S. law reflects the colonists' commitment to free movement in various ways. The Articles of Confederation explicitly protected interstate travel, recognizing that "the people of each State shall have free ingress and

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[84] THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

[85] Hoyt, *supra* note 77, at 253.

[86] THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776).

[87] Jared Peatman, *Coercion Gone Wrong: Colonial Response to the Boston Port Act*, 1 GETTYSBURG HIST. J. 3, 3–4 (2002).

[88] Declaration and Resolves of the First Continental Congress, October 14, 1774, *reprinted in* CHARLES C. TANSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 70-398 (1927).

[89] *Cf.* CHAFEE, *supra* note 57, at 184 ("Therefore, the question of regulating freedom of movement to the westward was a strong reason for the Revolution, for Independence, for a permanent Union.").

regress to and from any other State."[90] Although the drafters did not replicate this exact provision in the Constitution, the Supreme Court has made it clear that no negative implication should be read into its omission: "The reason [for its absence in the Constitution], it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[91]

This conclusion is buttressed by the fact that several provisions of the Constitution (in addition to the Due Process clauses) implicitly protect movement, including the Dormant Commerce Clause and Article IV's Privileges and Immunities Clause.[92] These clauses respectively protect movement as an adjunct to prohibitions against state regulations on interstate commerce and discriminatory burdens on out-of-state citizens.[93] The First Amendment right to peaceably assemble and the later-ratified Fourteenth Amendment's Privileges or Immunities Clause likely also protect free movement—each also in specific ways related to the underlying expressive and nondiscriminatory purposes of the amendments in question.[94]

There are, moreover, a number of other constitutional provisions that clearly contemplate free movement, as Chief Justice Roger Brooke Taney recognized in an influential passage from his dissent in the *Passenger Cases*:

> the right to sue in a federal court sitting in another State, . . . the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties—all prove that [the Constitution] is intended to secure the freest intercourse between the citizens of the different States.[95]

That so many provisions of the Constitution independently affect or contemplate protections of movement evidences the fundamental nature

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[90] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

[91] United States v. Guest, 383 U.S. 745, 758 (1966) (citing CHAFEE, *supra* note 57, at 185). "[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.*

[92] *See, e.g.*, Smith-Drelich, *supra* note 13, at 1385–89 (collecting sources); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 19–20 ("Federalists also objected to the enumeration of rights implied by other enumerated rights . . . [for a] right did not have to be listed if it could be derived from a more general enumerated right.").

[93] *See, e.g.*, Hamburger, *supra* note 92, at 19 (demonstrating that the Founders did not enumerate every right in the Constitution, but that the express rights implied other fundamental rights).

[94] *See infra* Section II.C; Daniel B. Rodriguez, *Road Wary: Mobility, Law, and the Problem of Escape*, 106 IOWA L. REV. 2397, 2413 (2021) ("[T]he right to travel is a fundamental right, long incorporated to the states through the Privileges and Immunities Clause.").

[95] Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283, 492 (1849). Chief Justice Taney also noted, ignominiously, the Fugitive Slave Clause's "right to pursue and reclaim one who has escaped from service." *Id.*

of the right: free movement is necessary for numerous constitutional protections.

Early federal legislation also reveals a strong commitment to free movement. In one of the new country's first legislative acts—during the summer between the close of the Constitutional Convention and Delaware's ratification of the Constitution—the Confederation Congress passed the Northwest Ordinance, which, among other things, directly addressed the Quebec Act's limitation on movement. As part of its various guarantees, the Northwest Ordinance recognized: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free."[96] Like the Magna Carta, this statement reflects a broad view of the right to move freely, protecting travel not only across frontiers but also within them.[97]

Additionally, the United States demonstrated a strong commitment to free movement in its foreign policy during this period. The Treaty of Alliance and Treaty of Amity and Commerce—the first treaties signed between the revolutionary Americans and any European power (France)[98]—protected maritime movement, directly responding to the Navigation Acts. This was no minor accomplishment for the Americans: the treaties led England to declare war against France and ultimately brought the Spanish and Dutch to the colonists' aid as well.[99] Though the Europeans and Americans obviously had multiple motivations for these alliances, preserving free movement numbered among them. England's rise to become the dominant naval power of the time and its protectionist naval policies pitted it against much of the rest of Europe, which sought to project a far freer international policy of maritime travel.[100] Indeed, the ensuing

[96] NORTHWEST ORDINANCE (1787).

[97] *See* Hulsebosch, *supra* note 37, at 1605 (describing how "Alexander Hamilton invoked the merchants' chapter [of the Magna Carta]"—Article 41, described above as one of the Magna Carta's explicit protections of free movement—"as [a] source[] of an implied constitutional limitation" against "Jeffersonian Republicans[']] proposed embargoes and debt sequestration in retaliation against the belligerents involved in the wars of the French Revolution").

[98] Treaty of Alliance, Fr.-U.S., Feb. 6, 1778, T.S. No. 82; Treaty of Amity and Commerce, Fr.-U.S., Feb. 6, 1778, T.S. No. 83 [hereinafter French Treaty of Amity and Commerce].

[99] Gonzalo M. Quintero Saravia, *The Participation of France and Spain*, *in* 1 THE CAMBRIDGE HISTORY OF THE AGE OF ATLANTIC REVOLUTIONS 269 (Wim Klooster ed., 2023).

[100] Morocco, too, sought such a policy—and in support of that, in 1777, the Sultan of Morocco decried that American ships could freely travel through Moroccan waters and enter Moroccan ports. *U.S. Morocco Relations – The Beginning*, U.S. EMBASSY & CONSULATES IN MOROCCO, https://ma.usembassy.gov/our-relationship/policy-history/io/ [https://perma.cc/3L7Y-UL55].

multinational conflict gave rise to the contemporary international law that navigation must be free.[101]

Though the French and Dutch entered the Revolutionary War in part to seek this freedom of navigation, the specific movement protections in early U.S. treaties—not just with France and the Netherlands, but also with Sweden, Prussia, and Morocco (i.e., every single treaty signed with a European or North African nation in the decade following Independence)—appear to have been motivated largely by the Americans themselves: the provisions protecting movement in each of these treaties reflect almost verbatim Articles I and II of the Model Treaty of 1776 that Congress approved as a template for early treaty negotiations.[102] These articles, and the resultant treaty provisions, broadly protect movement—not just on the sea but on land as well.

Specifically, Article I of the Model Treaty of 1776 provides a broad reciprocal recognition of the right to move freely:

> The Subjects . . . shall enjoy all other the Rights, Liberties, Priviledges, Immunities, and Exemptions in Trade, Navigation and Commerce in passing

[101] *See* Oscar Chinn, Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, at 66, 83 (Dec. 12) ("According to the conception universally accepted, the freedom of navigation . . . comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers."); *see also* Franklin D. Roosevelt, *Fireside Chat.*, AM. PRESIDENCY PROJECT (Sept. 11, 1941), http://www.presidency.ucsb.edu/documents/fireside-chat-11 [http://perma.cc/4754-F6Z3] ("Upon our naval and air patrol . . . falls the duty of maintaining the American policy of freedom of the seas, now."). This story is complicated by the earliest American courts' occasional adoption of the more restrictive English view regarding freedom of navigation. Yet at the same time, the revolutionary Americans sought through treaties to project maximal freedom. *See* Treaty of Alliance, *supra* note 98; Treaty of Amity and Commerce, Neth.-U.S., Oct. 8, 1782, T.S. No. 249 [hereinafter Dutch Treaty of Amity and Commerce].

[102] *Compare* French Treaty of Amity and Commerce, *supra* note 98, Dutch Treaty of Amity and Commerce, *supra* note 101, *and* Treaty of Amity and Commerce, Swed.-U.S., Apr. 3, 1783, T.S. No. 346 249 [hereinafter Swedish Treaty of Amity and Commerce], *with Plan of Treaties*, *in* 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 576, arts. 1–2, at 576–77 (Worthington Chauncey Ford ed., 1906). The Prussian–American Treaty of Amity and Commerce (1785) adopted a slightly modified version of this, omitting any explicit reference to "roads." Treaty of Amity and Commerce, Prussia-U.S., Sept. 10, 1785, T.S. No. 292 [hereinafter Prussian Treaty of Amity and Commerce]. The first U.S. treaty to not adopt this language, the Treaty with Morocco (1786), provided strong protections of movement, including giving "Citizens . . . full Liberty to pass and repass our Country and Sea Ports whenever they please without interruption." Treaty of Peace and Friendship, Morocco-U.S., June 28 and July 15, 1786. The treaty "contained in substance all that the Americans requested." *U.S. Morocco Relations – The Beginning*, U.S. EMBASSY & CONSULATES IN MOROCCO, https://ma.usembassy.gov/our-relationship/policy-history/io/ [https://perma.cc/8STH-WWGE]; *see also* Jay Treaty, Gr. Brit.-U.S., Nov. 19, 1794, T.S. No. 105 (repeating this language and extending these movement rights to not only "His Majesty's subjects" and U.S. citizens, but "also to the Indians dwelling on either side of the said Boundary Line").

> from one Part thereof to another, and in going to and from the same, from and to any Part of the World, which the said Natives, or Companies enjoy.[103]

This provision appears to have been taken nearly verbatim from a clause in early drafts of the Articles of Confederation, which differed only in that it applied to "[t]he Inhabitants of each Colony" and appears aimed at "prevent[ing] . . . local restrictions and discriminations in trade, navigation, and commerce."[104] The clause in question ultimately became the provision protecting "Privileges and Immunities" more generally and the right of "free Ingress and Egress" more specifically.[105]

Article II of the Model Treaty, in turn, prevents the imposition of higher duties on movement "in the Ports, Havens, Roads, Countries, Islands, Cities [and towns] or Places" of the respective countries.[106] The prohibition eliminated one of the most significant limitations on movement in the countries in question—punitive nationality-based duties—thereby freeing Americans to travel throughout Europe and Europeans to travel throughout the United States.

The Swedish–American Treaty of Amity and Commerce of 1783 provides additional evidence of the high value placed on free movement in the Founding Era of the United States. As the first treaty between the postwar United States and a country that was not a U.S. ally in the Revolutionary War, the treaty was of great importance not only to the United States but also to Sweden. Sweden sought the symbolic mantle of being the first new power to ally with the United States. Ben Franklin himself negotiated the treaty.[107] The treaty closely followed the United States' recent treaties with the French and Dutch with respect to broadly protecting movement, with the additional negotiated provision that the two countries "shall use all the means . . . to protect & defend the vessels and effects belonging to the citizens or inhabitants of the United States" or "the subjects of his Swedish Majesty, which shall be in the ports, havens, or roads, or on the seas near to the countries, islands, cities and towns."[108] The Continental Congress deemed the provision sufficiently important that Congress directed Ben Franklin to negotiate its addition, even though Congress recognized its inclusion as

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[103] *Plan of Treaties*, *supra* note 102, art. 1, at 576–77.

[104] Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 102 (2011).

[105] *Id.* at 103.

[106] Dutch Treaty of Amity and Commerce, *supra* note 101; Swedish Treaty of Amity and Commerce, *supra* note 102. These provisions extended this protection to all "subjects and inhabitants" of the United States.

[107] Swedish Treaty of Amity and Commerce, *supra* note 102.

[108] *Id.*; *see also* Prussian Treaty of Amity and Commerce, *supra* note 102 (adopting this provision).

"possibly controversial."[109] The provision serves primarily to add teeth to the treaty's more general recognition of the right to move freely on the seas and roads.[110]

Closer to home, the U.S. Treaty of Canandaigua of 1794 between the United States and the Six Nations of the Haudenosaunee (Iroquois) Confederacy granted robust movement rights (if one-sided—the rights were not reciprocal). This included "the right [to the United States] of making a wagon road," giving "the people of the United States . . . the free and undisturbed use of this road, for the purposes of traveling and transportation."[111] More broadly, the Treaty held that

> the Six Nations, and each of them, will forever allow to the people of the United States a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.[112]

These movement rights constituted one of the seven articles in the Treaty, reflecting their relative importance at that time.[113]

3. Early State Constitutions

The strong Founding Era commitment to free movement in the United States was reflected on the state level as well: free movement was protected in some form in all but two of the state constitutions or analogous governing documents in effect at the time of the ratification of the Bill of Rights, plus in Kentucky, which became a state just months after ratification.[114] These protections took the form of Blackstonian guarantees of liberty, explicit protections of extraterritorial movement, implicit protections of extraterritorial movement in qualification clauses, rights to assemble, and

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[109] Swedish Treaty of Amity and Commerce, *supra* note 102.

[110] *See also* Treaty of Paris, Gr. Brit.-U.S., art. 8, Sept. 3, 1783, T.S. No. 102 ("The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States.").

[111] Treaty with the Six Nations, Six Nations-U.S., Nov. 11, 1794, 7 Stat. 44.

[112] *Id.*

[113] The public trust doctrine, which has its roots in the Code of Justinian, reflects similar views about the freedom of movement: "The public rights secured by this trust are the rights of passage, of navigation, and of fishery." Jackvony v. Powel, 21 A.2d 554, 557 (R.I. 1941).

[114] Consistent with the Court's fundamental-rights analysis, this examination doesn't distinguish between rights included in the first ratified state constitution, rights recognized via constitutional revision, or rights recognized via constitutional amendment. *Cf.* Daniel B. Rodriguez, *Change That Matters: An Essay on State Constitutional Development*, 115 PENN ST. L. REV. 1073, 1084–89 (2011) (articulating some import to these distinctions). I do, however, note when a movement-related right was included in an earlier effective state constitution but not the one in force at the time of ratification of either the Bill of Rights or the Fourteenth Amendment.

constitutional prohibitions on martial law. Table 1, below, catalogs these state constitutional protections of movement.[115]

a. Constitutions that explicitly protected movement

First, whatever the meaning of "liberty" in the U.S. Constitution,[116] state guarantees of "liberty" at this time appear intended to protect movement. This was probably the primary way by which states recognized the broad guarantee of free movement central to the English and American legal traditions.[117] Most commonly, state guarantees of "liberty" came as part of a state "law of the land" constitutional clause, a due process analog.[118] The Maryland Constitution of 1776's formulation of this, for example, reads: "That no freeman ought to be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."[119] The first half of this guarantee borrows from chapter 29 of the 1225 Magna Carta, which is generally understood as the origin of due process and a source of the right secured by habeas corpus.[120]

On the other hand, the clause's second invocation of liberty ("life, liberty, or property") appears to be taken from Blackstone's formulation of the "rights of the people of England." Blackstone "reduced" these rights "to three principal or primary articles; the right of personal security [(life)],

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[115] *Compare* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250–51 (2022) (seemingly requiring such analysis), *with* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 99 (2023) (connecting *Dobbs*'s method of "state-counting" to the methodology used by segregationists rejected by *Brown v. Board of Education*). *Cf.* Noah Smith-Drelich, *The Anti-Discriminatory Right to Travel*, 100 IND. L.J. (forthcoming 2025).

[116] This is one of the questions that this Article seeks to answer. N.B., even those who have advocated for narrow readings of the Due Process Clause have accepted that it conveys the right to move freely. *See, e.g.*, Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property*,*"* 4 HARV. L. REV. 365, 382 (1890) (asserting that even the narrowest interpretation of "liberty" would include freedom of a person from restraint); Obergefell v. Hodges, 576 U.S. 644, 728 (2015) (Thomas, J., dissenting) (reaffirming that "liberty" has always encompassed freedom from restraint); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 508 (1997) ("Understood most narrowly, liberty is simply freedom from physical restraint, the ability to move about as one chooses.").

[117] *See supra* Part I.

[118] *See, e.g.*, Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language from 1776 to 1789*, 40 T. JEFFERSON L. REV. 103, 111–12 (2018) (collecting examples of English and early American law-of-the-land and denial-of-justice clauses).

[119] MD. CONST. of 1776, DECLARATION OF RIGHTS art. XXI.

[120] Larry May, *Magna Carta, the Interstices of Procedure, and Guantanamo*, 42 CASE W. RSRV. J. INT'L. L. 91, 92 (2009); *see Magna Carta, 1225*, NAT'L ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/magna-carta/magna-carta-1225-westminster/ [https://perma.cc/F7R6-GQ86].

the right of personal liberty; and the right of private property."[121] Maryland's respective guarantees of "liberties" and "liberty" may well be redundant—Blackstone's statement of these rights distilled the protections conveyed via the Magna Carta. But at the very least, in adopting the Blackstonian formulation in its latter usage of "liberty," drafters of the Maryland Constitution appear to have aimed to encapsulate the Blackstonian view of liberty, including the personal right to "the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct."[122] At this time, 10 of the 14 states, along with the commonwealth of Kentucky, constitutionally protected liberty—with all but Virginia using a Blackstonian formulation.[123]

Another common way that states protected free movement in their constitutions or analogous founding documents was by guaranteeing the right to emigrate, immigrate, or stay. The Pennsylvania Constitution of 1776, for example, provides "[t]hat all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries."[124] This guarantee of the right to emigrate was essentially limitless, recognizing the "natural inherent right" held by "all men."[125] Pennsylvania's Constitution of 1776 also provided that

> [e]very foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may . . . acquire . . . land or other real estate; and after one year's residence, shall be deemed a free denizen . . . entitled to all rights of a natural born citizen, except that he shall

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[121] Blackstone built from John Locke, who is often credited for creating this trilogy. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

[122] 1 BLACKSTONE, *supra* note 44, at *134; *cf.* Butler v. Craig, 2 H. & McH. 214, 233–34 (Md. 1787) (relying on English common law authorities); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 628 (2009) (citing *Butler v. Craig*'s recognition of customary English rights).

[123] *See infra* Table 1. Distinctions between these clauses may have had little importance, as state courts largely interpreted these clauses broadly. *See* Gedicks, *supra* note 122, at 664 ("[T]he declarations of both Pennsylvania and North Carolina placed their law-of-the-land clauses in the midst of criminal procedure guarantees, yet this placement did not bar judicial constructions of those clauses that incorporated substantive-rights guarantees based upon the classical understanding of 'law.'"); *cf.* Trevett v. Weeden (R.I. 1786), *reprinted in* 1 BERNARD SCHWARTZ, BILL OF RIGHTS: A DOCUMENTARY HISTORY 417, 420–21 (1971) (accepting the argument that the Rhode Island Charter included the Magna Carta and other natural and customary English rights); Ham v. McClaws, 1 S.C.L. (1 Bay) 93 (1789) ("[S]tatutes made against *common right and reason* are void. So statutes made against natural equity are void; and so also are statutes made against *Magna Carta*."); MASS. CONST. of 1780, art. XVIII ("[T]he fundamental principles of the constitution . . . are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people . . . have a right to require of their lawgivers and magistrates, an exact and constant observance of them.").

[124] PA. CONST. of 1776, art. XV.

[125] *Id.*

> not be capable of being elected a representative until after two years residence.[126]

Pennsylvania's constitutional protection of immigration was broad as well, limited only by a "good character" requirement and a one- or two-year residency requirement.[127] These provisions are representative of the emigration and immigration clauses used during this period, which 6 of the 14 states plus Kentucky included in their constitutions at that time.[128] South Carolina, Maryland, and Massachusetts additionally guaranteed freedom from being exiled, essentially constitutionalizing a right to stay in the state. Including this, 9 states plus Kentucky constitutionally guaranteed one or more of these rights related to extraterritorial movement.

In addition to these direct guarantees, 6 states constitutionally carried a subset of such protections in one or more qualifications clauses. Qualifications clauses permit state residents who have satisfied a residency requirement to serve as an elector, representative, senator, or governor.[129] Though such clauses are not explicitly framed around immigration, they indirectly confer much of that same right. Under New Hampshire's Representative Qualification Clause, for example, "Every member of the house of representatives . . . for two years, at least, next preceding his election shall have been an inhabitant of this state . . . ."[130] The effect of this clause is that immigrants to the state who have satisfied the two-year residency requirement can be elected as a representative—which is the exact right conferred via the applicable provision of Pennsylvania's immigration clause.[131] New Hampshire did not, of course, constitutionally provide as wide a gamut of rights for immigrants as did Pennsylvania (which did more than grant immigrants the right to be a representative)—but its constitution nonetheless provides some. I do not include qualifications clauses in counting movement protections because of the indirect nature of such protections. If qualifications clauses conferring rights to immigrants constitute a protection of movement, then every state as of 1791 protected movement in some form in its constitution or analogous founding document. New Jersey and Georgia—the only two states that did not clearly otherwise

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[126] *Id.* § 42. The Pennsylvania Constitution of 1790 shortens but does not weaken this guarantee of emigration: "That emigration from the state shall not be prohibited." PA. CONST. of 1790, art IX, § 25.

[127] PA. CONST. of 1776, § 42.

[128] *See infra* Table 1.

[129] *Id.*

[130] N.H. CONST. of 1784, art. XIV (amended 1964).

[131] PA. CONST. of 1776, § 42; *see also* N.J. CONST. of 1776, art. IV ("[A]ll inhabitants . . . [who] have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote.").

protect movement in their constitutions—had qualifications clauses that conferred implicit movement rights to recent immigrants.

Yet another way states protected movement in their early constitutions was by guaranteeing the right to free assembly. Four states, plus Kentucky, secured the right to peaceable assembly.[132] Though this right is most closely associated with speech and petition, each of the "best-known form[s] of assembly— . . . a protest, parade, or demonstration"[133]—is inextricably tied with freedom of movement; one cannot protest, parade, demonstrate, or in other ways assemble without being able to freely move. Indeed, even if the right to assembly encompasses only that necessary to petition—as some have argued[134]—it still sets forth a movement-related right, albeit a narrower one. Coming together to petition the government necessarily entails some freedom to move (and to not move). In any event, "state courts [at this time] interpreting parallel provisions of assembly articulated far broader protections" than simply to petition, including the right to "march[] together with their party banners, and inspiring music, up and down the principal streets," and to gather "to indulge in healthful recreations and innocent amusements" like "dancing in the open air."[135] Constitutional protections of assembly thus reflect a commitment to the intertwined right to free movement.

Finally, several state constitutions also indirectly protected free movement by prohibiting martial law.[136] These clauses, as well as related clauses placing the military "under strict subordination to . . . the civil power,"[137] were a reaction to the "military usurpation" of Great Britain in the immediate pre-colonial period.[138] As the Declaration of Independence explains, the King had "affected to render the military independent of and superior to the civil power."[139] This took a number of forms, with "[t]he attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to

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[132] MASS CONST. of 1780, art. XIX; N.H. CONST. of 1784, art. XXXII; PA. CONST. of 1776, art. XVI; N.C. CONST. of 1776, art. XVIII; KY. CONST. of 1792, art. XII, § 22.

[133] JOHN INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 2 (2012); *see also* Nikolas Bowie, *The Constitutional Right of Self Governance*, 130 YALE L.J. 1652, 1656 (2023) ("The emerging consensus from this scholarship—drafted in the wake of Occupy and Black Lives Matter—is that the Assembly Clause should be understood as an irreplaceable protector of the in person gathering of dissidents, regardless of how they express themselves.").

[134] INAZU, *supra* note 133, at 7, 39–40.

[135] *Id.* at 7, 42–44.

[136] *See infra* Table 1.

[137] PA. CONST. of 1776, art. XIII; *see also* DEL. CONST. of 1776; MD. CONST. of 1776, art. XXVII; N.C. CONST. of 1776, art. XVII; S.C. CONST. of 1778, art. XLII.

[138] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 37 (1866).

[139] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

enforce martial rule, excit[ing] the greatest indignation."[140] Martial law during this period was closely associated with limitations of movement: "[o]n the continent of Europe, the legal formula for putting a place under martial rule is to declare it in a state of siege," with the effect being to give the military government power to restrict exit and entry into a region, to suppress assemblages, and to more easily confine people than would be possible under civilian rule.[141] Constitutional prohibitions on martial law protect a substantially wider range of conduct than just movement—and I do not include these in my tallying of movement protections—but they still provide another illustration of the value of free movement at this time; the restrictions on movement accompanying martial law were undoubtedly part of what motivated these constitutional prohibitions.

The types of movement protected by these constitutional provisions are broad in scope. The rights to peaceably assemble and to be free of martial law primarily protect local movement, whereas the rights to immigrate, emigrate, or to avoid exile predominantly protect interstate and international movement. And Blackstonian guarantees of liberty likely protect each of these forms of movement.

b. Constitutions that did not explicitly protect movement

The many, often redundant, ways in which the states constitutionally protected movement during the Founding Era shows the extent to which movement was viewed as a fundamental right of the highest order during this time. And yet, looking to state constitutions and founding documents may actually underrepresent beliefs held about movement. Free movement was likely viewed as the sort of unenumerated right of such fundamental importance that it required no explicit protection.[142] The Founding Era provided fertile ground for multiple different approaches to the creation of constitutions, with state choices about what to exclude from constitutions often reflecting a different approach to constitution drafting rather than to the underlying right(s) in question.[143]

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[140] *Milligan*, 71 U.S. (4 Wall.) at 37. The resulting objections of the colonists to martial law was accordingly broad, with colonial leaders decrying the "attempt to supersede the course of the common law" and to "annul[] the law of the land." *Id.* at 28.

[141] *Id.* at 38–39.

[142] *See* Gedicks, *supra* note 122, at 625 ("A state 'constitution' generally consisted of a written plan or frame of government that was positively enacted or affirmed by the state legislature, together with natural and customary rights whose existence predated any constitutional text, and that may not have been reduced to any writing at all.").

[143] *Cf.* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435, 437–38 (2010) (exploring founding era states' relative consensus on the law-of-the-land constitutional principle but their differences in its implementation and related provisions).

New Hampshire and South Carolina, for example, were the first of the newly independent colonies to form new governments and adopt state constitutions, and neither constitution includes a law of the land or due process clause, or any other explicit protection of liberty; these constitutions were "more focused on practical realities than on political theory."[144] As such, the respective omissions in these constitutions should not give rise to any negative implications; rather than suggesting any lack of faith in New Hampshire or South Carolina regarding the importance of life, liberty, property, or other unenumerated rights, these constitutions simply reflect a more limited approach to constitution drafting.[145] And indeed, these states adopted much more substantial constitutions just two and twelve years later, including Blackstonian protections of liberty, multiple qualifications clauses, freedom from exile (South Carolina), a right to assembly (New Hampshire), and freedom from martial law (New Hampshire).[146] The attitudinal shift in these states over this short period almost certainly regarded the nature of a constitution, rather than the various movement rights.

The notion that looking to state constitutional guarantees of free movement understates the extent to which the right was valued at this time is further reinforced by more closely considering the only two states that did not explicitly protect liberty, extraterritorial movement rights, or assembly in their constitutions as of 1791: New Jersey and Georgia. Nothing about the history of these states or their respective constitutions suggests any lack of commitment to the movement values encapsulated by such constitutional protections.

The Georgia constitutions of 1777 and 1789 follow in many respects from the New Hampshire Constitution of 1775: they don't contain a declaration-of-rights or law-of-the-land clause.[147] This did not likely reflect any particularly limited Georgian view about these things. To the contrary: the Georgia Charter of 1732 was a charitable one, including as a first objective giving the poor "the means to defray their charges of passage, and other expences, incident to new settlements," so as to enable them "to settle

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[144] Bodoh, *supra* note 118, at 121. It wasn't until several months later that the Continental Congress called for each colony to form a government "for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties . . . ." 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 341, 342, 358 (Ford ed., 1905).

[145] *See, e.g.*, Letter from Stevens Thomson Mason to Matthew Lyon, *reprinted in* INDEP. CHRON., Dec. 10–13, 1798, at 2 ("[W]e well remember, that when the Constitution was proposed for our adoption, and the want of a bill of rights complained of, we were told that personal liberty never could be endangered under the constitution. . . . Nay, that it would be dangerous to attempt their security by a bill of rights, lest it might imply that any such powers were contemplated to be given to the general government . . . .").

[146] S.C. CONST. of 1778, art. VI–VII, IX, XLI; N.H. CONST. of 1784, art. XXXII–XXXIII.

[147] *See* GA. CONST. of 1777; GA. CONST. of 1789.

in any of our provinces in America."[148] Georgia was thus chartered with aspirations explicitly related to the promotion of movement. Moreover, the Charter guaranteed settlers the "liberties, franchises and immunities" of Englishmen, which, as this Part discusses, would have been understood to include the liberty to move freely.[149] Though Georgia surrendered its Charter in 1752 (and did not govern in strict accordance with its Charter even during its applicable period),[150] it does seem unlikely that the newly independent colonists would have intended to constitutionally grant themselves fewer rights than they had so recently been formally entitled to. The Preamble to the Georgia Constitution of 1777 reinforces this conclusion by blaming the "'the legislature of Great Britain . . . for violating the 'common rights of mankind' to which the laws of nature and reason had entitled the people of Georgia and the other newly independent American states."[151] Even if the Georgia constitutions of 1777 and 1789 were mostly silent with respect to such "common rights," little negative implication should be read into this silence.

New Jersey's Constitution of 1776 was similarly sparse, and it also contained no bill of rights. In the words of one leading commentator, it was "hastily drafted during wartime"[152] and was "little more than a colonial charter."[153] Indeed, the New Jersey Constitution of 1776 was subject to widespread contemporaneous criticism,[154] including being negatively singled out by both James Madison (in *Federalist No. 47*)[155] and Alexander Hamilton (in *Federalist No. 66*).[156] Moreover, like with Georgia (and much of the rest of what would eventually become the United States), free movement dramatically shaped the development of the New Jersey colony. "New Jersey's unique population distribution is due in part to the organic development of travel routes charted out over the course of hundreds of

[148] GA. CHARTER of 1732 para. 2, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 369 (Ben Perley Poore ed., 1877). This was the first objective announced in the Georgia Charter's Preamble. *Id.*

[149] ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 15–16 (1948).

[150] Scott D. Gerber, *The Origins of the Georgia Judiciary*, GA. HIST. Q., Spring 2009, 55, 62.

[151] *Id.* at 69–70.

[152] Robert F. Williams, *Afterword: The New Jersey State Constitution Comes from Ridicule to Respect*, 29 RUTGERS L.J. 1037, 1038 (1998).

[153] Chief Justice Deborah T. Poritz, *A Roadmap Through the Modern New Jersey Constitution*, 44 RUTGERS L.J. 599, 601 (2014).

[154] Williams, *supra* note 152, at 1040.

[155] THE FEDERALIST NO. 47, at 318 (James Madison) (Modern Library ed. 1964).

[156] THE FEDERALIST NO. 66, at 430 (Alexander Hamilton) (Modern Library ed. 1964). *But see* THE FEDERALIST NO. 70, at 456 (Alexander Hamilton) (Modern Library ed. 1964) (defending the unitary executive theory by reference to New Jersey's constitution).

years."[157] This included the Old York Road, which was at that time the most used route between Philadelphia and New York City, the two biggest cities in colonial-era America.[158] Given how integral free movement was to the fabric of New Jersey life at the point of Independence, it seems unlikely that New Jersey's limited constitution reflected a lack of commitment to movement-related ideals in the state.[159]

[157] Giancarlo Piccinini, *Achieving Access Equity*, 46 SETON HALL LEGIS. J. 221, 227 (2022).

[158] *Id.* The road served as the backbone of the Philadelphia-to-New-York corridor that was a "powerful influence on all of New Jersey's transportation." *Id.* at 228.

[159] *Cf.* Holmes v. Watson (N.J. 1780), *reprinted in* 1 SCHWARTZ, *supra* note 123, at 405, 407 (premising the requirement that juries have twelve people on the "'common law' of England," on "immemorial custom," and on prior colonial charters); Gedicks, *supra* note 122, at 630.

TABLE 1: STATE CONSTITUTIONAL MOVEMENT PROTECTIONS AT THE RATIFICATION OF THE BILL OF RIGHTS[160]

	Liberty	Assembly	Emigration	Immigration	Exile	Qualification Clause(s)	Martial Law
R.I.			1663	1663			
Del.	1776	1792				1776	
Md.	1776				1776	1776	1776
N.H.	1784	1784			1784	1776	1784
N.J.						1776	
N.C.	1776			1776			
Penn.	1776	1776	1776	1776		1776	
Va.				1776			
Ga.						1777	
N.Y.	1777			1777			
Mass.	1780	1780			1780	1780	1780
Vt.	1786		1786	1786		1786	
S.C.	1778				1778		
Ky.	1792	1792				1792	

Note. A duplicate Table with the specific provisions providing these protections is available in the Online Appendix linked at the end of this Article.

Key	
Indirect Protection(s) Only	Clause No Longer in Force
(1) Movement Protection	Direct Protection of Movement
(2) Movement Protection	Indirect Protection of Movement
(3) Movement Protection	
(4) Movement Protection	
(5) Movement Protection	

[160] The Fundamental Orders of Connecticut, which some consider to be the first ever constitution, did not protect movement. *See* CONN. CONST. of 1638. But like the New Hampshire, Georgia, and New Jersey constitutions, the Fundamental Orders were largely structural and, therefore, their lack of protections may reflect differing views of constitution drafting rather than of the right to move freely. Connecticut's first formal constitution (which did protect movement) was adopted in 1818 and is reflected in *infra* Table 2.

C. Free Movement at the Ratification of the Fourteenth Amendment

1. The Pre-War Years

Free movement continued growing as an economic force and a practical part of everyday life in the United States through the first half of the nineteenth century. The idea captured the American imagination. "Afoot and light-hearted I take to the open road," wrote Walt Whitman in *Leaves of Grass*.[161] "Healthy, free, the world before me, The long brown path before me leading wherever I choose."[162]

Movement again became a flash point in this period, largely because of the rising tensions over slavery.[163] African Americans fled slavery, seeking freedom in northern states, the western territories, and internationally, in Canada, Mexico, Spanish Florida, the Caribbean islands, and even Europe.[164] The domestic and international movement of enslaved people toward freedom via the Underground Railroad grew to an apex in the 1850s—with an estimated one hundred thousand people guided to freedom in the decades between 1810 and the beginning of the Civil War in 1861.[165]

Supporters of slavery responded with laws restricting movement. "Negro seamen acts," for example, subjected free, Black sailors to imprisonment in Southern ports until their ships departed.[166] And Missouri banned any Black people, even if free, from immigrating into the state.[167] In 1850, the U.S. Congress went further in passing the second of the Fugitive Slave Acts, which compelled the capture and forcible relocation of enslaved

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[161] *See* Walt Whitman, *Song of the Open Road*, *in* LEAVES OF GRASS 183, 183 (1855).

[162] *Id.*

[163] The right to move freely was recognized at least once by courts before this pre-war period. *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (describing the "fundamental principles" incorporated by the privileges and immunities clause as generally including "the enjoyment of life and liberty," and specifically including "[t]he right of a citizen of one state to pass through, or to reside in any other state").

[164] *What Is the Underground Railroad?*, NAT'L PARK SERV. (last updated July 22, 2022), https://www.nps.gov/subjects/undergroundrailroad/what-is-the-underground-railroad.htm [https://perma.cc/2EK9-94BH].

[165] *The Underground Railroad*, NAT'L GEOGRAPHIC (last updated Oct. 19, 2023), http://education.nationalgeographic.org/resource/underground-railroad [https://perma.cc/Y5FC-G6RH].

[166] *See* David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1133 (2016); Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J.L. & PUB. POL'Y 1, 2 (2020) (noting how this "became a cause célèbre in the North," and arguing that this contributed to the Fourteenth Amendment's protection of travel through the Privileges or Immunities Clause).

[167] An Act Respecting Slaves, Free Negroes and Mulattoes, MO. REV. STAT. § 1 (1847). For a more comprehensive discussion of laws at this time that prohibited such travel, see Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779, 806–12 (2010), and also see Dred Scott v. Sandford, 60 U.S. 393, 416–17 (1857) (discussing restrictions in slaveholding states on the free movement of Black people during the Ratification period).

people—even requiring private citizens to participate in its oppressive project.[168] The 1850 Act met fierce political resistance, with several states seeking to bypass or nullify the law entirely. Efforts to resist included passing "Personal Liberty Acts," which protected movement by preventing their Black citizens from removal.[169] Indeed, Northern resistance to the second Fugitive Slave Act led groups of civilians to take justice into their own hands by forcibly rescuing escapees held in federal custody in Massachusetts, New York, Pennsylvania, and Wisconsin.[170] Just as the Underground Railroad heightened tensions between the North and the South, so too did these state and federal efforts to preserve the institution of slavery; disagreements related to free movement were a central part of the tension leading to the Civil War.[171]

The question of whether states could constitutionally restrict movement ultimately made its way to the Supreme Court during this period in a pair of cases shaded by slavery. In the *Passenger Cases*, the Supreme Court considered several state taxes imposed on ships based on the number and identity of the ship's passengers. The effect of these taxes was to burden the interstate and international movement of people: ships with more passengers from other states or countries had to pay higher taxes.[172] These taxes came at a time of heightened tension between state governments and the federal government over the regulation of movement, including not only with respect to fugitive slaves, but also westward expansion and a recent increase in immigration resulting from famine in Europe.[173] In considering

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[168] The first, the Fugitive Slave Act of 1793, was largely unenforced by the Northern states. *Fugitive Slave Acts*, HIST. CHANNEL (June 29, 2023), https://www.history.com/topics/black-history/fugitive-slave-acts [https://perma.cc/N2WS-RC8G].

[169] *See, e.g.*, An Act to Protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, 1955 Mass. Acts 924; An Act to Prevent Kidnapping, Preserve the Public Peace, Prohibit the Exercise of Certain Powers Heretofore Exercised by Judges, Justices of the Peace, Aldermen and Jailers in This Commonwealth, and to Repeal Certain Slave Laws, *in* THE GENERAL LAWS OF PENNSYLVANIA, FROM THE YEAR 1700 TO APRIL 1849, CHRONOLOGICALLY ARRANGED 1092 (James Dunlop comp., 2d ed. 1847); *cf.* Prigg v. Pennsylvania, 41 U.S. 539 (1842) (striking down the Pennsylvania Personal Liberty Law as superseded by federal law).

[170] *Fugitive Slave Acts*, *supra* note 168 (describing how resistance to the law was so successful that it became "virtually unenforceable in certain northern states," with "only around 330 enslaved people" returned to their Southern slaveholders by 1860).

[171] This also took the form of disagreement related to assembly, largely revolving around the freedom of slaves and free Black people to assemble. *See, e.g.*, INAZU, *supra* note 133, at 30–35 ("By 1835, 'most southern states had outlawed the right of assembly and organization by free blacks, . . . requir[ing, among other things,] their adherence to slave curfews.'").

[172] Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283, 392–94 (1849).

[173] *See* TONY ALLAN FREYER, THE *PASSENGER CASES* AND THE COMMERCE CLAUSE ch. 1 (2014) (discussing increased immigration as a result of the European famine and the resulting federal and state passenger acts in tension).

the taxes, which themselves burdened movement, the Supreme Court was thus acting in the shadow of other looming movement-related issues.

In a pair of 5–4 decisions, the Supreme Court struck down both state taxes. The *Passenger Cases* produced no majority opinion, with eight Justices writing separately to address a multitude of questions involving the regulation of "immigrants and blacks under police powers and the commerce power," the "contested admission of slavery into the Western territories, Northern states' personal liberty laws defying the U.S. fugitive slave law, and abolition of the slave trade in Washington."[174] Free movement thus lurks in the background of each of the separate opinions.

Most influentially, though, the right to move freely was foregrounded in one opinion. In a still-quoted passage from Chief Justice Taney's dissent, the Chief Justice set out a powerful view of movement as a fundamental right: "We are all citizens of the United States," Chief Justice Taney wrote, "and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[175] Although time has greatly faded any precedential import of the *Passenger Cases*—in part due to the lack of a majority opinion—its broad affirmation of movement has remained greatly influential over the years. And as this passage illustrates (somewhat ironically, given its author[176]), even as proponents of slavery were using movement restrictions to preserve the institution of slavery, the highest level of the judiciary recognized the fundamental importance of free movement.

2. Reconstruction

Unsurprisingly, the Civil War did not by itself fully resolve the tensions that built through much of the preceding decades. In the first years of Reconstruction, "[t]he rights of blacks to vote, travel, and walk about as free men and women were violated with frightening regularity."[177] Racially motivated movement restrictions were common, mostly local but often with

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[174] *Id.* at 108.

[175] Passenger Cases, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting), *cited with approval in* Crandall v. Nevada, 73 U.S. 35, 40 (1867); United States v. Guest, 383 U.S. 745, 758 (1966); *and* Shapiro v. Thompson, 394 U.S. 618, 630 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 671 (1974) (noting that *Shapiro* did not "refer to or substantively treat" any Eleventh Amendment argument but "disapprov[ing]" of any inconsistent implicit Eleventh Amendment holding). Chief Justice Taney's dissent does not reflect an unambiguous commitment to free movement: through his favorable reference to the Fugitive Slave Clause, *id.*, and his dismissive discussion of the movement rights of "the emancipated slaves of the West Indies," *id.* at 474, the Chief Justice outlines a racially restricted view of the right foreshadowing his *Dred Scott v. Sandford* majority. *Cf.* 60 U.S. 393 (1857).

[176] Chief Justice Taney later wrote the infamous majority opinion in *Dred Scott*, 60 U.S. 393.

[177] Ken Gormley, *Private Conspiracies and the Constitution*, 64 TEX. L. REV. 527, 534 (1985).

interstate reach.[178] For example, Southern states began enacting "Black codes" in 1865, with the goal of keeping Black people "in a state of constructive servitude" by denying, among other things, "the freedom to travel."[179] In this landscape—with not only the recent oppressions of antebellum America in mind, but also the many immediate postwar problems—the Reconstruction Amendments came into being, with substantial accompanying civil rights legislation.

The Reconstruction Amendments and their accompanying legislation address threats to free movement in multiple ways.[180] The Ku Klux Klan Act of 1871, originally entitled "An Act to Enforce the Provisions of the Fourteenth Amendment," does so head-on: it prohibits "two or more persons in any State or Territory" from "conspir[ing] or go[ing] in disguise on the highway . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."[181] This provision, codified now at 28 U.S.C. § 1985(3), was aimed at preventing racially motivated violence such as attacks by members of the Klan against Black highway travelers, which had become common.[182]

Section 1985(3) follows from the Fourteenth Amendment, which protects movement via its broad guarantees of privileges and immunities, equal protection, and liberty—each of which the Supreme Court has identified as a source of movement-related rights.[183] By adding protections for equal protection and privileges or immunities (and in its incorporation of rights against the states), the Fourteenth Amendment builds substantially on the constitutional safeguards of movement that had previously been in

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[178] For an example of this in the waning days of the Civil War, see HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM 42 (2009), which describes one such movement restriction in 1865 Memphis: a Bureau official prohibited "ferrymen from transporting freed people across the Mississippi River from Arkansas into Memphis unless the prospective passengers carried a note from their employer authorizing their travels."

[179] Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 559 (2019).

[180] *See id.* (describing, for example, the "Black Codes" as "uncontroversially among the primary targets of the [Civil Rights Act of 1866]").

[181] Pub. L. No. 42-22, § 2, 17 Stat. 13, 13 (codified at 42 U.S.C. § 1985(3)). The Act retains significant contemporary salience given its role in enacting § 1983, the primary vehicle by which civil rights claims are litigated. Both § 1983 and § 1985(3) remain in force today.

[182] *Cf.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 316 (1993) (Stevens, J., dissenting) (describing such attacks as "emblematic of the antiabolitionist violence that § 1985(3) was intended to prevent").

[183] *See supra* Section III.B.2.

place.[184] By repeating the Blackstonian trio found in the Fifth Amendment, the Fourteenth Amendment reaffirms the importance of, among other things, liberty. Americans would have understood "liberty" as no less broad at the time of the ratification of the Fourteenth Amendment than at the time of Independence—reaching, at the very least, the freedom of movement that the recently defeated proponents of slavery again threatened.[185] As the nineteenth-century jurist Francis Lieber reiterated: "The right of locomotion, or of free egress and regress, as well as free motion within the country, is another important individual right and element of liberty."[186]

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[184] *Compare* U.S. CONST. amend. XIV, § 1, *with id.* amend. V; *see also* Barnett, *supra* note 166 (explaining how the Privileges and Immunities Clause protected the "fundamental" right to travel); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 74 (2011) ("The traditional privileges and immunities problem in international law was how to assure travelers from one jurisdiction of local rights when in another jurisdiction.").

[185] Though "liberty" was rarely evoked as a basis for overturning a law by litigants in this period, the few existing judicial discussions of "liberty" support a broad reading of the word. The Indiana Supreme Court, for example, recognized in considering a law forbidding the manufacturing, sale, or use of alcoholic beverages "the right of liberty . . . secured by the constitution" as "embrac[ing] the right, in each *compos mentis* individual, of selecting what he will eat and drink . . . ." Herman v. State, 8 Ind. 545, 558–59 (1855) ("If the constitution does not secure this right to the people, it secures nothing of value. . . . If the people are . . . incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish."); *see also* Lincoln v. Smith, 27 Vt. 328, 361 (1855) ("The liberty, spoken of in our bill of rights, is the liberty of the person of every subject; and the right to the enjoyment of life is personal to all; and a proceeding affecting the life of a subject may well be termed a proceeding to deprive him of his natural personal liberty . . . ."); Beebe v. State, 6 Ind. 501, 511–15 (1855), *overruled by* Schmitt v. F.W. Brewing Co., 187 Ind. 623 (1918); *cf.* Andrew T. Bodoh, *Liberty Is Not Loco-Motion:* Obergefell *and the Originalists' Due Process Fallacy*, 40 CAMPBELL L. REV. 481, 518–19 (2018) (criticizing Justice Thomas's constrained reading of *Herman*); Gedicks, *supra* note 122, at 608 (articulating the historical importance of Coke's broad view of due process and liberty). *But cf.* Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1 (2022) (arguing against adopting an identical interpretation of the Fifth and Fourteenth Amendment Due Process clauses). For other challenges brought, at least in part, under some state constitutional provision akin to the "liberty" clause of Due Process, see generally *McCarthy v. Hinman*, 35 Conn. 538 (1869), which considered a challenge to commitment; *Devin v. Scott*, 34 Ind. 67 (1870), which considered a challenge to guardianship for "drunkards"; *Parker v. Kaughman*, 34 Ga. 136 (1865), which considered a challenge to compulsory military service; *Kneedler v. Lane*, 45 Pa. 238 (1863), which considered a challenge to conscription; and *Nott's Case*, 11 Me. 208 (1834), which also considered a challenge to commitment but was overruled by *Portland v. Bangor*, 65 Me. 120 (1876). None of these decisions includes any significant discussion of the meaning of "liberty."

[186] Francis Lieber, ON CIVIL LIBERTY AND SELF GOVERNANCE 92 (1853); *see also* HENRY BRANNON, TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT 109–10 (1901) ("I should say that it means exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure, commonly called the right of locomotion . . . ."); FREDERICK JESSUP STIMSON, THE AMERICAN CONSTITUTION AS IT PROTECTS PRIVATE RIGHTS 99 (1923) ("Further, the right to liberty includes constitutionally the right to move, go and come, live where he will, emigrate, and if a citizen, to return; also to forswear his allegiance and expatriate himself, but not against his will; he can never, even as a punishment for crime, be banished.").

The Thirteenth Amendment also acts to protect movement. Slavery is a great limiter of movement (among other freedoms). One of the primary effects of abolishing slavery was therefore to enable a great deal of previously curtailed movement—leading, among other things, to the Great Migration, "one of the largest movements of people in United States history."[187] By abolishing slavery except as punishment for criminal acts, the Thirteenth Amendment obviated some of the other most divisive pre-War limitations on movement: the Fugitive Slave Acts.

Perhaps, though, the most direct evidence that society viewed movement as a right of fundamental importance during this period came not from Congress but from the Supreme Court itself in *Crandall v. Nevada*.[188] The Court decided *Crandall* in the brief period between the Senate passing and the states ratifying the Fourteenth Amendment. The timing of *Crandall*, therefore, provides an unusual window into the exact period of ratification. In *Crandall*, the Court struck down "a tax upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel."[189] The petitioners did not actually put the case to the Court on movement-related grounds. Instead, they exclusively presented the Court with arguments regarding the Dormant Commerce Clause and the Import–Export Clause.[190] Despite these arguments, Justice Salmon Portland Chase, writing for a majority of six (with no dissents), framed the tax as violating the constitutional right to free movement.[191] The majority explicitly refused to locate this right in the Commerce or Import–Export Clauses. Rather, the Court described the right as something more fundamental, as a part of the very fabric of what it means to be a unified country:

> [The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several

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[187] *The Great Migration*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/migrations/great-migration [https://perma.cc/F2Y8-WQAJ] ("Approximately six million Black people moved from the American South to Northern, Midwestern, and Western states roughly from the 1910s until the 1970s.").

[188] *See* 73 U.S. (6 Wall.) 35, 44 (1867).

[189] *Id.* at 40.

[190] The word "travel" was not even used in the underlying Nevada Supreme Court decision. *Ex parte* Crandall, 1 Nev. 294 (1865).

[191] *See Crandall*, 73 U.S. (6 Wall.) at 35. Justices Chase and Nathan Clifford concurred in the judgment but would have ruled based on the Commerce Clause. *Id.* at 49.

> States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.[192]

The right described by the Court in *Crandall* did not spring from the Fourteenth Amendment—the Fourteenth Amendment hadn't yet been formally ratified—but the Court's description of free movement bears many characteristics of what has ultimately become the test for locating a fundamental right.[193]

Crandall, moreover, set out a broad view of the right to free movement, one that is not limited to interstate or international movement: a Maryland citizen prevented from traveling through Maryland to Annapolis or Washington, D.C., has been prevented from "com[ing] to the seat of government" or visiting "its sea-ports," etc., no less than a Pennsylvania citizen would.[194] *Crandall* clearly recognizes that this right attends not simply to someone visiting the Nation's capital, but to government "offices of secondary importance in all other parts of the country," to "the sea-coasts and on the rivers," and to "its land offices, its revenue offices, and its subtreasuries" "[i]n the interior"—indeed, the Court held that this right was violated by a Nevada passenger tax of one dollar.[195]

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[192] *Id.* at 44.

[193] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 234 (2022) ("[W]e examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'").

[194] 73 U.S. (6 Wall.) at 44. *But see* Jones v. Helms, 452 U.S. 412, 420 (1981) (interpreting *Crandall* as holding "that a State may not impose a tax on residents who desire to leave the State, nor on nonresidents merely passing through").

[195] 73 U.S. (6 Wall.) at 43–44; *compare* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (affirming this principle), Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (noting, as among the protections conferred by Article IV's Privileges and Immunities Clause, that "it gives them the right of free ingress into other States, and egress from them"), Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (same), Twining v. New Jersey, 211 U.S. 78, 97 (1908) (noting that "among the rights and privileges of [n]ational citizenship recognized by this court are the right to pass freely from State to State" and "to enter the public lands"), Buck v. Kuykendall, 267 U.S. 307, 314 (1925) (striking down a regulation on commerce clause grounds, while remarking "[t]he right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States"), *and id.* (noting also that a state "may impose fees [on highways] with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided"), *with* Pierce Oil Corp. v. Hopkins, 264 U.S. 137, 139 (1924) (holding, without discussion of the right to travel, $0.01 gas tax was an "incidental burden" that did not violate due process), *and* Hendrick v. Maryland, 235 U.S. 610, 624 (1915) ("There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the State, and is consequently bad according to the doctrine announced in *Crandall*. . . . In that case a direct tax was laid upon the passenger for the privilege of leaving the State; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities." (citation omitted)).

3. State Constitutions at the Ratification

Moreover, movement was protected in some form in every state constitution when the Fourteenth Amendment was ratified (37 out of 37). Indeed, movement is protected in at least two distinct ways in 35 out of 37 state constitutions and by at least three independent clauses in 30 out of 37 state constitutions in force at the time of ratification. These protections are catalogued in Table 2.

In most respects, state constitutional protections of movement in 1868 resembled protections of movement in 1791. Every state had constitutional protections of liberty at the time of ratification.[196] This is a slightly higher percentage than when the Bill of Rights was ratified in 1791, with some apparent momentum behind including such protections during this time. "Seventy-eight percent of the pre-1855 constitutions and 84% of the post-1855 constitutions contained either the due process or the 'by the law of the land' formulation."[197] Tennessee and Kentucky had bars on arbitrary power that invoked similar ideals. Kentucky's constitution, for example, read: "That absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic—not even in the largest majority."[198]

Similarly, 34 of the 37 states at that time protected the constitutional right to peaceable assembly.[199] And 25 states explicitly protected at least one of the right to emigrate (6 states), immigrate (10), or be free from exile (11).[200] This relatively lower number may have been due in part to the perception that emigration and immigration clauses are superfluous; Article IV's Privileges and Immunities Clause guarantees this right.[201] Nevertheless, there does appear to have been a trend toward including immigration protections at the time: 22% of the pre-1855 constitutions include such clauses, whereas 37% of the post-1855 constitutions include them.[202]

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[196] *See infra* Table 2; *cf.* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 66–67 (2008) (collecting data and concluding that 30 states had constitutional protections of liberty at the time of ratification, with 82% of Americans living in states with such a clause).

[197] Calabresi & Agudo, *supra* note 196, at 67.

[198] KY. CONST. of 1850, art. XIII, § 2; *see also* TENN. CONST. of 1834, art. I, § 2 "([G]overnment being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression, is absurd, slavish, and destructive to the good and happiness of mankind.").

[199] Calabresi & Agudo, *supra* note 196, at 43 (writing that 34 states in which 94% of the American people lived constitutionally protected assembly).

[200] *See infra* Table 2. This number would be higher if it included any state that ever constitutionally protected one of these rights; 4 states dropped emigration protections from their constitution during this period, 6 dropped immigration protections, and 3 dropped exile protections. *Id.*

[201] Calabresi & Agudo, *supra* note 196, at 93.

[202] *See infra* Table 2.

Moreover, every single state at the time of ratification included a qualifications clause containing some immigration-related movement protections.[203]

On the other hand, state constitutional prohibitions of martial law were relatively uncommon; only 5 states included clauses barring the imposition of martial law in times of peace.[204] There appears to have been a trend away from including such clauses in constitutions: states provided some form of protection against martial law "in 39% of the pre-1855 constitutions but in only 11% of the post-1855 constitutions."[205] This decrease may reflect the growing distance between the state constitution drafters and the English's oppressive use of martial law in the years preceding American independence.

In addition to these protections found at the time of the ratification of the Bill of Rights, several states had adopted new movement-related constitutional guarantees by 1868. Most squarely, Mississippi constitutionally guaranteed "[t]he right of all citizens to travel upon all public conveyances,"[206] and Tennessee guaranteed "equal participation in the free navigation of the Mississippi," with a total of 8 states guaranteeing some constitutional right to free navigation.[207] Moreover, 11 states in 1868 had constitutional clauses that protected residents who temporarily left the states. South Carolina, for example, guaranteed that "[t]emporary absence from the State shall not forfeit a residence once obtained."[208]

Many states in this period also may have protected movement via a reference to natural and inalienable rights (27) or fundamental principles (7).[209] Wisconsin's "fundamental principles" clause was representative: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent

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[203] *Id.*

[204] Some state constitutions contained martial law. *See* Calabresi & Agudo, *supra* note 196, at 80 (putting this number at nine, perhaps because they count martial law provisions unrelated to movement). Maryland's Constitution of 1867, for example, read: "no person except regular soldiers and marines, and mariners in the service of this State, or militia; when in actual service, ought, in any case, to be subject to or punishable by martial law. MD. CONST. of 1867, DECLARATION OF RIGHTS art. 32; *cf.* R.I. CONST. of 1842, art. I, § 18 ("And the law martial shall be used and exercised in such cases only as occasion shall necessarily require.").

[205] Calabresi & Agudo, *supra* note 196, at 80.

[206] MISS. CONST. of 1869, art. I, § 24.

[207] TENN. CONST. of 1835, art. I, § 29. An additional 3 states included a form of this protection in earlier constitutions. *See infra* Table 2.

[208] S.C. CONST. of 1868, art. I, § 35. An additional 3 states included such protections in earlier constitutions. *See infra* Table 2.

[209] Calabresi & Agudo, *supra* note 196, at 88.

recurrence to fundamental principles."[210] This sort of general invocation of "fundamental principles" may not be positive evidence of the belief in the right to move freely at the time, but it does suggest that no negative implication should be read into states without any such explicit protections (or with only limited explicit protections). As such clauses indicate, "state positive constitutional law in 1868 openly contemplated the existence of at least some unenumerated fundamental, natural, and inalienable rights."[211] Ninth Amendment analogs, in 18 states, similarly suggest that the lack of any explicitly enumerated right to movement should not be understood as evidence for the lack of such a right.[212]

The many respects in which state constitutions protected movement at the time of the ratification of the Fourteenth Amendment, and the Reconstruction Amendments themselves (and associated legislation), reflect strong support for a broad right to move freely in this period. This builds from that found in the Magna Carta, Blackstone, and in similar state constitutional provisions at the time of the ratification of the Bill of Rights. The *Dobbs–Timbs–McDonald–Glucksberg* historical inquiry thus weighs strongly in favor of a fundamental right to move freely—locally, interstate, and internationally.

TABLE 2: STATE CONSTITUTIONAL MOVEMENT PROTECTIONS AT THE RATIFICATION OF THE FOURTEENTH AMENDMENT

	Liberty	Assembly	Emigration	Immigration	Exile	Free Navigation	Residence Forfeiture	Qualification Clause(s)	Martial Law
La.	1812	1868	1812	1868			1845	1845	
Miss.	1817	1817	1817		1817	1817	1817	1817	
Conn.	1818	1818						1818	
Ala.	1819	1819	1819		1819	1861	1819	1819	
Mo.	1820	1820	1820			1865		1820	
Me.	1825	1825						1825	
Penn.	1776	1776	1838					1838	
R.I.	1842	1842	1663	1663		1842		1842	1842
N.J.	1844	1844						1776	
Wis.	1848	1848				1848		1848	
Mich.	1850	1835		1850		1850	1850	1835	
Ind.	1816	1816	1816				1851	1816	

[210] WIS. CONST. of 1848, art. I, § 22.
[211] Calabresi & Agudo, *supra* note 196, at 118.
[212] *Id.* at 89.

Ohio	1802	1802			1851			1802	
Iowa	1846	1846		1846				1846	
Or.	1857	1857	1857	1857			1857	1857	
Minn.	1858					1858	1858	1858	
Kan.	1859	1859		1859	1859			1859	
Nev.	1864	1864		1864			1864	1864	
Md.	1776				1776			1851	1851
Ark.	1836	1836		1868	1836		1836	1836	
Fla.	1838	1838		1868	1838			1838	
N.C.	1776	1868		1776	1868			1868	
S.C.	1788	1865			1788	1865	1865	1788	1865
Del.	1776	1792						1776	
Ga.	1861	1861		1868				1861	1861
Mass.	1780	1780			1780			1780	1780
Va.	1864			1776				1830	
N.Y.	1777	1846		1777			1846	1821	
Vt.	1786	1793	1786	1786				1786	1793
Ky.	1792	1792	1792				1850	1792	
Tenn.	1796	1796			1796	1796		1796	
Ill.	1818	1818			1818			1818	
Tex.	1845	1845		1861	1845	1861	1845	1845	
Cal.	1849	1849		1849			1849	1849	
W. Va.	1863					1863		1863	
N.H.	1784	1784			1784			1776	1784

Note. A duplicate Table with the specific provisions providing these protections is available in the Online Appendix linked at the end of this Article.

Key	
Indirect Protection(s) Only	Clause No Longer in Force
(1) Movement Protection	Direct Protection of Movement
(2) Movement Protection	Indirect Protection of Movement
(3) Movement Protection	
(4) Movement Protection	
(5) Movement Protection	

III. 155 CONTEMPORARY YEARS OF FREE MOVEMENT

In the century and a half since the Fourteenth Amendment was ratified, legislatures and courts have had many occasions to opine on questions related to movement. The resulting discussions reflect and affirm the fundamental importance of free movement in the United States. As the "[g]reat concept[] . . . [of] 'liberty'" has "gather[ed] meaning from experience,"[213] the fundamental nature of this right has only grown more apparent.

A. Late-Nineteenth-Century Policy

By the end of the nineteenth century, the United States was very much a country on the move and on the rise—which was reflected in the laws and policies of the time. Decades of federal and state investment in the rail, road, and canal transportation networks had begun to pay off, with (among other things) the completion of the Transcontinental Railroad in 1869, followed by a twenty-year boom in railroad construction.[214] Facilitated by the rising ease and availability of travel, it became increasingly common to travel for work or pleasure in the nineteenth century, both locally and further afield. In New York alone, for example, passengers traveled over one *billion* miles in just 1882.[215]

This was also a period of substantial migration, both to the United States and within it. Nearly twelve million immigrants, the majority from Germany, Ireland, and England, came to the United States between 1870 and 1900.[216] This large influx of people, coupled with the economic opportunities in the West (including the California gold rush), industrialization, and the ideology of Manifest Destiny spurred substantial migration within the United States as well. Such movement was greatly encouraged by state and federal legislation—for example the Homestead Act of 1862, the Southern Homestead Act of 1866, the Timber Culture Act of 1873, and the Dawes Act of 1887—each of which sought to incentivize (westward) relocation within

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[213] Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1948) (Frankfurter, J., dissenting).

[214] *Tracking Growth in the U.S.*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/tracking-growth-us/ [https://perma.cc/5TSB-XDQ8].

[215] Brief for the United States at 18, *Civil Rights Cases*, 109 U.S. 3 (1883).

[216] *Immigration to the United States, 1851-1900*, LIBR. CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/ [https://perma.cc/TU3Z-RW2T].

the United States via grants or sales of land (often at the cost of the Native peoples living on that land).[217]

Because of these various forms of migration, cities in the United States grew by about 15 million people between 1880 and 1900, with much of this relocation coming from rural America: "almost 40 percent of the townships in the United States lost population because of migration."[218] And within cities, movement boomed with the rise of mass transit such as subways, trolleys, and cable cars.[219] Indeed, suburbs—communities built entirely on the premise of commuting—first arose in the final years of the nineteenth century.[220]

That is not to say that this was a time of only open and free movement. The English-American history of movement is one marked by tension, and this time period was no exception; although pro-movement views have consistently won out, they have regularly done so against significant resistance. There are several prominent late-nineteenth-century exceptions to the notably pro-movement attitudes of that time. The Chinese Exclusion Act of 1882 barred the immigration of Chinese laborers to the United States, effectively halting immigration from China until well into the twentieth century.[221] At around the same time, Native American tribes were removed from their ancestral lands and restricted to newly created reservations, with the U.S. Army called to police any "breakouts" from those reservations.[222] Black, Jewish, and other "undesirable" communities faced both formal and informal barriers to movement, including racially targeted vagrancy and loitering laws, restrictive covenants, exclusionary zoning, and a range of discriminatory financial practices, many of which later became entrenched

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[217] *See generally* DAVID EDLEFSEN, HOW THE WEST WAS CLAIMED: THE HOMESTEAD ACT AND THE GENERAL ALLOTMENT ACT (Mar. 31, 2018), http://www.wpsanet.org/papers/docs/WPSA_HtWwC.pdf [https://perma.cc/2HGS-79S8] (discussing how federal legislation such as the Homestead Act led to disastrous consequences for Native individuals). The popular phrase "Go West, young man" exemplifies this encouragement, though the phrase's origins are uncertain. Ruth Puoti, *Did Greeley Really Say, 'Go West, Young Man'?*, N.Y. TIMES, Aug. 21, 1994, at 13 (noting the disagreement as to whether the quote may be properly attributed to Horace Greeley, N.Y. DAILY TRIB., July 13, 1865).

[218] *City Life in the Late 19th Century*, LIBR. CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/city-life-in-late-19th-century/ [https://perma.cc/ES9H-MDJG].

[219] *Id.*

[220] *Id.*

[221] *Chinese Exclusion Act (1882)*, NAT'L ARCHIVES, http://www.archives.gov/milestone-documents/chinese-exclusion-act [https://perma.cc/79LR-M9W9].

[222] *A Brief History of Civil Rights in the United States: The Reservation Era (1850 - 1887)*, VERNON E. JORDAN L. LIBR., https://library.law.howard.edu/civilrightshistory/indigenous/reservation [https://perma.cc/5MWW-KBHZ]; *see, e.g.*, *The Cheyenne Breakout*, NEB. STATE HIST. SOC'Y: BLOG, https://history.nebraska.gov/the-cheyenne-breakout/ [https://perma.cc/5VMA-QD69] (providing an example of an Army-policed breakout).

in state and federal government practices such as redlining.[223] Notably, each of these policies can be explained by racism or xenophobia. This history presents an important cautionary note on how animus and discrimination can taint even strongly expressed ideals, such as the American commitment to free movement. For purposes of evaluating attitudes toward movement during this time, these limitations may be more accurately viewed as anti-Chinese or anti-Native or anti-Black as opposed to anti-movement.[224]

B. Late-Nineteenth-Century Case Law

Judicial cases considering movement-related questions during this period tell, if anything, an even stronger pro-movement story than statutory law and policy. One of the earliest post-Ratification recognitions of the right to move freely came in the 1889 Michigan Supreme Court case of *Pinkerton v. Verberg*, which involved the arrest of a "streetwalker," or sex worker.[225] Before arresting the plaintiff, "[a]ll [the defendant] had seen that night was that the plaintiff was down on Main Street, went into the Watkins House with three other women, and from there up the street for a distance, and, turning, walked towards her own home."[226] Under such circumstances, the Court held, the arrest violated the state's due process clause: "Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion,—to go where one pleases, and when . . . ."[227] As such,

> [o]ne may travel along the public highways or in public places . . . and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the right of no other citizen, there they will be protected under the law not only in their persons, but in their safe conduct.[228]

Other states considering similar issues in this period reached the same fundamental conclusion: regulations of this nature implicate the right to move freely. In *Ex parte McCarver*, for example, the Texas Court of Criminal Appeals struck down a curfew that "ma[de] it a misdemeanor for a person under 21 years of age to be found on the streets or public highways

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[223] *See* Chair C. Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/ [https://perma.cc/R4FH-LBMB].

[224] *See* Smith-Drelich, *supra* note 115 (discussing and providing an analytical framework for understanding such restrictions).

[225] 44 N.W. 579 (Mich. 1889).

[226] *Id.* at 583.

[227] *Id.* at 584.

[228] *Id.* "These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land." *Id.* at 583.

of any city or town after 9 o'clock at night."[229] The Court held this was "an invasion of the personal liberty of the citizen," as minors "have the same rights of ingress and egress that citizens of mature years enjoy."[230] The Court of Appeals of Kentucky likewise held that an ordinance that "subjects every woman who may chance to be walking along the street and meet a friend, and stop within 50 feet of a saloon . . . to arrest and punishment" is "an unnecessary interference with individual liberty."[231]

Even those state court decisions upholding restrictions on movement at this time affirmed the existence of the right—just not always its applicability to the given circumstances. In *Dunn v. Commonwealth*, for example, the Kentucky Court of Appeals (then the highest court in Kentucky) declined to strike down an ordinance imposing a $5 fine on "[a]ny prostitute being upon the streets or alleys . . . between the hours of seven o'clock p.m. and four o'clock a.m. . . . except in instances of reasonable necessity."[232] This restriction did not "unreasonably abridge their personal liberty," the Court held, because it did not apply at all for "15 hours of the 24" and had a "reasonable necessity" exception for the remaining hours.[233] This conclusion has early echoes of the current fundamental-rights jurisprudence: the ordinance survived not because it avoided implicating a fundamental right, but because it was narrowly tailored.

Indeed, the U.S. Supreme Court repeated the notion that free movement was a right inherent to personal liberty in this period, albeit only in dicta. First, Justice Stephen Johnson Field noted in his *Munn v. Illinois* dissent (a case turning on the meaning of "property") that

> [b]y the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness.[234]

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[229] *Ex parte* McCarver, 46 S.W. 936, 936–37 (Tex. Crim. 1898). This case was brought on writ of habeas corpus.

[230] *Id.*

[231] Gastenau v. Commonwealth, 56 S.W. 705, 705 (Ky. 1900).

[232] Dunn v. Commonwealth, 49 S.W. 813, 813–14 (Ky. 1899); *cf. Ex parte* Branch, 137 S.W. 886, 887 (Mo. 1911) (upholding a vagrancy statute because it "prohibit[ed] any one from being without visible means of support" *and* "from being idle" *and* "from loitering around saloons or gambling houses": "Neither one of those things in itself and alone can be punished as a crime, but, when they all three meet in one person at the same time, they constitute a vagrant . . . .").

[233] *Dunn*, 49 S.W. at 814.

[234] Munn v. Illinois, 94 U.S. 113, 142 (1877) (Field, J., dissenting).

Justice John M. Harlan made the connection between liberty and movement even more directly in his *Civil Rights Cases* dissent, relying on the right to move freely to argue against segregation:

> [I]t would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom.[235]

Justice Harlan reiterated this view in his famous *Plessy v. Ferguson* dissent:

> "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.[236]

Though Justices Field and Harlan were in the minority in these major decisions, their view of free movement does not appear to have been.[237] Just four years after *Plessy*, Chief Justice Melville Weston Fuller echoed this sentiment for an 8–1 majority in *Williams v. Fears*, which involved taxes on agents for laborers working in other states:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[238]

Between 1875 and 1900, eleven Justices ultimately signed on to opinions that endorsed a broad fundamental right to free movement—with no Justices in this period expressing any sort of contrary view.

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[235] 109 U.S. 3, 39 (1883) (Harlan, J., dissenting) (repeating, also, Blackstone's movement-centered definition of personal liberty).

[236] 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (citation omitted) (quoting 1 BLACKSTONE, *supra* note 44, at 134).

[237] The respective majority opinions in these cases do not contain any indication about those Justices' view of the right.

[238] 179 U.S. 270, 273–74 (1900) (holding that a tax on an "emigrant agent"—"a person engaged in hiring laborers in Georgia to be employed beyond the limits of that state"—only "incidentally" or "remotely" affected individual laborers' "freedom of egress from the state" and thus did not violate the right). Justice Harlan dissented in the decision, somewhat ironically given his previous writings on free movement, though on other grounds.

Other discussions at this time of the meaning of "liberty" as it is used in the Fourteenth Amendment, or in similar state constitutional clauses, support the notion that free movement was viewed as fundamental. In the words of one nineteenth-century commentator, Reconstruction-era courts showed "a tendency to give to the clause as a whole a wide scope, and to the term 'liberty' a meaning at least sufficiently broad to include . . . freedom from restraint in the ordinary pursuits and avocations of the citizen."[239] A consistent theme in Ratification-era cases considering the meaning of "liberty" in this context is a recognition that "[o]ne may be deprived of his liberty in a constitutional sense without putting his person in confinement."[240] That is to say: freedom from confinement (a total loss of liberty) is the core of a right that extends far more broadly, reaching all freedom of movement.

C. Twentieth- and Twenty-First-Century Policy

The twentieth and twenty-first centuries have been no less important for movement in the United States. At the turn of the twentieth century, immigration was such a powerful force that by 1910, first- and second-generation immigrants made up over 70% of the population of New York City. Indeed, in 1906 alone, 150,000 Jewish immigrants came to the United States from Russia.[241] There was also substantial migration within the country, notably including the millions of African Americans who left the South for the Midwest, Northeast, and, to a lesser extent, West in the Great Migration between 1910 and 1970.[242] This period was also marked by significant local migration, mostly from rural areas to small towns or cities.[243] This large amount of immigration and migration partially resulted from organic economic factors, but it was also substantially facilitated by official policies, such as New Deal programs that paid farmers to stop cultivating less productive land (leading farmers to leave their farms) and Jim Crow

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[239] Shattuck, *supra* note 116, at 391.

[240] Bertholf v. O'Reilly, 74 N.Y. 509, 515 (1878); *In re* Jacobs, 98 N.Y. 98, 106–07 (1885); People v. Marx, 2 N.E. 29, 33 (N.Y. 1885); People v. Gillson, 17 N.E. 343, 345 (N.Y. 1888); State v. Goodwill, 10 S.E. 285, 286 (W. Va. 1889), *overruled by* White v. Raleigh Wyo. Min. Co., 168 S.E. 798 (W. Va. 1933) (overruling *Goodwill* to the extent that it held the meaning of "liberty" to include freedom of contract).

[241] SMITHSONIAN AM. ART MUSEUM, IMMIGRATION IN THE EARLY 20TH CENTURY, https://americanexperience.si.edu/wp-content/uploads/2013/11/Immigration-in-the-Early-20th-Century.pdf [https://perma.cc/RM7F-BSC4].

[242] John Beck, *Migration and the American South*, AM. HIST. ASS'N (Jan. 1, 2000), https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age/the-history-of-the-americas/migration-and-the-american-south/migration-and-the-twentieth-century-south-an-overview [https://perma.cc/K2SC-TFJN] (noting that the Great Migration peaked in the 1940s and 1950s).

[243] *Id.*

laws that drove Black people to seek homes in new regions free of discrimination.[244]

During this time, Americans increasingly traveled for work and pleasure as well. City and suburb transportation networks grew substantially throughout the twentieth century in particular, including with the opening of subway systems in most major cities, such as New York, in 1904.[245] And the Federal Road Aid Act of 1916, the Federal Aid Highway Act of 1921, and the Federal-Aid Highway Act of 1956 funded a national road grid and ultimately created the interstate highway system, greatly easing travel both within and between states.[246] Congress also codified the right to air travel during this period in 49 U.S.C. § 40103, which specifies that "[a] citizen of the United States has a public right of transit through the navigable airspace."[247]

The United States continues to be a highly mobile country today. Over 7 million people now change their state of residency each year, with the largest net changes exceeding 300,000 people per state in 2022.[248] There is even more movement within states, including not only with respect to residency, but commutes; the average one-way commute in 2019 hit a new high of 27.6 minutes, with nearly 90% of commuters reporting living over 10 minutes from their work.[249]

This mobility is all reflected in a substantial continuing amount of public spending on movement-related infrastructure. In 2021, for example, state and local governments spent $206 billion on highways and roads, with this spending trailing only public welfare, education, and hospitals.[250] The

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[244] *Id.*

[245] Katherine Wanger, *The Subway System*, HIST. N.Y.C., https://blogs.shu.edu/nyc-history/tours/the-subway-system/ [https://perma.cc/HX8C-J4QS].

[246] Rodriguez, *supra* note 94, at 2407–08 (2021) (describing the massive ensuing change in the three decades following the 1956 Act: "While '[our] population increased by 95 percent' during this period, 'the number of vehicles in the nation increased by 357 percent'").

[247] 49 U.S.C. § 40103.

[248] Mehreen S. Ismail, Justin M. Palarino & Brian McKenzie, *More People Moved Across State Lines in 2021 than in 2019, Many to Neighboring States*, U.S. CENSUS BUREAU (June 8, 2023), https://www.census.gov/library/stories/2023/06/state-to-state-migration.html [https://perma.cc/CZH5-DGFS]; Nadia Evangelou, *Where People Moved in 2022*, NAT'L ASS'N REALTORS: ECONOMISTS' OUTLOOK (Jan. 30, 2023), https://www.nar.realtor/blogs/economists-outlook/where-people-moved-in-2022 [https://perma.cc/YDX6-M264] (reporting a net migration of 318,855 for Florida and -343,230 for California); Rodriguez, *supra* note 94 (discussing movement and migration in the COVID-19 pandemic).

[249] Press Release, U.S. Census Bureau, Census Bureau Estimates Show Average One-Way Travel Time to Work Rises to All-Time High (Mar. 18, 2021), https://www.census.gov/newsroom/press-releases/2021/one-way-travel-time-to-work-rises.html [https://perma.cc/M9VH-MGU2].

[250] *Highway and Road Expenditures*, URBAN INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/highway-and-road-expenditures [https://perma.cc/C4EZ-PBVM].

federal government also spends significantly on transportation, including on highways, rail and mass transit, and air travel—well over $100 billion annually.[251] In addition to this direct spending, federal, state, and local incentives for free movement abound, from tax credits and zoning code waivers for housing built near highway and public transportation access points, to the widespread subsidization of public transit, sometimes to the point of providing free public transportation. Though massive, this investment is largely uncontroversial: free movement enjoys strong bipartisan commitment.[252]

For the most part, the twentieth and twenty-first centuries have built from and expanded on the nineteenth century's supportive view toward free movement, including when it comes to official law and policy. Free movement has continued to be a central part of the American experience.

D. Twentieth- and Twenty-First-Century Case Law

The past 125 years have also been important for the constitutional law of movement, including some of the most detailed judicial analyses and expansive declarations of the right.[253]

Moreover, the rise and fall of Lochnerism at the Supreme Court, and the development of the contemporary fundamental-rights analysis and tiers of scrutiny, have reshaped constitutional jurisprudence, including with respect to movement.[254] Indeed, the many shifts in fundamental-rights jurisprudence have left significant questions today regarding the extent of the fundamental rights protected by the Constitution and the appropriate constitutional framework for protecting such rights—leading some to question the continuing pendency of any substantive due process right to travel given its proximity to other potentially endangered rights.[255]

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[251] *Infrastructure*, USAFACTS: STATE OF THE UNION, https://usafacts.org/state-of-the-union/transportation-infrastructure/ [https://perma.cc/D2RG-PGHM].

[252] *See* Dana Farrington, *Here Are the Republicans Who Voted for the Infrastructure Bill in the Senate*, NPR (Aug. 10, 2021, 4:25 PM), https://www.npr.org/2021/08/10/1026486578/senate-republican-votes-infrastructure-bill [https://perma.cc/TY67-P4RV] (highlighting the bipartisan vote to invest $1 trillion in U.S. infrastructure); *Fact Sheet: The Bipartisan Infrastructure Bill*, WHITE HOUSE (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/ [https://perma.cc/Z5AW-UNQD] (discussing Congress passing the Bipartisan Infrastructure Deal to invest into the nation's infrastructure).

[253] *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 126 (1958) ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage."); Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (referencing the same court opinion in *Kent*).

[254] These changes primarily effect the standard used in the application of the right; the answer to *whether* there is a fundamental right to move freely has remained largely consistent.

[255] *See, e.g.*, Cohen et al., *supra* note 11, at 39 (discussing how *Dobbs* potentially diminished the strength of the Due Process Clause's protection of the right to travel).

This Section analyzes in turn five significant dimensions of the right with which the Court has grappled: its location in the Constitution, its applicability to international movement, its applicability to durational-residency requirements, its infringement by private actors, and its applicability to intrastate movement. Throughout the varied stances taken by the Supreme Court toward fundamental rights, the Court has remained consistent in recognizing free movement as fundamental; whatever the exact reach or structure of fundamental rights analyses, movement has been near-universally recognized as protected.[256]

1. Wheeler *and* Edwards *and the Location of the Right*

Despite this nearly universal recognition, several tensions have emerged specific to the Court's right-to-move jurisprudence—though none suggest no such right exists. First, because a restriction that impedes movement will also often affect other constitutionally protected conduct, such as interstate commerce, many of the Court's contemporary decisions have struggled with identifying the best constitutional provision for locating the violation. The Court has not always agreed whether the operative constitutional violation is of the right to movement rather than a constitutional provision, for example, the Dormant Commerce Clause. Similarly, even when determining that the regulation implicates the right to movement, the Court has not always agreed on which of the various constitutional provisions that protect movement best applies. Contemporary courts have consistently recognized some form of movement protected by the Dormant Commerce Clause, Article IV's Privileges and Immunities Clause, and the First Amendment's Assembly Clause. In addition to this, the Court has developed fundamental-rights jurisprudence tied to the Fifth and Fourteenth Amendment Due Process clauses, the Fourteenth Amendment's Privileges or Immunities Clause, and the Fourteenth Amendment's Equal Protection Clause—and it has located the right to free movement in each.

In its first twentieth-century case considering these questions, the Court came down strongly on the side of free movement. *United States v. Wheeler* was a 1920 case involving the kidnapping and deportation of over 1,000 striking mine workers by a posse organized by the mining

[256] This Article suggests it should continue as such, even under *Dobbs*.

company.[257] In an 8–1 decision[258] focused largely on Article IV's Privileges and Immunities Clause, the Court expressly embraced the right to move freely as fundamental:

> In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.[259]

This recognition of the right was not specifically tied to the Privileges and Immunities Clause or to "liberty"—*Wheeler* located it instead "upon implications arising from [the Constitution] as a whole"—but its shape was otherwise identical to that mapped in the nineteenth century: *Wheeler* recognized a fundamental right to stay in a state, to travel within a state, and to travel between states.[260]

The Court's next major examination of free movement came twenty years later in *Edwards v. California*. In *Edwards*, the defendant drove his wife's brother, "an indigent person" and Texas resident, to California, resulting in his conviction under California law for "bring[ing] or assist[ing] in bringing into the State any indigent person who is not a resident of the State."[261] The Court unanimously held that the law unconstitutionally restricted interstate travel, with five Justices in the majority premising their ruling solely on the Dormant Commerce Clause. But as Justice William Orville Douglas noted in his concurrence, that clause is not the only possible basis for this decision: "While the opinion of the Court expresses no view on that issue, the right involved is so fundamental that I deem it appropriate to

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[257] 254 U.S. 281, 292 (1920). The Court ultimately held that the federal government did not have the constitutional power to punish private citizens' violations of this right, a holding that was later questioned in (and arguably overruled by) *United States v. Guest*. *See* 383 U.S. 745, 764, n.16. *See generally July 12, 1917: The Bisbee Deportation*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/the-bisbee-deportation/ [https://perma.cc/CQ82-FK49] (noting the deportation of 1,000 striking mine workers); *United States v. Wheeler*, BALLOTPEDIA, https://ballotpedia.org/United_States_v._Wheeler [https://perma.cc/RF2J-5UGS] (providing more context for the case and the deportation of the 1,000 mine workers).

[258] Justice John H. Clarke was the lone dissent, but he did not author a dissenting opinion. *Wheeler*, 254 U.S. at 300.

[259] 254 U.S. at 293.

[260] *Id.* This structural recognition of free movement as constitutionally protected provides an independent basis for recognizing a constitutional right to free movement. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (recognizing such a structural right); Printz v. United States, 521 U.S. 898 (1997) (same).

[261] 314 U.S. 160, 171 (1941).

indicate the reach of the constitutional question which is present."[262] Justice Douglas proceeded by centering free movement—including "the right of locomotion, the right to remove from one place to another according to inclination [that] is an attribute of personal liberty"—as a fundamental "right of national citizenship" protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[263] And as in *Wheeler*, not one Justice in *Edwards* expressed any reservations about the right to move freely.

Of course, such disagreements over *where* to locate the right hardly devastate this Article's central thesis that free movement *is* a fundamental right, particularly when they are otherwise accompanied by endorsements of the importance of free movement. Indeed, the many ways in which movement restrictions implicate the Constitution reinforces the essential nature and the breadth of the right.

2. Kent *and* Aptheker *and International Movement*

Each of the cases discussed so far involved movement limitations within the country. In *Kent v. Dulles* and *Aptheker v. Secretary of State*, the Supreme Court addressed the right to travel outside the country, holding that passport denials that limit such travel may violate the right to move freely.

As of the 1950s, passports remained a relatively recent prerequisite for U.S. citizens to travel internationally.[264] Indeed, prior to World War I, the United States had imposed few restrictions of any sort on the extraterritorial movement of U.S. residents.[265] In the 1950s, however, anti-Communist fears motivated the widespread denial of passports—and therefore international travel—to known and suspected Communists.

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[262] *Id.* at 177 (Douglas, J., concurring).

[263] *Id.* at 179. Justice Jackson's separate concurrence also endorsed this view. *Id.* at 184 (Jackson, J., concurring). This should not be understood as the sole basis for the right. *See, e.g.*, *supra* Part I. Regardless, even if the right to travel is best conceptualized as a privilege, there is some authority for extending it to noncitizens. *See* Truax v. Raich, 239 U.S. 33, 39 (1915) (noting that the "alien[]" in question "was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union"). Justice Potter Stewart later cited *Truax* as support for a fundamental right to travel. Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring)).

[264] *See, e.g.*, Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 52 (1956) (analyzing the international application of travel rights).

[265] *See id.* at 60 (discussing how this changed with the Travel Control Act of 1918 and its 1941 amendment, which gave the President the authority to require passports for travel during times of war or national emergency). As *Kent* recognized, it was the relative permanence and sweeping effect of the 1918 and 1941 restrictions that made them unique: "there were numerous [other] laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them," though for limited periods of time and to a limited effect. 357 U.S. 116, 122–23 (1958) (discussing, for example, a law made during the War of 1812 making "it illegal for a citizen to 'cross the frontier' into enemy territory . . . 'without a passport,'" while noting that "for most of our history a passport was not a condition to entry or exit").

Kent involved two such denials made by the Secretary of State as part of his discretionary powers. In striking down these denials, the *Kent* majority focused largely on the constitutional right to travel.

"The right to travel," Justice Douglas wrote for the Court, "is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."[266] The *Kent* majority traced this right back to article 42 of the Magna Carta, which "gave every free man the right to leave the realm at his pleasure in time of peace, thus rescinding the king's order that his political and religious enemies be confined to the realm."[267] *Kent* then recognized the right's continued salience: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."[268]

The specific aspect of this right that was impacted by the denial of passports, *Kent* noted, was "the right of exit [that] is a personal right included within the word 'liberty' as used in the Fifth Amendment."[269] This conclusion, the majority wrote, was supported by Blackstone himself: "Blackstone regarded the subject as having a general common law right to leave the realm subject to the prerogative right of the Crown to restrain him by writ of *exeat Vegno*," which "has now lapsed through desuetude." And even if the writ had not lapsed, "[s]ince it was part of the king's prerogative, it was not transplanted to this country."[270]

Though the *Kent* Court expressly declined to consider the "extent to which [this right] can be curtailed," its analysis of the right was not dicta (as it is often characterized): *Kent*'s conclusion that Congress did not "g[ive] the Secretary of State unbridled discretion," began with the recognition that this involved "an exercise by an American citizen of an activity included in constitutional protection."[271]

Kent was a 5–4 decision, although there appears little disagreement over the right to move freely. Not one Supreme Court Justice questioned

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[266] 357 U.S. at 125.

[267] Boudin, *supra* note 264, at 47; *see Kent*, 357 U.S. at 125.

[268] 357 U.S. at 126.

[269] *Id.* at 129; *see also* Aptheker v. Sec'y of State, 378 U.S. 500, 514 (1964) ("Any limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guaranties." (quoting MESSAGE FROM THE PRESIDENT—ISSUANCE OF PASSPORTS, H.R. DOC. NO. 85-417 (2d Sess. 1958))).

[270] Boudin, *supra* note 264, at 48.

[271] 357 U.S. at 127–29; *see also Aptheker*, 378 U.S. at 506 ("[T]he decision [in *Kent*] protected the constitutional right to travel . . . .").

whether such a right exists[272]—nor, for that matter, did a single judge in the underlying D.C. Circuit decisions.[273] Instead, the tensions in *Kent* revolved around questions of delegation of power and executive discretion (in the Supreme Court) and of whether the threat of communism was sufficiently severe to justify any impingements on the right to move freely (in the D.C. Circuit).

Just six years later, the Court, now with three new Justices, reached the full constitutional question in *Aptheker v. Secretary of State*, holding that the newly effective section 6 of the Subversive Activities Control Act violated the fundamental right to free movement.[274] Like *Kent*, *Aptheker* involved the denial of passports based on suspected Communist affiliations.[275] In *Aptheker*, the passport denials were made pursuant to a recently enacted statute rather than executive discretion.[276]

Writing for the *Aptheker* majority, Justice Arthur Joseph Goldberg began by reiterating that "[f]reedom of movement is basic in our scheme of values."[277] As such, "[t]he right to travel," including "[t]ravel abroad," "is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."[278]

Aptheker then went further than *Kent* in applying that right to the restriction in question. "The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment": the statute barred Communists from applying "for a passport to visit a

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[272] The dissent (Justice Tom Clark joined by Justices Harold Burton, John M. Harlan II, and Charles Whittaker) expressly declined to consider the question, noting—not quite correctly—that "[t]he majority's resolution of the authority question prevents it from reaching the constitutional issues raised by petitioners." 357 U.S. at 143.

[273] The D.C. Circuit plurality had recognized that restrictions impinged on the Fifth Amendment right to travel, but held that "the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel." Briehl v. Dulles, 248 F.2d 561, 573 (D.C. Cir. 1957), *rev'd sub nom.*, Kent v. Dulles, 357 U.S. 116 (1958). The dissenters would have held that the right was violated. *See id.* at 584, 599. The respondent in its principal Supreme Court brief made little effort to dispute the existence of the right. To the contrary: the respondent's brief regularly references the "right to travel" in the context of bemoaning how it may be misused by Communists. The closest the respondent comes to asserting that there may not be such a right is in a two-page section (of its 101-page brief) arguing that the government has a "general power . . . to place reasonable restrictions upon the travel of its citizens." Brief for the Respondent at 89, Briehl v. Dulles, 357 U.S. 116 (1957) (No. 481).

[274] 378 U.S. at 514.

[275] *Id.* at 501–02 (quoting Pub. L. 81-831, § 6, 64 Stat. 987, 993 (1950) (repealed 1993)).

[276] *Id.*

[277] *Aptheker*, 378 U.S. at 506 (quoting *Kent*, 357 U.S. at 126).

[278] *Id.* at 505 (quoting *Kent*, 357 U.S. at 125–26) ("[T]his case involves a personal liberty protected by the Bill of Rights.").

relative in Ireland, or to read rare manuscripts in the Bodleian Library of Oxford University."[279] Thus, section 6 of the statute was unconstitutional because it was not "narrowly drawn to prevent the supposed evil," as must be for "legislation so affecting basic freedoms."[280]

Like *Kent*, *Aptheker* was not a unanimous decision. And like *Kent*, the tension between the majority and the various concurrences (written by Justices Hugo Lafayette Black and Douglas) and the dissent (written by Justice Tom Campbell Clark and joined by Justices John M. Harlan II and Byron Raymond White) did not regard whether there was a right to move freely: the Justices unanimously recognized such a right, including with respect to its international application.[281]

Kent and *Aptheker* are particularly important to the right to free movement for several reasons. For one, although the decisions regard international travel, itself an extension of the Court's many prior affirmations of the domestic reach of the right, *Kent* and *Aptheker* set forth a broad vision of the constitutional protection of movement—one that applies equally within the country as without.[282] Moreover, they represent two of the most developed treatments of the right, with *Kent* specifically drawing on the Magna Carta, Blackstone, and Due Process "liberty," while also citing the history of laws regarding travel. *Kent*'s analysis and conclusion, fully embraced by *Aptheker*, represent something very similar to the Court's post-

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[279] *Id.* at 512, 514.

[280] *Id.* at 514 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)).

[281] Justice Black would have struck the whole act down and Justice Douglas wrote separately primarily to celebrate the right. *See id.* at 518 (Black, J., concurring) (recognizing that "Congress has . . . broad powers to regulate the issuance of passports" while also noting that "[t]he Due Process Clauses of the Fifth and Fourteenth Amendments do mean to me, however, that neither the Secretary of State nor any other government agent can deny people in this country their liberty to travel . . . except in accordance with the 'law of the land' as declared by the Constitution or by valid laws made pursuant to it"); *id.* at 520 (Douglas, J., concurring) ("This freedom of movement [within or without the country] is the very essence of our free society, setting us apart."). The dissent, in turn, would have held that the right was not violated with respect to the specific petitioners before the Court. *Id.* at 525–26 (Clark, J., dissenting) ("While the right to travel abroad is a part of the liberty protected by the Fifth Amendment, the Due Process Clause does not prohibit reasonable regulation of life, liberty or property. Here the restriction is reasonably related to the national security."); *see also* Flynn v. Rusk, 219 F. Supp. 709, 713, 715 (D.D.C. 1963) (recognizing that the "[d]enial of a passport to a citizen is a denial of the right to travel outside the United States" while holding the specific restrictions were "not so unreasonable as to violate the plaintiffs' constitutional rights"), *rev'd sub nom.*, *Aptheker*, 378 U.S. 500.

[282] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 15–16 (1965) (applying *Kent* and *Aptheker* to uphold the restriction on travel to Cuba: "The right to travel within the United States is of course also constitutionally protected. . . . But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole. So it is with international travel. . . . [T]he restriction which is challenged in this case is supported by the weightiest considerations of national security").

Dobbs fundamental-rights jurisprudence. Although these opinions are not the most recent of the Court's treatments of the right to move freely, they are, in many important respects, the most contemporary of its decisions. That these conclusions were reached with no apparent disagreement among the Justices as to the right lends even more support to their force.

3. Durational-Residency Requirements and the Right

In the decades following *Kent* and *Aptheker*, the Supreme Court issued a string of decisions recognizing movement as a fundamental right in the context of durational-residency requirements.[283] Though these cases are sometimes read to suggest that the right is limited to just travel *inter*state, they are better understood as painting a broad vision of free movement, one that extends beyond the sort of day-to-day travel for work or for pleasure that is centered in many of the Court's earlier decisions.

These cases considered (and respectively struck down) federal and state durational-residency requirements for welfare recipients (*Shapiro v. Thompson*,[284] *Graham v. Richardson*,[285] and *Saenz v. Roe*[286]), voting (*Dunn v. Blumstein*[287]), nonemergency medical care (*Memorial Hospital v. Maricopa County*[288]) and civil service preference for veterans (*Attorney General of New York v. Soto-Lopez*[289]) all as impermissible burdens on interstate migration.

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[283] For one particularly fleeting recognition, see *United States v. Price*, 383 U.S. 787, 806 (1966), which gave three examples of "fundamental rights: . . . the freedom to travel, nondiscriminatory access to public areas and nondiscriminatory educational facilities." *United States v. Guest*, 383 U.S. 745 (1966), was decided on the same day as *Price*, and is discussed subsequently in Section II.D.4.

[284] 394 U.S. 618, 631 (1969) (striking down a federal welfare requirement).

[285] 403 U.S. 365, 376 (1971) (striking down a Pennsylvania welfare requirement). *Graham* rests its holding on alienage-based heightened scrutiny, but Part II of the opinion (joined by eight Justices, with Justice Harlan offering no comment) speaks positively about the right, citing *Shapiro* favorably. *Id.* at 375 (declining to "narrow the application of *Shapiro* to citizens" without fully reaching the question). The statutes in *Graham* withheld the benefits just for aliens. *Id.* at 371; *see also* Oregon v. Mitchell, 400 U.S. 112, 237–38 (1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part) (recognizing the "fundamental importance" of this right); *id.* at 285–86 (Stewart, J., concurring in part and dissenting in part) ("Freedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship."); Rivera v. Dunn, 329 F. Supp. 554, 555 (D. Conn. 1971) (discussing interstate travel as a fundamental right), *aff'd*, 404 U.S. 1054 (1972).

[286] 526 U.S. 489, 511 (1999) (striking down a California welfare requirement).

[287] 405 U.S. 330, 338 (1972) (describing "the right to travel" as a "fundamental personal right," and striking down a Tennessee voting requirement); *see also id.* at 364 (Burger, C.J., dissenting) ("The existence of a constitutional 'right to travel' does not persuade me to the contrary.").

[288] 415 U.S. 250, 260 (1974) (Arizona nonemergency medical care requirement).

[289] 476 U.S. 898, 901–05 (1986) (affirming the fundamental nature of the right to travel, while recognizing that the right may not be strictly tied to any textual provision of the Constitution, and striking down a New York civil-service preference requirement); *cf. id.* at 920–21 (O'Connor, J., dissenting) (arguing, instead, that "the limited preference granted under the . . . New York law can[not] realistically be held to infringe or penalize the right to travel," which is best conceptualized as protected by Article

Because these programs extended to longer-term residents benefits not also available to shorter-term residents, they had the effect of discouraging interstate migration, which, the Court held, violated the right to travel. As this somewhat circuitous application of the right shows, the right to free movement casts a broad shadow.

Still, these cases were not entirely without tension. The Court struggled to locate the right in these decisions, repeatedly declining "to ascribe the source of this right to travel interstate to a particular constitutional provision"—but nevertheless recognizing the right's longstanding and "fundamental" nature.[290] Moreover, a number of these cases include dissents, albeit not regarding the existence of the right; any tension between the Justices in the durational-residency-requirement cases revolved instead around "'the extent of the governmental restriction imposed' and the 'extent of the necessity for the restriction.'"[291] These opinions represent a broader disagreement between the Justices at that time regarding the appropriate scrutiny for a regulation impinging on a fundamental right (a question since resolved in favor of strict scrutiny).[292] The durational-residency-requirement cases thus reflect a strong, if often muddy, consensus in favor of recognizing free movement as a fundamental right.

Finally, these cases have left some questions about the scope of the fundamental right: notably, does it only encompass interstate travel? This potential point of confusion has two sources. First, in discussing the right, these cases near-exclusively refer to "the right to interstate travel." And second, in *Saenz v. Roe*, Justice John Paul Stevens (joined in the majority by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer) noted that

> [t]he "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an

IV's Privileges and Immunities Clause (alterations in original) (quoting August v. Bronstein, 369 F. Supp. 190, 194 (S.D.N.Y. 1974))).

[290] *Shapiro*, 394 U.S. at 630, 638.

[291] *Shapiro*, 394 U.S. at 650 (Warren, C.J., dissenting) (quoting Zemel v. Rusk, 381 U.S. 1, 14 (1965)); *id.* at 671, 676 (Harlan, J., dissenting) (recognizing "that the right to travel interstate is a 'fundamental' right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment" while concluding "that the balance [of interests at stake] definitely favors constitutionality"); *id.* at 634 (requiring a compelling government interest to be shown due to an imposition on a "constitutional right" of moving "from State to State"); *id.* at 643 (Stewart, J., concurring) ("[I]t is a virtually unconditional personal right.").

[292] Washington v. Glucksberg, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring). This is also the standard for fundamental rights under Equal Protection. *See* Smith-Drelich, *supra* note 11, at 1386 (discussing how the standard for fundamental rights under Article IV's Privileges and Immunities Clause instead focuses on out-of-state discrimination).

> unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[293]

The durational-residency-requirement cases are not, however, best understood as articulating an exclusively interstate reach of the right. For one, none of these cases involve regulations on *intra*state travel, so their respective discussions of the right to "interstate travel" naturally flow from their facts.[294] That this "interstate" verbiage does not denote any limited scope of the right is illustrated well by *Demiragh v. DeVos*, a federal court of appeals case decided around this time and cited favorably in *Memorial Hospital v. Maricopa County*.[295] In *Demiragh*, the Second Circuit recognized "the right to travel . . . as a 'fundamental' one" in striking down a *city* durational-residency requirement.[296] The Second Circuit did not limit its discussion in *Demiragh* to interstate travel, presumably because the requirement in question applied to any travel from outside the city, including intrastate travel.[297] *Demiragh* (and *Memorial Hospital*) suggests that the discussion of the right to "interstate travel" in these durational-residency-requirement cases simply reflects the nature of the restrictions considered; when a durational-residency requirement applied *intra*state, the court's analysis shifted accordingly. The Court's favorable discussions of its earlier right-to-move cases provides further support: the durational-residency cases include numerous lengthy exegeses of the *Passenger Cases*, *Crandall*, *Fears*, *Wheeler*, *Edwards*, *Kent*, and *Aptheker*, none of which are limited to just interstate travel (with *Kent* and *Aptheker*, of course, explicitly applying

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[293] Saenz v. Roe, 526 U.S. 489, 500 (1999). This confusion is likely also fed by the fact that free movement is protected by a number of different provisions in the Constitution, including Article IV's Privileges and Immunities Clause and the Dormant Commerce Clause, which do primarily reach restrictions on interstate travel.

[294] *Memorial Hospital* involved a county-based restriction, so it conceivably could have addressed this question. Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974). Instead, the Court declined to consider whether there is any "constitutional distinction between interstate and intrastate travel" because the appellant "ha[d] been effectively penalized for his interstate migration" and because the Arizona Supreme Court did not "construe[] the waiting-period requirements to apply to intrastate but not interstate migrants." *Id.* at 255–56.

[295] *Mem'l Hosp.*, 415 U.S. at 254 n.7.

[296] 476 F.2d 403, 405 (2d Cir. 1973). Though the intervening plaintiff moved from Maryland, this fact did not appear to have been given any weight. *Id.* at 404.

[297] *Id.* at 404. For another hint at this, *Saenz* characterizes *Edwards* as "vindicat[ing]" "the right to go from one place to another, *including* the right to cross state borders while en route." 526 U.S. at 500 (emphasis added). This framing suggests that the right to interstate travel is just one component of a broader right to free movement. *See id.* at 511–12 (Rehnquist, C.J., dissenting) ("The right to travel clearly embraces the right to go from one place to another, *and* prohibits States from impeding the free interstate passage of citizens." (emphasis added)).

to international travel).[298] In relying on these earlier affirmations of the right to move freely, the durational-residency-requirement cases give no indication that their holdings should be in any way limited.

Second and similarly, the majority's discussion of the "components" of the right to travel in *Saenz* centered on interstate travel because the case centered on such travel. The underlying regulation at issue in *Saenz* had little bearing on intrastate travel (or even nonmigratory interstate travel) —and neither, appropriately, do the "components" of the right that the majority described or the discussion that followed. *Saenz* made clear that this discussion did not cabin the right: as the majority wrote, the right "embraces *at least* three different components."[299]

Perhaps most powerfully, any reading of the durational-residency cases, including *Saenz*, that limits the right to interstate travel also suggests that these cases overrule *Kent* and *Aptheker*. Yet, none of these cases say any such thing. To the contrary, *Kent* and *Aptheker* are cited favorably in a number of the durational-residency cases.[300] The durational-residency-requirement cases are instead best understood as affirming the fundamental nature of the right to free movement, as well as its specific protection of interstate migration.

4. Guest*,* Griffin*,* Bray*, and Private Infringements of the Right*

In *United States v. Guest*, *Griffin v. Breckenridge*, and *Bray v. Alexandria Women's Health Clinic*, the Court considered whether private parties, and not just state actors, can infringe on the right to free movement. These cases arose in two less-used statutory contexts: criminal prosecutions for constitutional wrongdoing via 18 U.S.C. § 241 (*Guest*)[301] and suits for conspiracy to violate constitutional rights under 42 U.S.C. § 1985 (*Griffin* and *Bray*).[302] These decisions unequivocally endorse the fundamental right. They also present the strongest potential argument that its reach is largely limited to interstate travel. *Guest*, *Griffin*, and *Bray* are, however, best understood as discussions of the subset of travel rights that can be enforced against private parties through § 241 and § 1985(3). The unique statutory

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[298] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 619, 629–30, 630 n.8 (1968) (positively invoking the earlier right-to-move cases); Graham v. Richardson, 403 U.S. 365, 375 n.10 (1970) (same); *Saenz*, 526 U.S. at 512 (Rehnquist, C.J., dissenting) (same); *Mem'l Hosp.*, 415 U.S. at 280–83 (Rehnquist, J., dissenting) (same); Dunn v. Blumstein, 405 U.S. 330, 338 (1971) (same); Att'y Gen. v. Soto-Lopez, 476 U.S. 898, 901–02 (1985) (same).

[299] 526 U.S. at 500 (emphasis added).

[300] *See, e.g.*, *Shapiro*, 394 U.S. at 630 n.8 (citing with approval *Kent* and *Aptheker*); *Dunn*, 405 U.S. at 338 (citing with approval *Kent*); *Soto-Lopez*, 476 U.S. at 902 (same).

[301] United States v. Guest, 383 U.S. 745, 747–48 n.1 (1966).

[302] Griffin v. Breckenridge, 403 U.S. 88, 91–92 (1971); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993).

contexts in which these cases arise limit the scope of the right to travel potentially applicable, and therefore limit the sweep of these respective decisions. *Guest*, *Griffin*, and *Bray* reaffirm the fundamental nature of the right without narrowing its reach.

First, *Guest* involved a criminal conspiracy by members of the Ku Klux Klan to "intimidate [Black] citizens of the United States . . . in the free exercise and enjoyment [of] . . . [t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."[303] There were two primary questions in *Guest*: whether the federal conspiracy statute, 18 U.S.C. § 241, fully embraces all of the rights and liberties of the Constitution, and whether that statute applied to the private conduct described in the indictment.

Writing for the majority, Justice Potter Stewart answered both of these questions in the affirmative. Section 241 prosecutions, *Guest* noted, can be premised on violations of Due Process, Equal Protection, or any other constitutional right or liberty—including the right to free movement.[304] On this last point, *Guest* included a strong endorsement of the right to travel: it "occupies a position fundamental to the concept of our Federal Union"; it "has been firmly established and repeatedly recognized"; it "has long been recognized as a basic right under the Constitution."[305] And after conducting a lengthy survey of the many constitutional recognitions of the right, *Guest* concluded: "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvas those differences further. All have agreed that the right exists. . . . We reaffirm it now."[306]

As with the similar invocations in the durational-residency-requirement cases, *Guest*'s recognition of the right to free movement was arguably limited: it described the right to "interstate travel."[307] But unlike those cases,

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[303] *Guest*, 383 U.S. at 747–48 n.1.

[304] *Id.* at 753, 757.

[305] *Id.* at 757.

[306] *Id.* at 759.

[307] *Id.* at 757; *see also id.* at 759 ("All have agreed that the right exists. Its explicit recognition as one of the federal rights protected by what is now 18 U.S.C. § 241 goes back at least as far as 1904. . . . We reaffirm it now."); *Shapiro*, 394 U.S. at 630; *id.* at 643 (Stewart, J., concurring) (emphasizing the fundamental nature of this "virtually unconditional personal right, guaranteed by the Constitution to us all"); *Saenz*, 526 U.S. at 498 (repeating this characterization); *Shapiro*, 394 U.S. at 669–71, 676 (Harlan, J., dissenting) ("It is now settled that freedom to travel is an element of the 'liberty' secured by [the Fifth Amendment Due Process clause]. . . . I therefore conclude that the right to travel interstate is a 'fundamental' right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment. . . . However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the

Guest did not only involve restrictions on interstate travel: the *Guest* defendants were also accused of restricting potentially local travel—on the "public streets and highways in the vicinity of Athens, Georgia."[308]

It is difficult to know how much to read into this. On the one hand, although *Guest* only addressed this count of the indictment briefly, in two sentences of footnote 13 of the majority, this discussion did suggest that the right at issue may not protect purely local travel: "Insofar as [this allegation] refers to the use of local public facilities," the Court noted, "it is covered by the discussion of the second numbered paragraph of the indictment in Part II of this opinion" (which involved access to public facilities and the Equal Protection Clause).[309] "Insofar as the third paragraph refers to the use of streets or highways in interstate commerce, it is covered by the present discussion of the fourth numbered paragraph of the indictment [regarding interstate travel]."[310] The implication of these two sentences is that there may not be any independent basis for protecting purely local travel.

On the other hand, this is a far cry from any sort of explicit command limiting the scope of the right. And given the Court's reluctant standard for overturning an indictment,[311] the majority may simply have been articulating the low bar that the count *did* pass. This more limited reading of *Guest* is consistent with the opinion's detailed summary of the Court's prior

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requirements are legitimate and real."); Jones v. Helms, 452 U.S. 412, 418 (1981) ("Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by this Court."); Zobel v. Williams, 457 U.S. 55, 55, 59–60 n.6 (1982) (striking down a "dividend statute [that] creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State" without specifically relying on the right to travel: "right to travel analysis refers to little more than a particular application of equal protection analysis"); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 618 n.6 (1985) (applying equal protection analysis, as *Zobel* did, instead of relying on the right to travel); *Zobel*, 457 U.S. at 66–67 (Brennan, J., concurring) (noting that this ruling could also be justified by the "right to travel," to which Justice William J. Brennan Jr. concludes it is "unnecessary" to "assign . . . some textual source in the Constitution," and even if there is "no citable passage in the Constitution to assign as its source, . . . I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation"); *id.* at 76–77 (O'Connor, J., concurring in the judgment) (concluding, as part of a Privileges and Immunities analysis, that "[c]ertainly the right [to travel] infringed in this case is fundamental. . . . It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State"); *id.* at 80–81 (recognizing, also, that the Privileges and Immunities Clause "may not address every conceivable type of discrimination that the Court previously has denominated a burden on interstate travel").

[308] 383 U.S. at 757 n.13.

[309] *Id.*

[310] *Id.*

[311] In another passage of his majority opinion, Justice Stewart concluded that "*contrary to the argument of the litigants*, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss." *Id.* at 756 (emphasis added).

invocations of the right, which never once suggested any such narrowing.[312] Indeed, *Guest* regularly cited to and quoted from cases that describe the right in its full breadth—such as, for example, Chief Justice Taney's recognition in the *Passenger Cases* that "as members of [one common country, we] must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[313]

Perhaps most tellingly, although the Justices disagreed on many points in *Guest*, this was not one. Justice Douglas—who authored some of the Court's boldest language on the right to free movement, often in solo concurrences written for the singular purpose of reaffirming the right—simply joined Justice Brennan's concurrence in part (along with Chief Justice Earl Warren), which departed from the majority on entirely different grounds.[314] If *Guest* effected (or even merely reflected) a more limited conception of the right to move freely, it is difficult to imagine Justice Douglas letting it pass without comment.[315]

Griffin v. Breckenridge similarly involved a racially motivated attack against African Americans on the public roads by private individuals.[316] Unlike *Guest*, *Griffin* considered a private suit brought under § 1985(3) (a civil counterpart to § 241). *Griffin* revolved almost entirely around the statutory question: does § 1985(3) authorize suits by purely private parties against purely private parties for constitutional violations? After a lengthy discussion, Justice Stewart, again writing for the Court, concluded that it does.[317]

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[312] *Id.* at 757–59 (providing examples of courts recognizing the constitutional right to travel from one state to another).

[313] *Id.* at 758 (quoting Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849)).

[314] *See* Aptheker v. Sec'y of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) ("This freedom of movement is the very essence of our free society, setting us apart"); *see also* Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring) ("I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system . . . [and] is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present.").

[315] The only expressed disagreement between the Justices with respect to the right to travel regarded whether it reaches purely private conduct through section 241: Justice Harlan argued in his own concurrence that none of the various sources of that right have been (or are appropriately) applied to private interferences with the right. *Guest*, 383 U.S. at 762–70 (Harlan, J., concurring) (engaging in a lengthy exegesis of the different constitutional protections of travel, which are "long [] declared" and "ha[ving] respectable precedent" (the right secured by Article IV's Privileges and Immunities), having an even "longer tradition of case law and more refined principles of adjudication" (the right secured by the Dormant Commerce Clause), and "endorsed by this Court" in "several decisions" (the right secured by the Due Process Clause)).

[316] The white defendants "drove their truck into the path of [the Black plaintiff's] automobile and blocked its passage over the public road," and then proceeded to beat and threaten them on the mistaken basis that the driver of the car "was a worker for Civil Rights for Negroes." 403 U.S. 88, 90–91 (1971).

[317] *Id.* at 101.

Griffin's discussion of the right to travel comprised only two paragraphs of the opinion. This passing consideration reflected the underlying Fifth Circuit opinion and the briefing before the Court, neither of which gave the matter much attention: the Fifth Circuit relegated most of its analysis of the right to a single footnote[318] and the petitioner devoted just five sentences to discussing "the 'right to interstate travel'" in his Supreme Court brief;[319] the respondent did not engage with the question at all.[320] Both the Fifth Circuit and the petitioner characterized the right in question as "the right to interstate travel."

Griffin's discussion of the right followed, speaking only in terms of "interstate travel."[321] Like *Guest*, the *Griffin* allegations potentially included conduct that impinged on *intra*state travel. And like in *Guest*, *Griffin* again suggested that this might matter: the petitioners may have to "prove at trial that they had been engaging in interstate travel or intended to do so," or "that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons."[322] *Griffin*, like *Guest*, thus hinted at a right to travel that may not extend to local movement.

Yet I do not think that *Griffin* limited the *fundamental* right: the *Griffin* Court made clear that

> [i]n identifying these two constitutional sources of congressional power [to enable a claim against private interference via Section 1985(3)—the Thirteenth Amendment and the right to interstate travel—]we do not imply the absence of any other. . . . By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.[323]

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[318] Griffin v. Breckenridge, 410 F.2d 817, 821–22, 821 n.17 (5th Cir. 1969).

[319] Brief for Petitioners at 29, *Griffin*, 403 U.S. 88 (No. 70-144), 1970 WL 122779.

[320] The sole amicus brief in the case also does not substantially address the question. Memorandum for the United States as Amicus Curiae at 16, *Griffin*, 403 U.S. 88 (No. 70-144), 1970 WL 123483 ("The court of appeals apparently read the complaint as alleging an interference with the right of *interstate* travel. . . . But, for our part, we find no allegation that the victims were travelling from one State to another, were using interstate highways, were hindered in petitioning the national government, or that the conspiracy was in any other respect directed at the exercise of 'federal' rights not founded on the post-Civil War Amendments.").

[321] 403 U.S. at 105. The petitioners had alleged that they "'were traveling upon the federal, state and local highways in and about' DeKalb, Kember County, Mississippi" (which "is on the Mississippi-Alabama border"). *Id.* at 106.

[322] *Id.* at 105–06.

[323] *Id.* at 107. This conclusion is further reinforced by the fact that Justice Douglas fully joined the majority in *Griffin*.

This suggests that *Griffin*'s holding was an intentionally narrow (as opposed to narrowing) one.

Bray v. Alexandria Women's Health Clinic[324] largely resolved any ambiguity with respect to the reach of the right to travel by asserting that *Griffin* and *Guest* (and *Bray*) involved only those rights protected against private action via § 1985(3) and § 241.[325] *Bray* noted these rights include only the right to travel interstate—and maybe not even every aspect of that right.

Bray, like *Griffin*, discussed "the right of interstate travel" in the context of a § 1985(3) claim against private conspirators: anti-abortion activists seeking to obstruct access to abortion clinics.[326] This context is important because, as *Bray* recognized, § 1985(3) does not protect all constitutional rights; it only protects the far more limited selection of rights that are secured against private action. Writing for the majority in *Bray*, Justice Scalia noted: "we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel."[327] *Bray* did not further expand this list.

Indeed, the *Bray* Court noted that not even every aspect of the right to interstate travel applies against private parties through § 1985(3): "the individual right of interstate travel we are here discussing . . . does not derive from the negative Commerce Clause."[328] The majority continued by expressing skepticism that any rights "less explicitly protected by the Constitution" could apply against private action—and *Bray* used as an example of a right "obviously *not* protected against private infringement" the Fourteenth Amendment's guarantee of liberty.[329]

The *Bray* Court never explicitly defined from where the individual right to interstate travel that *is* applicable does derive, but its discussion strongly points to Article IV's Privileges and Immunities Clause. For one, the majority cited two right-to-travel cases, prefacing the respective parentheticals that follow these cases with "Art. 4, § 2, inhibits" and "Art. 4, § 2, insures."[330] But perhaps more tellingly, *Bray*'s description and analysis

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[324] 506 U.S. 263 (1993).

[325] Justice Stevens argued in dissent that *Bray* limits *Guest* and *Griffin*, which appear to interpret the rights applicable against private action "more generously." *Id.* at 336–38 (Stevens, J., dissenting).

[326] *Id.* at 277.

[327] *Id.* at 278 (citations omitted) (first citing United States v. Kozminski, 487 U.S. 931, 942 (1988); and then citing United States v. Guest, 383 U.S. 745, 759 n.17 (1966)).

[328] *Id.* at 277 n.7.

[329] *Id.* at 278.

[330] *Id.* at 277; *see also id.* at 332 (Stevens, J., dissenting) ("Almost two decades ago, the Court squarely held that the right to enter another State for the purpose of seeking abortion services available

of the right echoes the discrimination test used in the Privileges and Immunities context. The right to travel applicable against private parties, *Bray* noted, "protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers."[331] *Bray* repeated this framing later with even more emphasis on discrimination: "a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them."[332] Such citizen-of-other-state discrimination is key to Article IV's Privileges and Immunities Clause, but it does not play a central role in any of the other possible sources of a right to travel, including the Court's fundamental-rights jurisprudence.[333] Such a limitation would make some amount of sense, given that the language of § 1985(3) explicitly invokes "privileges and immunities."[334]

Bray's discussion of the right to travel was thus an explicitly limited one. And in so clearly confining its discussion of that right, *Bray* clarifies the reach of *Guest* and *Griffin* as well: these cases involved only the particular limited right to interstate travel secured against private action through § 241 and § 1985(3).

5. The Right as a Purely Local Protection

Finally, a largely separate line of decisions on vagrancy and loitering ordinances, notably including *Papachristou v. City of Jacksonville*[335] and *Kolender v. Lawson*,[336] embrace a localized right to move freely. To the extent that the Court's durational-residency-requirement or private-action cases left any question about the *intra*state application of the right, the

there is protected by the Privileges and Immunities Clause." (citation omitted)); United Bhd. of Carpenters & Joiners of Am., Loc. 610 v. Scott, 463 U.S. 825, 832 (1983) ("The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals*." (quoting United States v. Price, 383 U.S. 787, 799 (1966))).

[331] 506 U.S. at 277 (noting that where "the only 'actual barriers to movement' . . . would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another[,] [s]uch a purely intrastate restriction does not implicate the right of interstate travel" without a discriminatory application).

[332] *Id.*; Toomer v. Witsell, 334 U.S. 385, 398 (1948) ("[T]he purpose of [the Privileges and Immunites] [C]lause . . . is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.").

[333] *See also Bray*, 506 U.S. at 277 n.7 (noting that the dissent's reliance on Dormant Commerce Clause cases is misplaced where such cases "are irrelevant to the individual right of interstate travel we are here discussing"—one reading of which would limit the majority's opinion to *only* the aforementioned right).

[334] 42 U.S.C. § 1985(3).

[335] 405 U.S. 156, 171 (1972).

[336] 461 U.S. 352, 358 (1983).

loitering and vagrancy cases largely put that to rest: the fundamental right to free movement applies *intra*state as well.

Papachristou "involve[d] eight defendants who were convicted . . . of violating a Jacksonville, Florida, vagrancy ordinance" that imposed fines and jail time for, among other things, "persons wandering or strolling around from place to place without any lawful purpose or object [and] habitual loafers."[337] *Kolender*, likewise, involved "a criminal statute that requires persons who loiter or wander on the streets to provide" identification when requested by a peace officer pursuant to "the standards of *Terry v. Ohio*."[338] Both ordinances operated on a strictly local—intrastate—level. Both were ruled unconstitutional.

In *Papachristou*, the local ordinance in question was derived from "early English" anti-movement legislation: the "Statute of Laborers," which was "designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions."[339] Writing for a unanimous majority, Justice Douglas concluded that the ordinance was void for vagueness because, among other things, it "makes criminal activities which by modern standards are normally innocent. 'Nightwalking' is one."[340] The opinion continued: "Walk[ing] and stroll[ing] and wander[ing] . . . are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights," but they "have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness."[341] *Papachristou* never quite made explicit its recognition that these sorts of activities are "fundamental"—though Justice Douglas later characterized *Papachristou* in such terms[342]—but its import is clear.[343]

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[337] 405 U.S. at 156, 157 n.1.

[338] 461 U.S. at 353.

[339] 405 U.S. at 161. The Statute of Laborers ultimately led to the Peasant's Revolt. *See Peasant's Revolt*, *supra* note 44.

[340] *Papachristou*, 405 U.S. at 163.

[341] *Id.* at 164.

[342] *See* Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (writing separately to describe other fundamental rights, including "the freedom . . . from bodily restraint or compulsion, freedom to walk, stroll, or loaf" (citing and discussing *Papachristou* in support)).

[343] 405 U.S. at 166 n.8 (citing Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 104 (1960), "[f]or a discussion of the void-for-vagueness doctrine in the area of fundamental rights")); *see* Note, *The Void-for-Vagueness Doctrine In the Supreme Court*, 109 U. PA. L. REV. 67, 104 (1960) ("This concept that the vagueness syntax is used to aid the Court's reviewing function by permitting an individual to complain of unconstitutionality when he has been subjected to state compulsion under a scheme of law whose imprecision in the framing of legal issues is such as to give the triers of fact a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties.").

Kolender made this connection more directly in reaching the same essential conclusion for the same essential reason. "Statutory limitations on [individual] freedoms," Justice O'Connor noted for a 6–2 majority,[344] "are examined for substantive authority and content as well as for definiteness or certainty of expression."[345] *Kolender* continued: under the California law,

> [a]n individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties." In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement.[346]

Kolender's identification of these freedoms was not mere dicta; the question of whether the statute limited "constitutionally protected conduct" was a necessary part of the Court's void-for-vagueness analysis.[347]

Most recently, Justice Stevens fully embraced the fundamental nature of a local right to move freely in his *City of Chicago v. Morales* concurrence—or, more precisely, the right not to move. Like with *Papachristou* and *Kolender*, *Morales* involved a vagueness challenge to a vagrancy law.[348] The ordinance in question, however, did not bar walking or wandering or any other sort of movement; it prohibited "'criminal street gang members' from 'loitering' with one another or with other persons in any public place," which "the ordinance defines as 'remain[ing] in any one place with no apparent purpose.'"[349] The majority struck the ordinance down for failing to "establish minimal guidelines to govern law enforcement[,]" focusing on the broad, indefinite, and necessarily subjective nature of the phrase "no apparent purpose."[350]

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[344] Kolender v. Lawson, 461 U.S. 352, 357 (1983). Justice White (joined by Justice William H. Rehnquist) dissented only with respect to the application of the vagueness test; the dissent "express[ed] no views" with respect to the question of whether the "Fourth or Fifth Amendment[s]" were violated. *Id.* at 374 (White, J., dissenting).

[345] *Id.* at 357.

[346] *Id.* at 358 (first quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965); then citing Kent v. Dulles, 357 U.S. 116, 126 (1958); and then citing Aptheker v. Sec'y of State, 378 U.S. 500, 505–06 (1964)).

[347] 461 U.S. at 358 n.8; *cf. Shuttlesworth*, 382 U.S. at 96 (Douglas, J., concurring) ("There was no such 'obstructing' here, unless petitioner's presence on the street was itself enough. Failure to obey such an order, when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion is honored." (citing Edwards v. California, 314 U.S. 160, (1941))).

[348] City of Chicago v. Morales, 527 U.S. 41, 51–52 (1999).

[349] *Id.* at 45–47.

[350] *Id.* at 60 (citing *Kolender*, 461 U.S. at 358).

In his concurrence, joined by Justices Souter and Ginsburg,[351] Justice Stevens noted several additional reasons why the statute was unconstitutional, including that it was invalid on its face for similar reasons as the ordinances in *Papachristou* and *Kolender*: though "the law does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional"; alternatively,

> the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[352]

Justice Stevens thus connected the often-hinted-at right to *not* move to the more consistently recognized right to move, concluding that Chicago's anti-loitering ordinance violated this (non)movement right.[353] Justice Stevens' recognition of the freedom to loiter—but *not* his accompanying acknowledgment of the freedom to move—prompted a spirited pushback by Justice Clarence Thomas in dissent.[354]

Numerous other courts have recognized the fundamental right to move locally as well. In *City of St. Louis v. Gloner*, the Supreme Court of Missouri held that "[t]he defendant had the unquestioned right to go where he pleased, and to stop and remain upon the corner of any street that he might desire," and so his arrest for "unlawfully lounging, standing, and loafing around" violated his right of personal liberty guaranteed by the state's due process clause.[355] Similarly, in *Territory of Hawaii v. Anduha*, the Supreme Court of

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[351] *See id.* at 67 (O'Connor, J., concurring in part and in the judgment) (noting that because this matter is fully resolved by the majority's first set of reasons, "there is no need to consider the other issues briefed by the parties and addressed by the plurality" and "I express no opinion about them").

[352] *Id.* at 52–54 (citations omitted).

[353] That Justice Stevens did so as part of a void-for-vagueness analysis and not a substantive due process analysis, *id.* at 64 n.35, does not lessen his recognition of the right.

[354] Justice Thomas wrote: "The asserted 'freedom to loiter for innocent purposes,' is in no way 'deeply rooted in this Nation's history and tradition.'" *Id.* at 98 (Thomas, J., dissenting) (citation omitted) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). In support, Justice Thomas largely relied on the observation "that 'antiloitering ordinances have long existed in this country.'" *Id.* at 102. "The American colonists," he noted, "enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy. Vagrancy laws were common in the decades preceding the ratification of the Fourteenth Amendment, and remained on the books long after." *Id.* at 103–04.

[355] 109 S.W. 30, 32 (Mo. 1908).

Hawaii held that an ordinance that made it "an offense to stand or loaf around upon the corner of one of the streets in the city for five minutes . . . [or] for two hours" violated the "right of locomotion,—to go where one pleases, and when."[356] Perhaps most strikingly, the Superior Court of Pennsylvania in *Commonwealth v. Doe* held that a man who had committed no crime could "push [an officer] aside" who sought to stop him from passing because "[f]reedom of locomotion, although subject to proper restrictions, is included in the 'liberty' guaranteed by our Constitution."[357]

In the past century alone, the U.S. Supreme Court has affirmed the fundamental nature of the right to free movement in fourteen majority opinions and in many more concurrences or dissents. Taken together, these discussions set out a broad right that protects purely local movement, interstate movement and migration, and even international travel—essentially the same as that revealed in the *Dobbs–Timbs–McDonald–Glucksberg* historical analysis.

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[356] 31 Haw. 459, 462–63 (1930), *aff'd*, 48 F.2d 171, 172–73 (9th Cir. 1931) (concurring with the views expressed by *Gloner* and *Pinkerton* regarding "personal liberty" and "the right of locomotion").

[357] 109 Pa. Super. 187, 190 (1933). For other examples of courts recognizing a right to travel locally, *see, e.g.*, Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) (recognizing a "right of travel"); Gomez v. Turner, 672 F.2d 134, 143 n.18 (D.C. Cir. 1982) ("That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others."); Hughes v. City of Cedar Rapids, 840 F.3d 987, 995 (8th Cir. 2016) (noting the right to travel is a fundamental right); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1016–17 (8th Cir. 2006) (concluding that the Arkansas residency-restriction law does not infringe on a constitutional right to intrastate travel); Doe v. Miller, 405 F.3d 700, 713 (8th Cir. 2005) (holding that the Iowa statute did not interfere with the constitutional right to travel); Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) (holding that the DMV's denial of a driver's license does not violate applicant's right to interstate travel); Bissonette v. Haig, 776 F.2d 1384, 1391 n.10 (8th Cir. 1985) (recognizing the constitutional right to travel); United States v. Shaheen, 445 F.2d 6, 10 (7th Cir. 1971) (holding the right to travel is a constitutional liberty that "cannot be abridged without due process of law"); *cf.* Doe v. City of Lafayette, 377 F.3d 757, 771 (7th Cir. 2004) (suggesting that there may be a fundamental right to "mov[e] from place to place within [one's] locality to socialize with friends and family, to participate in gainful employment or to go to the market to buy food and clothing"). For a decision connecting movement to assembly, see *Comm. for Indus. Org. v. Hague*, 25 F.Supp. 127, 130–31, 151 (D.N.J. 1938), which recognizes that "in nearly all modern legal systems we find a right (or liberty) of locomotion (movement) of free speech (and press) and of free assembly. . . . The constitutional provisions here applicable are contained in the First and Fourteenth Amendments, and the pertinent words are liberty, due process and free as applied to speech and assembly," and therefore enjoins officials "from in any way interfering with the plaintiffs in their right (1) to be and move about freely in Jersey City." *See also* Hague v. Comm. for Indus. Org., 101 F.2d 774, 787 (3d Cir.) (upholding the district court's decision while recognizing: "[l]iberty of the person[] include[ed] freedom of locomotion"), *aff'd*, 307 U.S. 496, 515 (1939) (upholding the Third Circuit in a foundational decision for the public forum doctrine regarding the public's historical use of streets and parks "for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has," Justice Owen Josephus Roberts wrote for the majority, "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens").

CONCLUSION

There is a fundamental right to free movement: to move around one's neighborhood or city, to cross state lines for business, pleasure, or to make a new home, and to leave and reenter the country as desired. Each aspect of this right is strongly rooted in history and tradition, and each has a long pedigree of support not only in the Supreme Court, but in many other state and federal court decisions considering this issue.

This Article's conclusion about the fundamental right raises an array of additional questions—and calls into doubt numerous state and federal restrictions. The federal no-fly list, for example, merits closer examination, as do traffic stops and tolls and the wide array of movement restrictions being implemented to limit access to abortion and gender-affirming care.[358] Can such impediments to free movement survive strict scrutiny? Or by falling below some minimum threshold (none of these measures foreclose movement altogether, after all) do they not implicate the right?[359] For that matter, is there a corresponding right to *not* move? The Court split 3–2 on this question in *Morales*,[360] thereby leaving in doubt the constitutionality of loitering ordinances.

Indeed, if *Dobbs* is taken seriously and the test for fundamental rights revolves almost exclusively around "history and tradition," immigration restrictions may not be on perfectly sound footing: there is substantial historical support that the fundamental right to move includes the right to immigrate; and the historical record of immigration restrictions before the late nineteenth century is relatively sparse.[361] Given that the Supreme Court has generally supported the constitutionality of immigration restrictions, this issue has long been considered settled. But as this Article's examination suggests, *Dobbs* raises, at least, a colorable question regarding whether the fundamental right protects immigration.[362] Limitations on emigration are likewise suspect.[363]

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[358] *See, e.g.*, Smith-Drelich, *supra* note 3 (examining travel rights as an additional protection against efforts to extend morally tinged travel limitations).

[359] *Cf.* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (recognizing an individual right to bear arms while "declining to establish a level of scrutiny for evaluating Second Amendment restrictions").

[360] *See supra* notes 348–354 and accompanying text.

[361] *See, e.g.*, *supra* Part II; *cf.* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 34 (categorizing historical sources because "when it comes to interpreting the Constitution, not all history is created equal").

[362] It also may be the case that most immigration laws survive strict scrutiny, but such an examination would represent a sea change for immigration law.

[363] *Cf.* Andrew Appleby, *No Migration Without Taxation: State Exit Taxes*, 60 HARV. J. ON LEGIS. 55, 73–76 (2023) (proposing state exit taxes, which may run afoul of the fundamental right).

These are all questions sparked by this Article's conclusion. Regardless of their answers, recognizing that the fundamental right to free movement exists alongside the other constitutional protections of travel is a necessary part of realizing the full scope of the Constitution. After all, free movement is more than an important facilitator of interstate commerce or one means by which a state may discriminate against out-of-state residents; it is an essential component of liberty itself.

ONLINE APPENDIX

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