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The Fundamental Right to Free Movement

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Abstract

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. Indeed, to the extent that right-to-travel claims are brought, they are more commonly rooted in Article IV's Privileges and Immunities Clause or the Dormant Commerce Clause—each of which protects travel, albeit in different ways, against different restrictions, and for different people than substantive due process. Given the many and increasing ways that states regulate through restrictions on travel, as well as the mounting attacks on substantive due process more generally, there is a need for clarity on this important and distinct set of travel protections.

This Article begins with the historical substantive due process analysis endorsed in Dobbs*, tracing the right to travel from the Magna Carta, through Blackstone's Commentaries, colonial America, and the ratification of the Fourteenth Amendment. Throughout history, repressive governments have sought to limit travel and movement. But the English and U.S. legal traditions are marked by repeated affirmations of the right; there is strong and persistent historical support for the existence of a fundamental right to travel. This is also reflected in judicial discussions of the right, both historical and contemporary. Although the legal justifications for and perceived constitutional sources of the right to travel have regularly shifted, one thread traces strongly through these decisions: whatever the exact founding of the right, it is fundamental.*

Through this examination, this Article surfaces a broad-reaching right that protects local, interstate, and international travel. Indeed, the fundamental right to travel may be better conceptualized as a fundamental right to move freely—something akin to what William Blackstone labeled as "locomotion" in his influential description of personal liberty. Government restrictions that burden free movement, whether across or within boundaries, implicate this fundamental right.

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INTRODUCTION

This Article seeks to answer two questions: is there a fundamental right to movement; and, if so, what sorts of movement fall under the ambit of this right?

The answer to the first of these questions is yes. Whether viewed through the narrow historical lens of *Dobbs*, or by reference to more than a century of Supreme Court cases, there is strong and consistent support for the protection of movement as a fundamental right. This conclusion does not suggest that movement is protected only as a fundamental right; it is well established that movement (in at least some of its forms) is protected (against at least some restrictions) by other constitutional provisions as well, including the Dormant Commerce Clause and Article IV's Privileges and Immunities Clause.[1] Recognizing free movement as a fundamental right in no way undermines these other protections; it supplements them.

What this recognition does mean is that at least some restrictions of movement, including federal restrictions, are subject to a fundamental rights analysis. This is a different and more widely applicable inquiry, and often a stricter one, than any conducted under

[1] Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1385-89 (2021) (describing these other travel rights).

the other constitutional provisions more commonly used today to challenge movement-related restrictions.

This Article's conclusion that movement is a fundamental right should not be a controversial one; even if the fundamental right to move is rarely relied on in practice, it has often been repeated without challenge, including by the Supreme Court.[2] I seek in establishing that there is a fundamental right to movement not to be the first to make this claim, but to be the first to really substantiate it.[3] And by so doing, I seek to (re)introduce the fundamental right to movement into regular use by both academics and practitioners.

This Article's second question—what kinds of movement are protected—does not have so clear an answer, mainly because of the great diversity of activities that can be fairly described as movement: we move when we permanently relocate from one region to the next, when we travel to another state for business, and when we go for a pleasant walk around the block. Each of these activities is a form of 'movement' (or 'travel' as they are often labeled[4]) but they are different in important ways.

Yet one thing about the right is crystal clear: the right to movement is a broad one, encompassing each of these activities, and others as well. The history, tradition, and jurisprudence of movement in England and America strongly support protecting a wide range of activities. This is because the fundamental right is no less than a right to free movement itself; it is this notion of liberty that has the most support.

I. A History and Tradition of Free Movement

This Article starts with the "historical inquiries" that *Dobbs* deemed "essential whenever the Court is asked to recognize a new component of the 'liberty' interest protected by the Due Process

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[2] *See* Part II.

[3] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (Kavanaugh, J., concurring) (referencing "the constitutional right to interstate travel" without any cited authority or discussion of that right).

[4] I use 'movement' rather than 'travel' to denote a broader set of activities. The act of migrating from one state to another entails 'traveling' in a narrow technical sense, as does an evening stroll. But the word that best captures these activities—and, more importantly, the actual right at issue—is 'movement'; travel is just one type of movement. *Compare* TRAVEL, 1A, MERIAM-WEBSTER.COM ("to go on or as if on a trip or tour: journey") *with* MOVEMENT, 1A, MERIAM-WEBSTER.COM ("the act or process of moving, *especially*: change of place or position or posture").

Clause."[5] Because no court has conducted this specific examination for this right, this Article starts by mapping out why movement is protected under *Dobbs*.

Dobbs held up two recent cases as exemplars of this analysis: *Timbs v. Indiana* and *McDonald v. Chicago*. The examination in *Timbs*, Justice Alito 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."[6] *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 to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence."[7] *Dobbs* also favorably cited the analysis in *Washington v. Glucksberg*, which "surveyed more than 700 years of 'Anglo-American common law tradition'" in concluding that there was no fundamental right to assisted suicide.[8]

Applying this type of historical inquiry reveals that the fundamental right to free movement, including local, interstate, and international movement, is "deeply rooted in [our] history and tradition."[9]

A. Free Movement in English History

1. The Magna Carta

First, the fundamental right to movement can be traced back to the 1215 Magna Carta, which recognizes strong movement-related rights in both Articles 41 and 42. Article 41 of the 1215 Magna Carta guarantees that "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 selling by the ancient

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[5] *Dobbs*, 142 S. Ct. at 2247. Movement is one of the longest recognized components of "liberty," *see, e.g.*, Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting) (connecting "liberty" with free movement), although there remains significant uncertainty around the nature of this right, *see, e.g.*, *Dobbs*, 142 S. Ct. at 2309.
[6] *Dobbs*, 142 S. Ct. at 2246–47.
[7] *Id.* at 2247 (recognizing that *Timbs* and *McDonald* concern "whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights," and concluding that "it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution").
[8] *Id*.
[9] *Id.* at 2246.

and right customs, quit from all evil tolls."[10] This sweeping acknowledgment encapsulates, at least for merchants, both international and domestic travel, and also the right to not travel—"to tarry there."[11] Article 42 similarly reads: "It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war . . . ."[12] Article 42 is at once broader and narrower; it extends to "any person," rather than merely to merchants, but it only explicitly protects entry and exit into England, not also movement within England.

Free movement was plainly important to the drafters of the Magna Carta; it is enshrined in two separate articles. And for good reason. In the immediate preceding years, there had been several notable efforts by the crown to limit movement, both extraterritorially and within England. The Constitutions of Clarendon required that clergymen obtain a license from the king in order to leave the country—partially precipitating Thomas Becket himself to flee the country in 1164.[13] 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."[14] Articles 41 and 42 serve as a

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[10] https://avalon.law.yale.edu/medieval/magframe.asp (noting an exception to this "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 . . . .").

[11] *Id.* Edward Coke's "gloss" of this chapter adds a degree of reciprocity to this interpretation, seemingly based on a subsequent portion of the article: 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).

[12] https://avalon.law.yale.edu/medieval/magframe.asp (excepting "prisoners and outlaws," "the people of the nation at war against us, and Merchants who shall be treates as it is said above"); *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 Crata," *citing* Article 42).

[13] Henry Summerson, *The 1215 Magna Carta: Clause 42, Academic Commentary*, THE MAGNA CARTA PROJECT, http://magnacartaresearch.org/read/magna_carta_1215/Clause_42?com=aca (accessed November 21, 2022). "The king's lay subjects were probably liable to similar restrictions, and on very similar grounds, but the evidence is very meagre." *Id.*

[14] Henry Summerson, *The 1215 Magna Carta: Clause 41, Academic Commentary*, THE MAGNA CARTA PROJECT, http://magnacartaresearch.org/read/magna_carta_1215/Clause_41?com=aca (accessed November 21, 2022).

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."[15]

2. Blackstone's Commentaries

Despite being written over five-hundred years later, William Blackstone's influential Commentaries on the Laws of England reflect a strikingly similar view of the right to move freely. That is not to say that the centuries between the Magna Carta and Blackstone were free of travel restrictions. To the contrary, as the Peasant's Revolt of 1381[16] and the Elizabethan Poor Laws of 1597-1598[17] illustrate well, England throughout this period saw a continuous push and pull of restrictions on movement and backlashes to those restrictions; as with most of the rights recognized in the Magna Carta, consistent governmental respect for movement did not follow directly from its formal recognition.

Yet Blackstone's 18th-century statement on the right to free movement was unequivocal. In setting out his influential concept of personal liberty, Blackstone begins with a description of this right: "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 removing one's person to whatever place one's own inclination may direct."[18] Blackstone thus explicitly connects free movement (or "loco-motion") to "personal liberty"—the place in the United States Constitution where

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[15] Viewed in this context, it is not clear that Article 41's limitation to "merchants" and Article 42's extension to "any person" has any import beyond reflecting the specific limitations on movement to which these respective articles responded. This points to a more general limitation of looking to the Magna Carta as an exclusive statement of rights: because the project itself was a response to perceived oppressions, there presumably 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 not represent the extent of beliefs at this time regarding movement. But these respective articles do suggest that strongly held views of the importance of preserving free movement, including movement within and without the country, date back to at least the time of the Magna Carta.

[16] *See, e.g.*, https://www.britannica.com/event/Peasants-Revolt (detailing how the "first great popular rebellion in English history" was "main[ly]" in response to the Statute of Labourers, a 1351 law that set maximum wages and limited the free movement of those seeking better working conditioners).

[17] *See, e.g.*, William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 103 (1997) (describing how the Act of Settlement facilitated the removal of new arrivals to a parish to limit "local responsibility for poor relief," and to "keep the laboring poor close to home and away from the cities").

[18] BLACKSTONE COMMENTARIES at 130.

it would eventually find its home. This right is, in Blackstone's view, a "right strictly 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."[19]

Blackstone also separately recognizes several related components of the right to move freely in the context of 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.[20] One of the earliest examples of a safe conduct was to the well-known Scottish poet John Barbour, who was 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."[21] As this example shows, both the permissive and the protective aspects of safe-conducts were important: 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 goes even further than this, 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."[22] Although Blackstone doesn't 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

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[19] *Id.* at 130-31; *see also* BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCES, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA at 388 (Henry St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 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]").

[20] Those granted safe-conduct, Blackstone writes, may "come into the realm, [or] travel himself upon the high seas" even during times of war. BLACKSTONE COMMENTARIES at 252.

[21] https://www.epoch-magazine.com/post/the-passport-s-medieval-forebear-grants-of-safe-conduct-in-medieval-britain.

[22] BLACKSTONE COMMENTARIES at 251-252, https://www.gutenberg.org/files/30802/30802-h/30802-h.htm#Page_117.

the king's protection."[23] This was, in effect, a recognition of the default position in England of guaranteeing free movement even for those foreigners who lacked the formal entailments that a safe-conduct would confer.[24]

Blackstone's Commentaries thus set out two tiers of movement-related rights in England. English residents have 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 persist largely at the mercy of the king. But this second tier of rights is, nevertheless, reasonably robust, consisting of (1) rights conferred by safe conducts (which include the right 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." Each set of non-resident rights has modern salience for the free movement of those holding passports or visa, immigrants, and even asylum-seekers.[25]

Blackstone's Commentaries were greatly influential in America in the time of independence. As such, Blackstone's strong affirmation of multiple components of the right to free movement, which restate similar recognitions found in the Magna Carta, were 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.

Movement in England during the period of the American colonization was heavily constrained by the English landscape: England "was crisscrossed in every direction with thousands of high fences along the boundaries of every parish."[26] The "unhappiness and frustration caused by [such] restrictions on freedom of movement in England" were, according to one leading commentator, "strong

[23] *Id.*
[24] *See also* Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 531 (2011).
[25] 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 except by the sentence of the law." BLACKSTONE COMMENTARIES.
[26] THREE HUMAN RIGHTS IN THE CONSTITUTION at 166.

incentives to go to the great open spaces in her American colonies."[27] And go they did; "by 1641, 300 ships had carried 20,000 settlers to America," nearly all from England.[28]

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 gives 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 . . . Soe that none of the same parsons be such as hereafter shalbe specially restrained by us our heirs or successors."[29] In effect, the Patent gave Sir Humphrey unlimited freedom to take whomever he wanted with him to America. This provision was copied 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").[30] "Freedom of movement went into later charters" as well.[31] 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."[32]

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.[33] "When the colonists described laws that would infringe their liberties, they

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[27] *Id.*

[28] https://www.britannica.com/topic/American-colonies/How-colonization-took-place.

[29] THREE HUMAN RIGHTS IN THE CONSTITUTION at 166 (contrasting this with the far more restrictive Spanish or French colonial practices).

[30] *Id.* at 173 (noting, at 174, 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 by James I to Plymouth Charter, and "foreigners" that will become our loving subjects (Georgia Charter))

[31] *Id.* As a result of this, "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.

[32] *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.

[33] *Id.* at 177.

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."[34] 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.[35] 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."[36] Overall, most of "the charters seem to have taken internal freedom of movement for granted."[37]

There were two notable exceptions to this: New York and the Carolinas. But these more restrictive views on movement did not last long. Early settlers in New York were ostensibly limited by a "Charter to Patroons in New Netherlands" issued by the Dutch West India Company in 1629. This document "compelled servants to stay permanently with their own patroon," seemingly in an "attempt to pin settlers to an estate like mediaeval serfs."[38] These restrictions, if they ever were enforced, had been removed by the time New York became an English colony.[39] Similarly, the 1670 Fundamental Constitutions of Carolina—allegedly written by John Locke himself—forbade settlers from freely leaving the land of their lords.[40] The Fundamental Constitutions of Carolina never actually went into force.[41] Thus, to the extent that there had ever been notable disagreement about free movement in the Americas, the question appears to have resolved in favor of the more permissive view long before the time of independence.

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[34] *Obergefell v. Hodges*, 576 U.S. 644, 728 (2015) (Thomas, J., dissenting) (citing Silas Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra,* at 101)).
[35] *See* THREE HUMAN RIGHTS IN THE CONSTITUTION at 177.
[36] *Id.* at 177; *see also* Massachusetts Body of Liberties (1641) ("Every man of or within this Jurisdiction shall have free libertie . . . to remove both himself 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 entertained and succoured among us . . . .").
[37] THREE HUMAN RIGHTS IN THE CONSTITUTION at 177.
[38] *Id.* at 179.
[39] *Id.*
[40] *Id.*
[41] *Id.*

By far the most significant respect in which the movement of the colonists was limited came in the years leading up to independence, in the Royal Proclamation of 1763. The Proclamation commanded the governors of the colonies not to authorize any surveys or grants west of the Appalachian mountains.[42] The restrictions on movement created by the Proclamation were subsequently codified by the English parliament in the Quebec Act of 1774 (which soon thereafter was labeled by the colonists as one of the "Intolerable Acts").[43] The effect of the Proclamation and Quebec Act was to severely limit westward movement by residents of the Thirteen Colonies: any resettlement of this land, though technically possible, would now entail movement to a different jurisdiction with different governance and different laws, which the colonists perceived unfavorably.[44]

The colonists' backlash against these restrictions would ultimately become part of the founding of the United States. One of the primary complaints noted by the Continental Congress of 1774 was 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."[45] The unacceptable burden on movement caused by this extension was to subject any "*English* subjects settled in that Province" to the "*French* Laws," as well as to the Quebec state church of Roman Catholicism.[46] This objection to the Quebec Act would ultimately become Grievance 20 of the Declaration of Independence, which decried the English monarchy "For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries . . . ."[47] By the point of independence, the colonists' complaint regarding the Quebec Act was framed primarily in terms of governance and religion, but the essential role of movement in this dispute never dissipated; at

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[42] *Id.* at 181-82.

[43] *Id.* The Quebec Act was somewhat less geographically restrictive than the Quebec Proclamation insofar as it permitted settlement of the area in which Pittsburgh is now located as well as of some southern areas, including Kentucky. *Id.*

[44] There was a great deal of colonial interest in westward expansion at this time, fueled in part by the "land swindle" of the Fort Stanwix Treaty of 1768, which drove the exploitation of lands that had recently been recognized as belonging to several Indian nations. *See* Timothy J. Shannon, *Review of SPECULATORS IN EMPIRE: IROQUOIA AND THE 1768 TREATY OF FORT STANWIX*, BY WILLIAM J. CAMPBELL, 111 REGISTER OF THE KENTUCKY HISTORICAL SOCIETY 235 (2013), doi:10.1353/khs.2013.0028.

[45] https://digital.lib.niu.edu/islandora/object/niu-amarch%3A88015; s*ee also* THREE HUMAN RIGHTS IN THE CONSTITUTION at 182.

[46] https://digital.lib.niu.edu/islandora/object/niu-amarch%3A88015

[47] DECLARATION OF INDEPENDENCE.

core, what the colonists sought was a right to the unencumbered settlement of the more western parts of the continent.[48]

One of the other "Intolerable Acts," the Boston Port Act, also effected a significant limitation on 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 both 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 see it as 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."[49] 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."[50]

As this history shows, the American colonists' views on free movement were broad, encompassing, at the very least, the freedom to come to America, to move from one colony to another or through the American frontiers, and to move about within a colony. And these views were not lightly held: 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.[51]

2. Early United States Law

Early United States law reflects this commitment. Free movement was explicitly protected by the Articles of Confederation, which recognized "the people of each state shall have free ingress and regress to and from any other state."[52] Although this line was not directly replicated in the Constitution, the Supreme Court has made it

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[48] On the other hand, the colonists directed a different complaint, regarding the King's opposition to colonial attempts to encourage immigration to America, in explicitly movement-related terms: "He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." https://founding.com/he-has-endeavoured-to-prevent-the-population-of-these-states-for-that-purpose-obstructing-the-laws-for-naturalization-of-foreigners/.

[49] https://cupola.gettysburg.edu/cgi/viewcontent.cgi?article=1027&context=ghj

[50] DECLARATION AND RESOLVES (1774).

[51] *Cf.* THREE HUMAN RIGHTS IN THE CONSTITUTION 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.").

[52] ARTICLES OF CONFEDERATION.

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."[53] The explicit inclusion of travel protections in the Articles of Confederation strongly suggests the importance of movement at the time of the founding.[54] This conclusion is buttressed by the fact that travel is protected by several provisions of the Constitution (in addition to the Due Process Clause)—including Article IV's Privileges and Immunities Clause and the Dormant Commerce Clause. That is to say, between the Articles of Confederation and the Constitution itself, there is ample evidence to suggest that the founders valued movement in many of its forms.

Moreover, in one of the new country's first legislative acts—in 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 recognizes: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free."[55] Like the Magna Carta, this statement reflects a broad view of the right to move freely, protecting travel not only across frontiers but within them.[56]

3. Early State Constitutions

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[53] United States v. Guest, 383 U.S. 745, 758 (1966) (citing Chaffee) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.")

[54] This conclusion is further buttressed by the fact that interstate travel is widely acknowledged to be protected by, at the very least, Article IV's Privileges and Immunities Clause, *see, e.g.*, Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1385-89 (2021) (collecting sources); there is little evidence to support the view that there would have been any widespread change of heart about the right to travel between the drafting of the Articles of Confederation and the Constitution.

[55] NORTHWEST ORDINANCE.

[56] *See also* Daniel Hulsebosch, *Magna Carta for the World? The Merchants' Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599, 1605 (2016) (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").

Tellingly, 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.

a. Constitutions that Explicitly Protected Movement

First, whatever the meaning of "liberty" in the U.S. Constitution,[57] state guarantees of "liberty" at this time were likely 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.[58] Most commonly, state guarantees of "liberty" came as part of a state "law of the land" constitutional clause, a due process analogue.[59] The Maryland Constitution of 1776's formulation of this, for example, reads: "That no freeman ought to be taken, or imprisoned, or disseized 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 lawful judgment of his peers, or by the law of the land." The first half of this guarantee borrows from chapter 39 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*.[60] On the other hand, the clause's second invocation of liberty ("life, liberty, or property") appears to be

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[57] This is, of course, a subject of this Article. It is worth noting that even those who have advocated for narrow readings of the federal Due Process Clause have argued that it conveys at least 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)); *Obergefell v. Hodges*, 576 U.S. 644, 728 (2015) (Thomas, J., dissenting); 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.").

[58] *See* Part I.

[59] *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) ("Law of the land and denial of justice clauses appear repeatedly in English and early American legal texts, including in Maryland's 1639 Act of the Liberties of the People, Rhode Island's Code of Laws from 1647, Connecticut's Code of 1650, New Haven's Code of 1655, the Concessions and Agreement of West New Jersey in 1676/77, the 1682 Laws Agreed Upon in England for Pennsylvania, the Fundamental Constitutions for East New Jersey of 1683, the 1683 Charter of Liberties and Privileges from New York, and the 1691 Act of New York Declaring Rights and Privileges." (citations omitted)).

[60] *See, e.g.*, Carafas v. LaVallee, 391 U.S. 234, 238 (1968); Daniel Hulsebosch, *Magna Carta for the World? The Merchants' Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. Rev. 1599, 1606 (2016) (describing this as the "due process provision of Magna Carta").

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)], the right of personal liberty; and the right of private property."[61] Maryland's respective guarantees of "liberties" and "liberty" may well be redundant—Blackstone's statement of these rights was a distillation of the protections conveyed via the Magna Carta.[62] But, at the very least, in adopting the Blackstonian formulation in its latter usage of "liberty," the Maryland Constitution appears intended to encapsulate the Blackstonian view of liberty, including the personal right to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct."[63] Ten of the fourteen states at this time plus Kentucky constitutionally protected liberty, with all but Virginia using a Blackstonian formulation.[64]

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[61] Blackstone built from John Locke, who is often credited for creating this trilogy. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271, 350 (Peter Laslett ed., student ed. 1988) (1689). But where Locke argued that the state power must be rationally directed to protecting "Property," which Locke collectively describes as "Lives, Liberties and Estates," Blackstone argued for a view of these "absolute rights" as things that cannot be infringed by the state. Blackstone at 125. The phrasing used in these Law of the Land Clauses—"That no freeman ought to be . . . deprived of his life, liberty, or property"—reflects Blackstone's view, not Locke's.
JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271, 350 (Peter Laslett ed., student ed. 1988) (1689) (using the terms "Lives, Liberties and Estates" as a collective to describe the "Property" that state power must be directed to protecting); Blackstone at 125; [[CITE]] (for linking these things).

[62] Blackstone's statement of these rights was a distillation of the protections conveyed via the Magna Carta.

[63] *Cf.* Butler v. Craig, 2 Md. 214 (1787) (relying on English common law authorities to grant a woman her freedom rather than the Maryland Constitution); 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).

[64] Maryland, North Carolina (identical clause to Maryland), South Carolina (identical clause to Maryland), Delaware (Blackstonian), Pennsylvania (Blackstonian), New York (both), New Hampshire (Blackstonian), Vermont (both), Massachusetts (both), Virginia (no Blackstonian trio: only references "liberty"), and Kentucky (Blackstonian). These distinctions may have had little import, as state courts largely interpreted these clauses broadly. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 664 (2009) ("[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. also* Trevett v. Weeden (R.I. 1786) (accepting the argument that the Rhode Island Charter included the Magna Carta and other natural and customary English rights); Ham v. M'Claws, 1 S.C.L. 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* Charta."); Mass. Const. of 1780, pt.

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." This guarantee of the right to emigrate was essentially limitless, recognizing the "natural inherent right" held by "all men." 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 not be capable of being elected a representative until after two years residence."[65] Pennsylvania's constitutional protection of immigration was broad as well, limited only by a "good character" requirement and a one/two year residency requirement. These provisions are representative of the emigration and immigration clauses used during this period, which six of the fourteen states plus Kentucky included in their constitutions at that time.[66] South Carolina, Maryland, and Massachusetts additionally guaranteed freedom from being exiled, essentially constitutionalizing a right to stay in the state. Including this, nine states plus Kentucky constitutionally guaranteed one or more of these rights related to extraterritorial movement.

In addition to these direct guarantees, six states constitutionally carried a subset of such protections in one or more qualifications clause. Qualifications clauses permitted state residents who had satisfied a residency requirement to be an elector, representative, senator, or governor.[67] 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

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1, 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 . . . .").

[65] *See* Chapter I, § XV; Chapter II, § 42. The Pennsylvania Constitution of 1790 shortens but does not weaken this guarantee of emigration, writing: "That emigration from the state shall not be prohibited." Art IX, § XXV.

[66] Pennsylvania, Rhode Island, North Carolina (just immigration), Virginia (just immigration), New York (just immigration), Vermont, and Kentucky (just emigration).

[67] Maryland, New Jersey, Georgia, New Hampshire, South Carolina, Massachusetts.

preceding his election shall have been an inhabitant of this state . . . ."[68] 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.[69] 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 did not include qualifications clauses in counting movement protections, given the indirect nature of such protections. If qualifications clauses that confer some 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 protect movement in their constitutions—had qualifications clauses that confer implicit rights to recent immigrants.

Another way by which movement was constitutionally protected at the time was by guaranteeing the right to free assembly. The Pennsylvania Constitution of 1776, the New Hampshire Bill of Rights of 1784, and, of course, the Bill of Rights to the U.S. Constitution, secure the right to peaceable assembly.[70] 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"[71]—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 is strictly limited to that necessary to petition—as some have argued[72]—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

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[68] https://www.nh.gov/glance/house.htm.

[69] https://avalon.law.yale.edu/18th_century/nj15.asp. New Jersey's representative qualification clause reads: "no person shall be entitled to a seat in the said Assembly unless he be, . . . for one whole year next before the election, an inhabitant of the county he is to represent, and worth five hundred pounds proclamation money . . . ." https://avalon.law.yale.edu/18th_century/nj15.asp. For another example of a representative qualification clause, see: "all inhabitants . . . of full age, who are worth fifty pounds proclamation money . . . and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote." Art IV.

[70] BILL OF RIGHTS Art. 32.

[71] JOHN INAZU, LIBERTY'S REFUGE, THE FORGOTTEN FREEDOM OF ASSEMBLY at 2 (2012).

[72] *Id.* at 7, 39-40.

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 principle streets," and to gather "to indulge in healthful recreations and innocent amusements" like "dancing in the open air."[73] 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.[74] These clauses, as well as related clauses placing the military "under strict subordination to . . . the civil power,"[75] were a reaction to the "military usurpation" of Great Britain in the immediate pre-colonial period.[76] As the Declaration of Independence itself explains, the King had "affected to render the military independent of and superior to the civil power."[77] This took a number of forms, with "[t]he attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to enforce martial rule, excit[ing] the greatest indignation."[78] 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.[79] Constitutional prohibitions on martial law protect a substantially wider range of conduct than just movement—and I have not included 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

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[73] *Id.* at 7, 42-44.
[74] New Hampshire and Maryland.
[75] Pennsylvania Constitution of 1776; *see also* Delaware Constitution of 1776; Maryland Constitution of 1776, North Carolina Constitution of 1776, South Carolina Constitution of 1778.
[76] Ex parte Milligan, 71 U.S. 2, 37 (1866).
[77] DECL. OF INDEPENDENCE.
[78] Ex parte Milligan, 71 U.S. 2, 37 (1866). The resulting objections of the colonists to martial law was accordingly broad, with Massachussettes and Virginia colonial leaders decrying the "attempt to supersede the course of the common law" and to "annul[] the law of the land." *Id.* at 28.
[79] *Id.* at 38.

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 and often redundant ways in which movement was constitutionally protected by the states 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. It is likely that free movement was viewed as the sort of unenumerated right of such fundamental importance as to require no explicit protection.[80] 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.[81]

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."[82] 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-

[80] *Cf.* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 625 (2009) ("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.").
[81] *Cf.* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 437 (2010) ("Eleven of the thirteen newly independent American states (as well as Vermont, which claimed the powers of a state) adopted new constitutions designed to specify the powers and duties of their newly independent governments.").
[82] Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language from 1776 to 1789*, 40 T. JEFFERSON L. REV. 103, 121 (2018). It wasn't until several months after this 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, against the hostile invasions and cruel depredations of their enemies." 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 342, 357-58 (Worthington Chauncey Ford ed., 1905).

drafting.[83] And indeed, these states adopted much more substantial constitutions just nine 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).[84] 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. There is nothing about the history of these states, or their respective constitutions, that 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. 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 of the charter 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 in any of our provinces in America."[85] 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.[86] Though the Georgia Charter was surrendered in 1752 (and Georgia was not governed in strict accordance with its Charter even during its applicable period[87]) it does seem

[83] *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 been dangered by our 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.").
[84] New Hampshire Constitution of 1784.
[85] Charter of Georgia in Poore, ed., Federal and State Constitutions, 1:369. This was the first objective announced in the Georgia Charter's Preamble.
[86] ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA, 1732-1968 at 15-16 (1948; rpt., Athens, Ga., 1970).
[87] The Georgia Historical Quarterly , Spring 2009, Vol. 93, No. 1 (Spring 2009), at 58-59 (noting that no governor was ever appointed, and that the "corporation enacted only three laws during the twenty-year period of the trusteeship").

unlikely that the newly-independent colonists would have intended to grant themselves fewer rights through their constitution than what 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."[88] 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. Indeed, in the words of one leading commentator, it was "hastily drafted during wartime"[89] and was "little more than a colonial charter."[90] Indeed, the New Jersey Constitution of 1776 was subject to widespread contemporaneous criticism,[91] including being negatively singled out by both James Madison (in *Federalist No. 47*)[92] and Alexander Hamilton (in *Federalist No. 66*).[93] Moreover, like with Georgia (and much of the rest of what would 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 years."[94] 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.[95] Given

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[88] The Georgia Historical Quarterly , Spring 2009, Vol. 93, No. 1 (Spring 2009), at 69-70.
[89] Robert F. Williams, *Afterword: The New Jersey State Constitution Comes from Ridicule to Respect*, 29 RUTGERS L.J. 1037, 1038 (1998).
[90] Chief Justice Deborah T. Poritz (Ret.), *A Roadmap Through the Modern New Jersey Constitution*, 44 RUTGERS L.J. 599, 601 (2014).
[91] Robert F. Williams, *Afterword: The New Jersey State Constitution Comes from Ridicule to Respect*, 29 RUTGERS L.J. 1037, 1040 (1998).
[92] THE FEDERALIST NO. 47, at 318 (James Madison) (Modern Library ed. 1964).
[93] 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 federal single executive President by reference to New Jersey's similar establishment of a unified executive).
[94] Giancarlo Piccinini, *Achieving Access Equity: Undoing De Facto Discrimination in Public Transit*, 46 SETON HALL LEGIS. J. 221, 227 (2022). These travel routes followed navigable bodies of water and property boundaries, and were often "adapted (in whole or in part) from existing Native American trails or paths"). *See* New Jersey Dep't of Transp. et al., *New Jersey Historic Roadway Study*, 17 (2011), https://www.state.nj.us/transportation/about/publicat/historicroadwaystudy.pdf.
[95] Giancarlo Piccinini, *Achieving Access Equity: Undoing De Facto Discrimination in Public Transit*, 46 SETON HALL LEGIS. J. 221, 227 (2022). The road served as the

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.[96]

C. Free Movement at the Ratification of the 14th Amendment

1. The Pre-War Years

Although the right to move freely was occasionally recognized by courts in the first part of the nineteenth century,[97] movement again became a flash point in the decades leading up to the Civil War. African Americans fled slavery, seeking freedom in northern states and the western territories, as well as internationally, in Canada, Mexico, Spanish Florida, the Caribbean islands, and even Europe.[98] 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 Civil War.[99]

Supporters of slavery responded with laws restricting movement. Missouri, for example, banned even free African-Americans from immigrating into the state.[100] In 1850, Congress went further in passing the second of the Fugitive Slave Acts,[101] which compelled the capture and forcible relocation of enslaved people—

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backbone of the Philadelphia-to-New York corridor that was a "powerful influence on all of New Jersey's transportation." *Id.*

[96] *Cf.* Holmes v. Watson (NJ, 1780) (premising the requirement the juries have twelve people on the "common law of England," on "immemorial custom," and on prior colonial charters); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 630 (2009).

[97] *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 reside in any other state").

[98] https://www.nps.gov/subjects/undergroundrailroad/what-is-the-underground-railroad.htm.

[99] https://education.nationalgeographic.org/resource/underground-railroad.

[100] http://www.sos.mo.gov/archives/education/aahi/earlyslavelaws/An%20Act%CC20Respecting%CC20Slaves,%C47.pdf.

[101] The first, the Fugitive Slave Act of 1793 was largely unenforced by the Northern states, many of which enacted "Personal Liberty Laws," which granted significant rights to both accused runaways and free blacks. https://www.history.com/topics/black-history/fugitive-slave-acts; *cf.* Prigg v. Pennsylvanian (1842) (striking down Pennsylvania Personal Liberty Law as superseded by federal law).

going so far as to require private citizens to participate in its oppressive project.[102] The 1850 Act was met with fierce political resistance, with several states seeking to bypass or nullify the law entirely, including by passing "Personal Liberty Acts," which protected their citizens from removal.[103] 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.[104] Just as the Underground Railroad raised 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 precipitating the Civil War.[105]

The question of whether states could constitutionally restrict movement ultimately made its way to the Supreme Court during this period, albeit in a pair of cases not involving 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. In a pair of 5-4 decisions, the Supreme Court struck down these taxes. The *Passenger Cases* produced no majority opinion, with eight justices writing separately. They have nevertheless been influential, with one passage from Chief Justice Taney in particular cited regularly by later courts considering movement-related issues: "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."[106] Thus, even as proponents of slavery were using movement restrictions to preserve the

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[102] https://www.history.com/topics/black-history/fugitive-slave-acts

[103] See, e.g., Pennsylvania Massachusetts Personal Liberty Act (1847); Massachusetts Personal Liberty Act (1857).

[104] https://www.history.com/topics/black-history/fugitive-slave-acts (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).

[105] This also took the form of disagreement related to assembly, largely revolving around the freedom of slaves and free blacks to assemble. *See, e.g.*, JOHN INAZU, LIBERTY'S REFUGE, THE FORGOTTEN FREEDOM OF ASSEMBLY at 30-35 (2012) ("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 . . . .'").

[106] Smith v. Turner, 48 U.S. 283, 492 (1849) (cited by *Guest*, *Crandall*, and *Shapiro*). Though influential, this passage is not from the majority opinion: the *Passenger Cases* produced eight separately authored opinions and no majority.

institution of slavery, the fundamental importance of free movement was being affirmed at the highest level of the judiciary.

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."[107] Racially motivated movement restrictions were common, mostly local but often with interstate reach.[108] And it was in this landscape—with not only the recent oppressions of antebellum America in mind, but the many immediate post-war problems—that 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 different ways. The Ku Klux Klan Act of 1871, which was 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 "conspire[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 . . . ."[109] This provision, now 28 USC § 1985(3), was aimed at preventing racially motivated violence such as attacks by members of the Klan against Black highway travelers, which had become unfortunately common.[110]

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[107] Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 534 (1985).
Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1630 (2019).

[108] For an example of this in the waning days of the Civil War, see HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 42 (2009) (describing one such movement restriction in 1865 Memphis: a Bureau official prohibited "ferrymen from transporting freedpeople across the Mississippi River from Arkansas into Memphis unless the prospective passengers carried a note from their employer authorizing their travels").

[109] Section 1985(3). The Act retains significant contemporary salience given its role in enacting Section 1983, the primary vehicle by which civil rights claims are litigating. Section 1985(3) also remains in force.

[110] *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").

This provision of the Ku Klux Klan Act follows from the Fourteenth Amendment, which itself protects movement via its broad guarantees of privileges and immunities, of equal protection, and of liberty—each of which the Supreme Court has pointed to as a source of movement-related rights.[111] 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 place.[112] And by repeating the Blackstonian trio found in the Fifth Amendment, the Fourteenth Amendment reaffirms the importance of, among other things, liberty. "Liberty" would have been understood no less broadly 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 had again become threatened by the recently defeated proponents of slavery.[113] As the nineteenth century jurist

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[111] *See* Part II.

[112] *Compare* U.S. CONST. AMEND. IV *with* U.S. CONST. AMEND. 5.

[113] 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, 558-563 (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) (recognizing that "[t]he 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; all this is involved."); Beebe *v.* State, 6 Ind. 501 (1855). *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*); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 608 (2009) (articulating the historical importance of Coke's broad view of due process and liberty). For other challenges brought, at least in part, under some state constitutional provision akin to the "liberty" clause of Due Process, see: McCarthy *v.* Hinman, 35 Conn. 538 (1869) (statute providing commitment for the abandonment of a child); Devin *v.* Scott, 34 Ind. 67 (1870) (statute providing guardianship for "drunkards"); Parker *v.* Kaughman, 34 Ga. 136 (1865) (statute providing compulsory military service); Kneedler *v.* Land, 45 Pa. St. 238 (1863) (statute involving conscription in the Civil War); Nott's Case, 11 Me. 208 (1834) (statute providing the commitment of the poor). None of these decisions includes any significant reasoning on the meaning of the word "liberty.

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."[114]

The Thirteenth Amendment also acts to protect movement. Slavery is, of course, 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."[115] Moreover, by abolishing slavery except as punishment for criminal acts, the Thirteenth Amendment obviated some of the most divisive pre-War limitations on movement: the Fugitive Slave Acts.

Perhaps, though, the most direct evidence that movement was viewed as a right of fundamental importance during this period came not from Congress but from the Supreme Court itself in *Crandall v. Nevada*. *Crandall* was decided in the brief period after the Fourteenth Amendment was passed by the Senate but before it was ratified by the states. 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" as violating the constitutional right to travel.[116] The Court explicitly refused to locate the right in either the Commerce Clause or the Import-Export Clause. Instead, 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:

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[114] FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF GOVERNANCE at 95 (1853); *see also* HENRY BRANNON, TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES at 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 at 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.").

[115] https://www.archives.gov/research/african-americans/migrations/great-migration ("Approximately six million Black people moved from the American South to Northern, Midwestern, and Western states roughly from the 1910s until the 1970s.").

[116] *Cf.* 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").

> [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 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.[117]

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

Crandall, moreover, sets out a broad view of this right, 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. *Crandall* is clear in recognizing 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.[118]

3. State Constitutions at the Ratification

Moreover, movement was protected in some form by [at least 34] of the 37 state constitutions at the time that the Fourteenth Amendment was ratified.

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[117] Crandall v. State of Nevada, 73 U.S. 35, 44 (1867).

[118] *Id.*; *see also* Slaughter-House Cases, 83 U.S. 36, 79, 21 L. Ed. 394 (1872) (affirming this principle). *Cf.* Paul v. State of Virginia, 75 U.S. 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"), *overruled on other grounds by* United States v. S.-E. Underwriters Ass'n, 322 U.S. 533 (1944); Ward v. State, 79 U.S. 418, 430 (1870) (noting that "it will be sufficient to say that the [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union"); Twining v. State of N.J., 211 U.S. 78, 97 (1908) ("among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state" and "to enter the public lands"), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

In most respects, state constitutional protections of movement in 1868 looked similar to protections of movement in 1791. Thirty states, more than three quarters of the total, had constitutional protections of liberty at the time of ratification, with 82% of Americans living in states with such a clause.[119] This is a slightly higher percentage than at the time that the Bill of Rights were ratified, 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."[120] Two states included 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."[121]

Similarly, thirty four of the thirty seven states at that time—in which 94% of the American people lived—protected the constitutional right to peaceable assembly.[122] On the other hand, relatively fewer states—[] states—explicitly protected the right to emigrate (six), immigrate (eleven), or be free from exile () at this time. This may have been due in part to the perception that immigration clauses are superfluous; Article IV's Privileges and Immunities Clause guarantees this right.[123] Nevertheless, there does appear to have been a trend toward including immigration protections at the time: 37% of the post-1855 constitutions include such clauses whereas only 22% of the pre-1855 constitutions include them. State constitutional prohibitions of martial law were also reasonably uncommon; only nine states included clauses barring the imposition of martial law in times of peace.[124] Moreover, not all of these clauses could reasonably be understood as encompassing the movement-related rights so often implicated by martial law. Maryland's Constitution of 1867, for example, read: "no person except regular soldiers and marines, and mariners in the service

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[119] 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, 67 (2008).
[120] *Id.*
[121] 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 non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.").
[122] 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, 43 (2008).
[123] *Id.* at 93.
[124] *Id.* at 80.

of this State, or militia, when in actual service, ought, in any case, to be subject to or punishable by martial law."[125]

In addition to these protections found at the time of the ratification of the Bill of Rights, several new movement-related constitutional guarantees had been adopted by 1868. Most squarely, Mississippi constitutionally guaranteed "[t]he right of all citizens to travel upon all public conveyances,"[126] and Tennessee guaranteed "equal participation in the free navigation of the Mississippi."[127] Moreover, three states in 1868 had constitutional clauses that protected residents who temporarily left the states. South Carolina, for example, guaranteed that "Temporary absence from the State shall not forfeit a residence once obtained."[128]

Many states in this period also may have protected movement via a reference to natural and inalienable rights (27) or fundamental principles (7).[129] 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 recurrence to fundamental principles."[130] 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 in-alienable

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[125] 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."). Additionally, there appears to have been a trend away from including such clauses in constitutions: "This right was protected in 39% of the pre-1855 constitutions but in only 11% of the post-1855 constitutions." 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, 80 (2008).
[126] Mississippi Constitution of 1869, § 24.
[127] https://www.capitol.tn.gov/about/docs/tn-constitution.pdf
[128] https://www.carolana.com/SC/Documents/South_Carolina_Constitution_1868.pdf.
[129] 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, 89 (2008). "Twenty percent of the American people in 1868 lived in states with these clauses in their state constitutions." *Id.* at 89.
[130] Wis. Const. of 1848, art. I, § 22.

rights."[131] Ninth Amendment analogues, in 18 states, similarly suggest that the lack of any explicitly set out right to movement should not be understood as evidence for the lack of such a right.

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* historical inquiry thus weighs strongly in favor of a fundamental right to move freely—locally, interstate, and internationally.

II. Free Movement After Ratification

In the 155 years since the Fourteenth Amendment was ratified, 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 "great concept[] . . . [of] 'liberty'" has "gather[ed] meaning from experience,"[132] the fundamental nature of this right has only grown more apparent.

A. Late-Nineteenth Century

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 prostitute.[133] Before arresting the plaintiff, "all [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." 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 . . . ." 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

[131] 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, 118 (2008)
[132] Nat'l Mut. Ins. Co. of Columbia v. Tidewater Transfer Co., 337 U.S. 582 (1948).
[133] 44 N.W. 579 (MI 1889).

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."[134]

Other states considering similar issues in this period reached the same essential 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 of any city or town after 9 o'clock at night." This, the Court held, 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."[135] 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."[136]

Even those state court decisions upholding restrictions on movement at this time affirmed the existence of the right—just not always its applicability. In *Dunn v. Commonwealth*, for example, the Kentucky Supreme Court 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."[137] 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.[138] 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.

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[134] *Id.* (noting, also, "[t]hese 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").

[135] Ex parte McCarver, 39 Tex. Crim. 448, 451-52 (1898). *McCarver*, which was brought on writ of *habeas corpus*, also rooted its conclusion in the unreasonableness of the legislation "usurp[ing] the parental functions." *Id.* at 452.

[136] Gastenau v. Commonwealth, 108 Ky. 473 (1900).

[137] Dunn v. Commonwealth, 105 Ky. 834 (1899). *Cf. also* Ex parte Branch, 234 Mo. 466 (1911) (upholding 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 meet in one person at the same time, they constitute a vagrant. . . . [T]he legislative right to punish vagrancy has been asserted since the reign of Edward III, and has been in our statutes at least since 1835").

[138] *Id.*

Indeed, the notion that free movement was a right inherent to personal liberty was repeated on multiple occasions in this period by the United States Supreme Court itself, albeit only in dicta. First, Justice 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."[139] Justice Harlan made the connection between liberty and movement more even directly in his *Civil Rights Cases* dissent, relying on the right to move freely to argue against segregation: "It 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." Justice Harlan further expanded on this view in his influential dissent in *Plessy v. Ferguson*: "'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.' 1 Bl. Comm. *134. 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."[140]

Though Justices Field and Harlan were in the minority in these decisions, their view of free movement does not appear to have been. Just four years after *Plessy*, this sentiment was echoed by the majority in *Williams v. Fears*: "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."[141] Between 1875 and 1900 eleven justices ultimately signed on to opinions that endorsed the fundamental right to free movement.

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[139] Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting).

[140] Plessy v. Ferguson, 163 U.S. 537, 557 (1896), *overruled by* Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

[141] Williams v. Fears, 179 U.S. 270, 274 (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 "indirectly" or "remotely" affected individual laborers' "freedom of egress from the state" and thus did not violate the right). Justice Harlan, somewhat ironically, dissented in the decision.

Other discussions at this time of the meaning of "liberty" as it is used in the Fourteenth Amendment or a similar state constitutional clause support this reading of the term. 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."[142] A consistent theme in ratification-era cases considering the meaning of the "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."[143] That is to say: "liberty," as it is used in the Fourteenth Amendment meant more than simply freedom from confinement.

B. 20th Century to the Present

The Twentieth Century was an important one for constitutional law in relevant part, with the rise and fall of *Lochner* and the development of the contemporary fundamental rights analysis and tiers of scrutiny. The many shifts in fundamental rights jurisprudence have left significant questions today regarding the extent of the fundamental rights protected by the Constitution, or even the appropriate constitutional framework for protecting such rights. Throughout, however, the Supreme Court has remained consistent in recognizing free movement as a fundamental right; whatever the exact reach or structure of fundamental rights analyses, movement is protected.

One such strong recognition of the fundamental right to move freely came in *United States v. Wheeler*, a 1920 case involving the kidnapping and deportation of over 1,000 striking mine workers by a posse organized by the mining company.[144] 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

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[142] 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, 391 (1891).

[143] Bertholf v. O'Reilly, 74 N.Y. 509, 515 (1878); In re Jacobs, 98 N.Y. 98, 106–07 (1885); People v. Marx, 99 N.Y. 377, 386 (1885); People v. Gillson, 109 N.Y. 399 (1888); State v. Goodwill, 33 W. Va. 179 (1889), *overruled by* White v. Raleigh Wyoming Min. Co., 113 W. Va. 522 (1933).

[144] United States v. Wheeler, 254 U.S. 281, 292 (1920). *Wheeler* 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*, 383 U.S. 745, 764, n.16 (1966).

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."[145] This recognition of the right is not specifically tied to "liberty"—*Wheeler* locates it instead "upon implications rising from [the Constitution] as a whole"—but its reach is the same: *Wheeler* recognizes a fundamental right to stay in a state, to travel within a state, and to travel between states.

The Court's next major consideration of free movement came twenty years later, in *Edwards v. California*. In *Edwards*, the appellant had brought 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."[146] The Court unanimously held that the law unconstitutionally restricted the right to interstate travel, with the five justices in the majority premising their ruling solely on the Dormant Commerce Clause. But as Justice Douglas noted in his concurrence, this 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 indicate the reach of the constitutional question which is present."[147] 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.[148]

Each of these cases involved movement limitations within the country. In *Kent v. Douglas* and *Aptheker v. Secretary of State*, the Supreme Court addressed the question of whether passport denials also implicate the right to move freely. In *Kent*, the Court held that they did: "The right to travel is a part of the 'liberty' of which the citizen cannot

[145] *Wheeler*, 254 U.S. at 293.
[146] Edwards v. People of State of California, 314 U.S. 160, 171 (1941).
[147] *Edwards*, 314 U.S. at 177 (Douglas, J., concurring, joined by Justices Black and Murphy).
[148] *Id.* Justice Jackson's separate concurrence also endorses this view. *Id.* at 184 (Jackson, J. concurring). This should not be understood as the sole basis for the right. *See, e.g.*, Part I. Regardless, even if the right to travel is best conceptualized as a privilege, there is some authority for extending it to non-citizens. *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") (cited favorably to support a fundamental right to travel in *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974)).

be deprived without the due process of law under the Fifth Amendment."[149] The Court traced this right back to Article 42 of the Magna Carta while recognizing its 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."[150] The specific aspect of this right to move that was impacted, the Court held, was "the right of exit [that] is a personal right included within the word 'liberty' as used in the Fifth Amendment."[151] Though the *Kent* Court expressly declined to consider the "extent to which [this right] can be curtailed," its recognition of the right was not dicta: *Kent*'s conclusion that Congress did not "g[ive] the Secretary of State unbridled discretion," "start[ed]" with the recognition that this involved "an exercise by an American citizen of an activity included in constitutional protection."[152]

Just six years later, the Court (with three new justices) fully reached the constitutional question, holding that the newly effective Section 6 of the Subversive Activities Control Act violated the fundamental right to travel. After repeating much of *Kent*'s description of this right, *Aptheker* concluded that "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 relative in Ireland, or to read rare manuscripts in the Bodleian Library of Oxford University."[153] *Kent* and *Aptheker* strongly affirm the fundamental right to free movement, relating it to the Fifth Amendment's "liberty" guarantee and making clear that its reach extends to travel outside of the United States.[154]

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[149] Kent v. Dulles, 357 U.S. 116, 125 (1958).
[150] *Id.*
[151] *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. Doc. No. 417, 85th Cong., 2d Sess.; 104 Cong. Rec. 13046)).
[152] *Id.*; *see* Aptheker v. Sec'y of State, 378 U.S. 500, 506 (1964) (noting that "the decision protected the constitutional right to travel").
[153] *Aptheker*, 378 U.S. at 512, 514.
[154] *See also id.* at 520 (Douglas, J., concurring) ("This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful . . . ."); *id.* at 525 (Clark, J., dissenting) (recognizing that "the right to travel abroad is a part of the liberty protected by the Fifth Amendment" while concluding that the present "restriction [of travel] is reasonably related to the national security").

Following *Kent* and *Aptheker*, the Supreme Court has regularly recognized movement as a fundamental right.[155] Although many of the Court's subsequent discussions have referenced the fundamental right to "interstate travel," that appears to be more a function of their facts than an intentional choice to limit the right. In a series of decisions, for example, the Court struck down durational residency requirements for welfare recipients, *Shapiro v. Thompson*, *Graham v. Richardson*, *Saenz v. Roe*,[156] voting, *Dunn v. Blumstein*,[157] non-emergency medical care, *Memorial Hospital v. Maricopa County*,[158] and civil service preference for veterans, *Attorney General of New York v. Soto-Lopez*,[159] as impermissible burdens on interstate migration. None of these cases involved regulations on *intra*state travel, and so their respective recognitions of the right to travel "interstate" do not—and in fact could not—represent any sort of binding narrowing of the right.[160] Indeed, in *Demiragh v. DeVos*, a federal court of appeals case decided around this time and cited favorably in *Memorial Hospital v. Maricopa County*, the Second Circuit recognized "the right to travel . . . as a 'fundamental'

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[155] For one particularly fleeting recognition, see *United States v. Price*, 383 U.S. 787, 806 (1966) (giving three examples of "fundamental rights: . . . the freedom to travel, nondiscriminatory access to public areas and nondiscriminatory educational facilities").
[156] Graham v. Richardson, 403 U.S. 365, 375 (1971). The statutes in *Graham* withheld the benefits just for aliens. *Id.*; *see also* Oregon v. Mitchell, 400 U.S., at 237 (separate opinion of Brennan, White, and Marshall, JJ.) (recognizing the "fundamental importance" of this right), *Id.* at 285-86 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined) ("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, 559 (D. Conn. 1971) (recognizing interstate travel as a fundamental right), *aff'd*, 404 U.S. 1054 (1972).
[157] 405 U.S. 330, 331, 338 (1972) (describing the "right to travel" as a "fundamental personal right"); *see also id.* at 364 (Burger, J., concurring) ("The existence of a constitutional 'right to travel' does not persuade me to the contrary.").
[158] 415 U.S. 250 (1974).
[159] 476 U.S. 898, 901-05 (1986) (affirming again the fundamental nature of the right to travel, while recognizing again that the right may not be strictly tied to any textual provision of the Constitution); *cf. id.* at 921 (O'Connor, J., dissenting) (arguing, instead, that that "the limited preference granted under the ... New York law can[not] realistically be held to infringe or penalize the right to travel," which Justice O'Connor argued was best conceptualized as protected by Article IV's Privileges and Immunities Clause).
[160] *Memorial Hospital v. Maricopa County* involved a county-based restriction, so it conceivably could have addressed this question. 415 U.S. at 255. Instead, the Court expressly declined to consider whether there is any "constitutional distinction between interstate and intrastate travel" because the appellant "has been effectively penalized for his interstate migration" and because the Arizona Supreme Court did not "construe the waiting-period requirement to apply to intrastate but not interstate migrants." *Id.*

one" in striking down a city durational residency requirement.[161] The court's discussion was not limited to interstate travel, presumably because the requirement in question applied to any travel from outside the *city*.[162] These durational residency cases thus affirm the fundamental nature of the right to free movement, as well as its specific protection of interstate migration—without limiting the right.

United States v. Guest and *Griffin v. Breckenridge* similarly affirm the fundamental nature of the right to free movement—at least interstate—albeit while presenting a somewhat murkier picture with respect to the local extent of the right's protections.[163] *Guest*,

[161] 476 F.2d 403, 404 (2d Cir. 1973). Though the intervening plaintiff had moved from Maryland, this fact does not appear to have been given any weight.

[162] *Id.* For another hint at this, *Saenz v. Roe* characterizes *Edwards v. California* as "vindicate[ing]" "the right to go from one place to another, *including* the right to cross state borders while en route." 526 U.S. at 501. This framing strongly suggests that the right to interstate travel is just one component of a broader right to free movement. *See also id. at* 511–12 (Rehnquist, J., dissenting, joined by Thomas, J.) ("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).)

[163] *Guest*, like *Shapiro* and many of the other durational residency cases, describes a range of constitutional sources to which the Court has attached movement-related rights before concluding that there is no need to identify any specific clause because "[t]he constitutional right to travel from one State to another occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966); *see also id.* at 770 ("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; *see also 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 669-70 (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." But "the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real."); *see also*
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, 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) (same); *Zobel* 457 U.S. at 66, 76 (Brennan, J., concurring, with Marshall, Blackmun, and Powell, Js.) (noting that this ruling could also be justified by the "right to travel," which Justice Brennan concludes is "unnecessary" to "assign . . . some

interestingly, framed the right at issue as "interstate travel," despite involving travel on the "public streets and highways in the vicinity of Athens, Georgia"[164]—which is more than an hour's drive from the nearest state border. There is little in *Guest* to suggest that the Court's framing of the right as "interstate travel" might subsequently limit such a purely intrastate claim.[165]

Griffin likewise embraced "the right of interstate travel" in a circumstance apparently involving only *intra*state travel.[166] However, *Griffin*, unlike *Guest*, suggested that this distinction might matter: the *Griffin* Court noted that 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."[167] *Griffin* thus at least hints at a right to travel that does not extend to local movement. Yet I do not think that *Griffin* limits the fundamental right: the 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)], 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

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textual source in the Constitution": even if there is "no citable passage in the Constitution to assign as its source, . . . I find its unmistakable essense in that document that transformed a loose confederation of States into one Nation"); *id.* at 72 (O'Connor, J., concurring) (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 residenc 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").

[164] United States v. Guest, 383 U.S. 745, 757 at n.13 (1966).

[165] *Cf.* United States v. Moore, 129 F. 630, 633 (C.C.N.D. Ala. 1904) (cited favorably by *Guest*, 383 U.S. at 759) ("Among the rights and privileges secured to citizens of the United States, expressly or impliedly, . . . are the right to . . . of his own volition, to become a citizen of any state of the Union by bona fide residence therein, with the same rights as other citizens of that state; . . . the right to go to and return from the seat of government; . . . the right to pass from one state to any other for any lawful purpose; . . . .").

[166] 403 U.S. 88. The petitions 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").

[167] Griffin v. Breckenridge, 403 U.S. 88, 106 (1971).

constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery."[168]

The opinion that most directly suggests that intrastate movement may not be protected is *Bray v. Alexandria Women's Health Clinic*.[169] *Bray*, like *Griffin*, discussed "the right of interstate travel" in the context of a Section 1985(3) claim against private conspirators.[170] This context is important because Section 1985(3) does not protect all constitutional rights—it only protects rights secured against private action.[171]

Without identifying the source of the right being discussed, *Bray* described the right in question as "protect[ing] interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers."[172] Because *Bray* does not specify the source of this right, it is unclear whether *Bray*'s reference to the "right to interstate travel" invokes the fullest breadth of the fundamental right to free movement, or even that it invokes the fundamental right at all—as opposed to whatever other travel-related right is secured against private action through Section 1985(3).[173]

Indeed, the Court's discussion in *Bray* appears limited to an application of the right to travel springing from Article IV's Privileges and Immunities Clause: the Court cites two right-to-travel cases, prefacing the respective parentheticals that follow these cases with "Art. 4, § 2, inhibits" and "Art. 4, § 2, insures."[174] Such a limitation would make some amount of sense, given that the language of Section 1985(3) explicitly invokes "privileges and immunities." Moreover, the *Bray* Court's reasoning for why a specific *intra*state restriction did not violate the right to interstate travel echoes the discrimination test used in the Privileges and Immunities context: "Such a purely intrastate restriction

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[168] *Id.* at 107. This conclusion is further reinforced by the fact that Justice Douglas—the author of a number of opinions recognizing a broad right to free movement—fully joined the majority in *Griffin*.
[169] 506 U.S. 263 (1993).
[170] *Id.* at 277.
[171] *Id.*
[172] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993).
[173] *Cf., e.g.*, *Bray*, 506 U.S. at 308 (1993) (Stevens, J., dissenting, joined by Blackmun) ("To date, the Court has recognized as rights protected against private encroachment (and, hence, by § 1985(3)) only the constitutional right of interstate travel and rights granted by the Thirteenth Amendment."); *id.* (recognizing that "important questions concerning the meaning of § 1985(3) have been left open in our prior cases, including whether the statute . . . provides a remedy for the kind of interference with a woman's right to travel to another State to obtain an abortion revealed by this record").
[174] *Id.*; *see also* United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott, 463 U.S. 825, 832 (1983) (noting that "[t]he Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals*'").

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."[175] Such citizen-of-other-state discrimination 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.[176] *Bray* is thus best understood as clarifying the particular right to interstate travel secured against private action through Section 1985(3), rather than as a limitation to the fundamental right to free movement writ large.[177]

If *Bray* or *Griffin* suggest that the fundamental right does not protect *intra*state travel, *Papachristou v. City of Jacksonville* and *Kolender v. Lawson*, on the other hand, embrace a particularly local right to move freely. *Papachristou* "involved 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."[178] *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*."[179] Both ordinances operated on a strictly local—intrastate—level. And 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." The *Papachristou* Court unanimously held 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."[180] The Court 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

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[175] *Bray*, 506 U.S. at 277 (1993). Toomer v. Witsell, 334 U.S. 385, 398 (1948).
[176] *See also id.* at n.7 (noting that the dissent's reliance on Dormant Commerce Clause 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 "right of interstate travel we are here discussing").
[177] This reading would be consistent with *Griffin*, which also explores the same question in the context of Section 1985(3), and which also stands out for apparently limiting the applicable right to interstate travel.
[178] Papachristou v. City of Jacksonville, 405 U.S. 156, 156 & n.1 (1972).
[179] Kolender v. Lawson, 461 U.S. 352, 353 (1983).
[180] Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

of Rights," but they "have dignified the right of dissent and have honored the right to be noncomformists and the right to defy submissiveness."[181] *Papachristou* never quite makes explicit its recognition that these sorts of activities are "fundamental," but its import is clear.[182]

Kolender makes this connection more directly in reaching the same essential conclusion for the same essential reason. "Statutory limitations on [individual] freedoms," *Kolender* noted, "are examined for substantive authority and content as well as for definiteness or certainty of expression."[183] *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."[184] *Kolender*'s identification of these freedoms are 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.[185]

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 to not move. Like with *Papachristou* and *Kolender*, *Morales* involved a vagueness challenge to a vagrancy law. 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

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[181] *Papachristou*, 405 U.S. at 164.
[182] *Id.* (*citing 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 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 . . . .").
[183] *Kolender*, 461 U.S. 352, 357 (1983).
[184] *Id.* at 358 (citing *Kent,* 357 U.S. at 126; *Aptheker,* 378 U.S. at 505–506 (1964)).
[185] *Id.* & n.8; *cf. also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 96 (1965) (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 (Edwards v. People of State of California, []) is honored.").

with other persons in a public place," which "the ordinance defines as 'remain[ing] in any one place with no apparent purpose.'"[186] 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."[187]

In his concurrence joined by Justices Souter and Ginsburg,[188] 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,"

> 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.[189]

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.[190] Justice Stevens' recognition of the freedom to loiter—but not his accompanying acknowledgment of the freedom to move—prompted a spirited pushback by Justice Thomas in dissent.[191]

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[186] City of Chicago v. Morales, 527 U.S. 41, 45, 47 (1999).
[187] *Id.* at 60.
[188] *See Id.* at 67 (O'Connor, J., concurring, joined by Breyer) (noting that because this matter is fully resolved by the first set of reasons given, "there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them").
[189] City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999).
[190] That Justice Stevens does so as part of a void-for-vagueness analysis and not a substantive due process analysis, *id.* at 64 n.35, does not make his recognition of the right any less.
[191] "The asserted 'freedom to loiter for innocent purposes,' is in no way 'deeply rooted in this Nation's history and tradition.'" City of Chicago v. Morales, 527 U.S. 41, 98 (1999) (Thomas, J., dissenting, joined by Scalia). In support, Justice Thomas largely relies on the observation "that 'antiloitering ordinances have long existed in the country.'" The American colonists," Justice Thomas notes, "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.

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 due process clause.[192] Similarly, in *Territory of Hawaii v. Anduha*, the Supreme Court of 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 please, and when."[193] 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."[194] And finally, in a decision connecting movement to assembly, the District of New Jersey recognized 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." The Court thus enjoined the offending officials "from in any way interfering with the plaintiffs in their right (1) to be and move about

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Vagrancy laws were common in the decades preceding the ratification of the Fourteenth Amendment, and remained on the books long after." *Id.*

[192] City of St. Louis v. Gloner, 210 Mo. 502 (1908).

[193] 31 Haw. 459, 462 (1930) *affirmed sub nom. by* Territory of Hawaii v. Anduha, 48 F.2d 171, 172-73 (9th Cir. 1931) (concurring in the views expressed by *Gloner* and *Pinkerton* regarding "personal liberty" and "the right of locomotion").

[194] Com. v. Doe, 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) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."); Gomez v. Turner, 672 F.2d 134, 143-44, 143 n.18 (D.C. Cir. 1982) (recognizing "[t]hat citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others"); *see also* Hughes v. City of Cedar Rapids, 840 F.3d 987, 995 (8th Cir. 2016); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1017 (8th Cir. 2006); Doe v. Miller, 405 F.3d 700, 713 (8th Cir. 2005); Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999); Bissonette v. Haig, 776 F.2d 1384, 1391 n.10 (8th Cir. 1985); United States v. Shaheen, 445 F.2d 6, 10 (7th Cir. 1971). *Cf. also* 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").

freely in Jersey City . . . ."[195] This decision was upheld in relevant part by the Third Circuit (which also recognized that "[l]iberty of the person[] include[ed] freedom of locomotion")[196] and the U.S. Supreme Court (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, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens").

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, one that protects purely local movement, interstate movement and migration, and even international travel—essentially the same as that revealed in the *Dobbs-Timbs-McDonald* historical analysis.

CONCLUSION

There is a fundamental right to travel. But more, 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 re-enter the country. Each aspect of this right is strongly rooted in history and tradition, and each has a long pedigree of support in not only the U.S. Supreme Court, but in many other state and federal court decisions considering this issue.

Given its deep roots and wide reach, this is a right that should be applied regularly—to anti-abortion laws limiting abortion-related travel to neighboring jurisdictions, to city-wide curfews seeking to quell an unpopular protest, to quarantine restrictions locking down a community, and to any of the wide variety of other, often anodyne, restrictions limiting free movement.

This fundamental right needn't displace the other constitutional protections of travel, such as the Dormant Commerce Clause or Article IV's Privileges and Immunities Clause, but it should supplement them. Indeed, many restrictions on movement, including a number of the examples described above, implicate the fundamental right to free movement without also violating other constitutional provisions.

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[195] Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 151 (D.N.J. 1938), *decree modified*, 101 F.2d 774 (3d Cir. 1939), *decree modified*, 307 U.S. 496 (1939).
[196] Hague v. Comm. for Indus. Org., 101 F.2d 774, 787 (3d Cir.), *decree modified*, 307 U.S. 496, (1939).

Possibly most importantly, though, recognizing the fundamental right to free movement alongside other constitutional protections of travel is a necessary part of realizing the full reach of the Constitution. After all, free movement is more than an important source 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.