

**TRAVEL TO RESIST:
NOT YOUR GRANDMOTHER’S FUNDAMENTAL RIGHT. OR IS IT?**



Spirit of Idaho Women¹

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¹ *Spirit of Idaho Women* beautifully illustrates the right for which I advocate: travel to resist. Unveiled in 2022, this statue commemorates the women’s suffrage movement. It features a graceful woman at the helm of a procession of shoes. Each pair of shoes represents a different decade of suffragists who used travel to resist in their march towards enfranchisement. Kelcie Moseley-Morris, ‘Remarkable Ability to Persevere’: Idaho Unveils Monument to Women’s Right to Vote, IDAHO CAPITAL SUN (Dec. 13, 2022, 4:30 AM) <https://idahocapitalsun.com/2022/12/13/remarkable-ability-to-persevere-idaho-unveils-monument-to-womens-right-to-vote/>.

II. INTRODUCTION

What do No Kings Day protestors, Charlie Kirk and the Richmond Reproductive Freedom Project all have in common? Whether protesting government action,² advocating for certain beliefs and ideas,³ or evading state law,⁴ they all leveraged travel to resist the status quo. And even though their movements were resistive, every step they took complied fully with applicable law.⁵ But did any of these actors have the freedom—the right—to travel to resist what they didn’t like? Despite centuries of Americans deploying travel to resist, under current doctrine the answer is likely no.

Despite dicta waxing poetic about travel,⁶ the fundamental right recognized by the Supreme Court is a far cry from the robust freedom upon which most Americans rely.⁷ The Court has made

² Corina Knoll, ‘No More Trump!’: Protesters Denouncing the President Unite Across the Country, N.Y. TIMES (Oct. 19, 2025, updated 8:09 AM), <https://www.nytimes.com/2025/10/18/us/protests-trump-no-kings.html>.

³ Robert Draper, *How Charlie Kirk Became the Youth Whisperer of the American Right*, N.Y. TIMES MAGAZINE (Feb. 10, 2025, updated Sept. 12, 2025), <https://www.nytimes.com/2025/02/10/magazine/charlie-kirk-american-right.html?searchResultPosition=2> (Kirk traveled extensively to promote himself, his organizations and his ideas).

⁴ Doris W. Chiu, Anna Bernstein, Alice F. Cartwright & Rachel K. Jones, *Why Six-Week Abortion Bans Make It Impossible for Many People to Get Care*, GUTTMACHER (Oct. 7, 2024), <https://www.guttmacher.org/2024/10/why-six-week-abortion-bans-make-it-impossible-many-people-get-care> (women living in states with total or restrictive abortion bans turn to travel and travel networks to receive health care in states with less restrictions).

⁵ No Kings Day protest organizers obtained permits for their planned demonstrations. *E.g.*, WTVR CBS 6 Web Staff, *Police on Planned ‘No Kings’ Protest in Richmond: Exercise these Rights Safely and Lawfully*, CBS 6 LOCAL NEWS RICHMOND (updated June 14, 2025), <https://www.wtvr.com/news/local-news/richmond-police-no-kings-day-protest-statement-june-13-2025>. Charlie Kirk appeared on college and university campuses by invitation. Draper, *supra* note 3. He founded Turning Point USA, which policy-compliant chapters at more than colleges. *Id.* These chapters “register students to vote, bring conservative speakers to campus and organize a nationwide network of right-wing student-government leaders.” *Id.* The Richmond Reproductive Freedom Project is an abortion fund. Abortion funds are often grassroots organizations founded in response to local conditions. Erin Johnson, *Access and Advocacy: The Philosophies and Practices of Abortion Funds Under Stress* (2024) (Ph.D. dissertation, University of California). Abortion funds engage in legal activities that include “recruit[ing] new people to the cause, reassure[ing] local individuals seeking abortion care, and connect[ing] patients to resources.” *Id.* at v.

⁶ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably restrict this movement”); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (“the right [to travel] is so important that it is ... ‘a virtually unconditional personal right, guaranteed by the Constitution to us all’”).

⁷ See Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court’s Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 458 (1995) (“the right to travel remains somewhat of an enigma—an ill-defined right emanating loosely from various penumbras within the Constitution. ... [A]lthough the Court continues to make occasional references to such a right, the [] Court is in the midst of significantly scaling back the scope of the right to travel”); Richard Sobel & Ramon L. Torres, *The Right to Travel”: A Fundamental Right of Citizenship*, 80 J. TRANSP. L.

it clear that the “right to travel” only protects interstate travel.⁸ Even then, the Court did not vest this right in the people. Instead, it operatized it by placing meager restrictions on states’ power to shutter their borders and discriminate against non-residents.⁹ Existing doctrine does not prevent states from restricting,¹⁰ or even criminalizing,¹¹ the movement of their own citizens. States continue to take advantage of this doctrinal gap and pass movement-restricting laws.¹² Absent a robust right to travel that extends to intrastate movement, laws restricting the movement of people must only be grounded “upon some rational basis within the knowledge and experience of the legislators.”¹³ Recognizing travel to resist as a fundamental right is necessary to ensure that government protesters, movement leaders, and abortion funds can continue to not only check perceived abuses of state power but also promote the type of self-identification fundamental to our scheme of liberty.

LOGISTICS & POL’Y 13, 15 (2013) (appellate courts have limited the right to travel and the Supreme Court should restore an “expansive right to travel”).

⁸ *Saenz v. Roe*, 526 U.S. at 498 (“the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence”) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

⁹ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277 (1993) (the Constitution “protects interstate travelers against two sets of burdens: the erection of actual barriers to interstate movement and being treated differently from intrastate travelers”) (internal citations omitted).

¹⁰ *E.g.*, Levon Kalanjian, *The Beginning of an Economic Civil War: The Unconstitutionality of State-Implemented Travel Bans*, 22 J. CONST. L. 409 (2020) (assessing the constitutionality of laws passed by New York and California that banned state-funded travel to certain states due to their discriminatory laws).

¹¹ VA. CODE ANN. § 8.01-662.1 imposes liability on “any person” who “assists or attempts to assist” another person commit suicide, including doctor-assisted suicide. This law criminalizes travel because it likely extends to any person who transports another person across state lines in the pursuit of doctor-assisted suicide.

¹² *E.g.*, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.) (denying application for injunctive relief from the Governor of California’s COVID-19 Executive Order limiting the size of religious and secular gatherings, and by extension, travel). In the last decade States and local governments introduced and enacted laws regulating the movement of people. Kathleen Hoke, Naisha Mercury & Valerie Ernat, *Restrictions on the Right to Travel for Out-of-State Abortion Care*, THE NETWORK FOR PUBLIC HEALTH LAW (May 28, 2025), <https://www.networkforphl.org/resources/restrictions-on-the-right-to-travel-for-out-of-state-abortion-care/> (Legislative bodies across the country are passing laws or weaponizing existing laws to impede and deter interstate travel for abortion care). According to the International Center for Not-For-Profit-Law (ICNL), 323 anti-protest laws were introduced in the United States between January 2017 and 2024. *Analysis of US Anti-Protest Bills*, ICNL (updated Feb. 5, 2025), <https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=&date=>

Fifty-four of these anti-protest laws were passed. *Id.* Many of these anti-protest laws target the right of travel to resist by imposing extreme penalties for movement-related offenses, and by extending liability to persons in the vicinity of protests. *Id.*

¹³ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Courts are generally deferential to legislators when evaluating whether laws have a rational basis.

In an era marked by increased deference to states' rights¹⁴ and political polarization,¹⁵ it is unlikely that the Court, legislators, or even Americans would welcome an unencumbered fundamental right to travel. But a narrower—more insurgent—framing of the right is not only supported by the Constitution but is also likely to find favor before the courts and among the people. Enter the right of travel to resist.¹⁶ Travel to resist should be recognized as a fundamental right because it is deeply rooted in our Nation's history and tradition, is essential to our scheme of ordered liberty¹⁷ and is necessary to preserve other fundamental rights.¹⁸ Recognizing travel to resist as a fundamental right would not only cure the Court's cramped interstate-only doctrine, but also supply the constitutional protection needed to prevent states and localities from banning or criminalizing the non-violent movement that Americans deploy to protest, check, or evade oppressive home laws.

This paper argues that now is the time to recalibrate the balance between individual and states' rights by recognizing the right of travel to resist. Part II provides a doctrinal overview of the fundamental right to travel as it presently exists, emphasizing the doctrine's flaw of granting states plenary power over the movement of people within their borders. Part III introduces and

¹⁴ See, *United States v. Skrametti*, 605 U.S. 495, 524 (2025) (states' "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" was sufficient justification for upholding Tennessee's ban on gender-affirming care for minors) (internal citations omitted); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 (2022) (removing abortion as a constitutionally protected right because "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives"). States now also have greater power to challenge federal rules and regulations with which they disagree because courts are no longer required to defer to an agency's interpretation of an ambiguous statute. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

¹⁵ Jeremy W. Peters & Ruth Igielnik, *Most Voters Think America's Divisions Cannot Be Overcome, Poll Says*, N.Y. TIMES (Oct. 2, 2025), <https://www.nytimes.com/2025/10/02/us/politics/times-siena-poll-political-polarization.html?searchResultPosition=4> (American voters are more concerned about problems in the political culture, including polarization and the state of democracy, than immigration, inflation or crime).

¹⁶ *Infra* Part IV.A carefully describes the right of travel to resist.

¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ("the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (internal citations omitted)).

¹⁸ The Court has recognized that the Constitution protects fundamental rights where such rights are "an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing freedom of association as a right necessary for engaging in First Amendment activities).

precisely defines the right of “travel to resist.” From there, the reader will journey through each epoch of our Nation’s history and discover the extent to which travel to resist is deeply rooted in our history and tradition, fundamental to our scheme of ordered liberty and necessary to protect constitutional rights. Part IV examines the text of the Thirteenth Amendment and argues that it stripped states of their power to unduly restrict the movement of people within their jurisdiction. This paper ends with a call to action: ongoing attacks on travel to resist provide the perfect opportunity to challenge oppressive state action in court, present the carefully defined right of travel to resist, and secure doctrinal protection for a right that is not only part of our national identity but also a right upon which we all rely.

III. TODAY’S CONSTITUTIONAL RIGHT TO TRAVEL IS WOEFULLY LIMITED

A. Today’s limited right to travel does little more than enable Americans to visit or move to another state.

Scrutiny of the Court’s right to travel cases reveals that this right was created largely as an afterthought to bolster the Court’s decision to invalidate a state classification scheme using rational basis review. In *Shapiro v. Thompson*,¹⁹ the first modern travel case,²⁰ the issue before the Court was whether Connecticut could use durational residency requirements as the basis for awarding welfare benefits.²¹ Petitioners argued that Connecticut’s classification scheme was reasonable because it eased the State’s administrative burden.²² Moreover, they asserted that even if the scheme did restrict the right to travel, federal legislation passed by Congress expressly authorized

¹⁹ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁰ NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FELDMAN AND SULLIVAN’S CONSTITUTIONAL LAW 475 (West Academic Publishing, 21st ed. 2022).

²¹ In *Shapiro v. Thompson*, Ms. Vivian Marie Thompson, a 19-year-old unwed mother challenged a Connecticut law that barred her from receiving welfare benefits until she had resided within Connecticut for at least one year before applying for such benefits. *Shapiro v. Thompson*, 394 U.S. at 622-23.

²² Jordan Lampo, *The Last Days of the Warren Court: How Justice Brennan Orchestrated Shapiro v. Thompson* (1969), 48 J. SUP. CT. HIST. 75, 83 (2023).

states to apply durational residency requirements to welfare programs.²³ Respondents countered that the durational residency requirements abridged the right to move to a new state, infringed on the right to travel in violation of the Privileges and Immunities Clause, and created a discriminatory wealth-based classification scheme in violation of the Equal Protection Clause.²⁴ The equal protection argument prevailed.²⁵ The Court held that Connecticut’s durational residency scheme was “irrational”²⁶—it failed rational basis scrutiny!²⁷ Only after the Court used rational basis review to invalidate Connecticut’s welfare scheme did it remark, in dicta, that the law could also be assessed using strict scrutiny because “the classification here touches on the fundamental right of interstate movement.”²⁸ Having already failed rational basis review however, there was no need for the Court to expound further upon the right of interstate movement.²⁹

Instead of vesting an expansive right to travel in the people, *Shapiro* effectively vested *states* with broad power to curtail the movement of people within their borders. It did this by expressly limiting the travel right to “interstate movement”³⁰ and doing little more than impose

²³ *Id.*

²⁴ *Id.* at 79.

²⁵ *Id.* at 90 (“state laws infringing on the right of interstate travel impermissibly classify in violation of the Equal Protection Clause of the Fourteenth Amendment”).

²⁶ *Shapiro v. Thompson*, 394 U.S. at 638 (“even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional”).

²⁷ “Rational-basis review, the most deferential form of scrutiny under the Equal Protection Clause, rarely invalidates legislation.” Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite*, 90 N.Y.U. L. REV. 2070, 2071 (2015).

²⁸ *Shapiro v. Thompson*, 394 U.S. at 638.

²⁹ Jordan Lampo claims that Justice Brennan, the author of the *Shapiro* opinion, avidly sought to use “the Equal Protection Clause to protect the rights of the poor.” Lampo, *supra* note 22, at 75. According to Lampo, the *Shapiro* Court initially focused on whether federal legislation did indeed permit states to enact durational residency requirements for welfare benefits, and if it did, whether Congress overstepped by “regulat[ing] travel [beyond] its limitations.” *Id.* at 79. Lampo notes that Justice Brennan persistently interjected at oral argument with his framing of the case: the classification scheme was invidious wealth-based discrimination that violated the Equal Protection Clause. *Id.* at 79-80. Brennan did not believe that Congress could authorize any state to use classification schemes that violated the Equal Protection Clause. *Id.* at 89. Brennan’s equal protection bent could explain not only why this case was argued before the Court twice, but also why the right to travel ultimately took a backseat in *Shapiro*.

³⁰ *Shapiro v. Thompson*, 394 U.S. at 638.

modest restraints on the ability of States to close their borders to interstate travelers. Since *Shapiro*, the Court has affirmed that the fundamental right to travel is limited; it only

protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.³¹

The only movement-curtailling limit imposed on states is that they cannot adopt classification systems and differentially regulate the movement of people based upon these schemes.³² This equal protection framing is a sound way to address certain types of discrimination, but it leaves state power over the intrastate movement of people largely intact. The Court's refusal to articulate any intrastate travel right³³ has created a paradox in which Americans are afforded greater protection when they want to leave their home state than when they want to travel within it. More disturbing still, this doctrinal gap subjugates the type of foundational movement³⁴ that is part of the American ethos to the whims of government.

B. Absent a right to travel inclusive of intrastate movement States have plenary power to control or curtail the movement of people.

³¹ *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

³² *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (*interstate* travelers are only protected against "being treated differently from *intrastate* travelers") (emphasis added) (internal citations omitted).

³³ The Supreme Court has not addressed the fundamental right to travel since *Saenz v. Roe*, 526 U.S. 489 (1999). Interstate travel was mentioned recently by Justice Kavanaugh, but no new gloss was added to the right. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. at 346 ("the constitutional right to interstate travel" would prevent states from barring residents from traveling to another state to obtain an abortion) (Kavanaugh, J., concurring).

³⁴ See discussion *infra* Part IV.B.

Absent the checking power of a fundamental right, states have long used police powers³⁵ to restrict movement of groups and individuals ostensibly to promote health, the public safety or general welfare.³⁶ One of the most omnipresent examples of this was criminal vagrancy laws.³⁷ Vagrancy laws long persisted in giving police broad discretion to arrest anyone for almost any reason.³⁸ The Court finally checked this abuse of power in *Papachristou v. City of Jacksonville*, by invalidating a movement-restrictive vagrancy law.³⁹ Once again, however, the Court resigned itself to extolling the freedom of movement in dicta⁴⁰ and failed to recognize a fundamental right to any form of intrastate travel that would trigger strict scrutiny. Instead, the Court invalidated the Jacksonville criminal statute as void for vagueness.⁴¹ Void-for-vagueness cured legislative drafting defects and imposed an outer limit on states' police power, but it did nothing to cabin states' ability

³⁵ Police powers include “all laws that relate to matters completely within [a State’s] territory. ... According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public.” *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

³⁶ *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (upholding a Louisiana law mandating separate street cars for white and black patrons as a “reasonable regulation” intended to preserve “the public peace and good order”).

³⁷ Movement-limiting vagrancy laws have long been used in the United States to effectuate racial and religious discrimination or to target other “nonconforming people.” Noah Smith-Drelich, *The Anti-Discriminatory Right to Travel*, 100 IND. L. J. 1063, 1092 (2025). After the Civil War and well into the mid-20th century, harsh vagrancy laws forced blacks to work for white employers. Adam Fairclough, *BETTER DAY COMING* 3, 188 (2001). In the wake of the Great Depression many states and municipalities moved to protect themselves from “the transient unemployed” by passing and strengthening vagrancy statutes. James N. Gregory, *SOUTHERN DIASPORA: HOW THE GREAT MIGRATIONS OF BLACK AND WHITE SOUTHERNERS TRANSFORMED AMERICA* 60-61 (2005).

³⁸ Risa Goluboff, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 3-4 (2016) (“vagrancy suspects were white and black, male and female, straight and gay, urban and rural, southern, northern, western, and midwestern. They had money or needed it, defied authority or tried to comply with it. They were arrested on public streets and in their own homes; as locals or strangers; for political protests or seeming like a murderer; for their race, their sexuality, their poverty, or their lifestyle.”). *See generally*, Smith-Drelich, *supra* note 37 (vagrancy laws targeted race, ethnicity, class and politically disfavored movements).

³⁹ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (Florida’s vagrancy law, which could be used to punish activities such as wandering and strolling, was void for vagueness).

⁴⁰ “These unwritten amenities [including wandering and strolling] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.” *Id.* at 164.

⁴¹ *Id.* at 162.

to restrict the movement of citizens.⁴² The right to travel remained tepid; it lacked any bite when exercised within the home state.

States have even gone so far as to enact laws criminalizing citizens who travel to dissent from oppressive home laws. In 1960s Virginia, for example, the State had a statutory scheme that not only prohibited interracial marriages, but also punished couples who left the “State to evade law” and obtain marriage licenses outside the State.⁴³ Mildred Jeter and Richard Loving were convicted under this scheme of laws after they peacefully travelled from Virginia to the District of Columbia, “were married ... pursuant to [the District’s] laws,” and then returned home to Virginia.⁴⁴ The Court failed to mention even the interstate travel right when it struck down Virginia’s statutory scheme in *Loving v. Virginia*.⁴⁵ Instead, the Court relied once again on the Equal Protection Clause to invalidate a discriminatory law but made no effort to curb Virginia’s choice to punish people who chose peaceful travel to resist oppressive home laws. By focusing on equal protection, the Court not only acquiesced to relying on a convoluted, multi-step process

⁴² Indeed, while “contemporary vagrancy laws are no longer so broad and ambiguous, restrictions on movement—on loitering, on ‘lingering,’ and other sorts of ‘suspicious’ activity—continue to provide a widely used mechanism for law enforcement to target the free movement of disfavored populations.” Smith-Drelich, *supra* note 37, at 1097. See also, *Noem v. Perdomo*, 606 U.S. --- at 2 (2025) (Kavanaugh, J., concurring) (sanctioning “brief investigative stops to check the immigration status of those *who gather in locations* where people are hired for day jobs...” (emphasis added)).

⁴³ *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

⁴⁴ *Id.* at 2-3.

⁴⁵ This case was decided two years before the fundamental right to travel was discussed in *Shapiro v. Thompson*. Even then, it is interesting that travel didn’t play any role in the Court’s analysis because the Court did engage with the Due Process Clause of the Fourteenth Amendment and affirmed that the freedom to marry was “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. at 12. Neither the parties nor the Court tried to operationalize the Fourteenth Amendment to protect travel as a fundamental right.

for protecting freedom,⁴⁶ but also missed the opportunity to vest the power of travel to resist in the people.

State power over the movement of people is not an isolated problem existing only in the criminal context. State and local governments have long relied on city planning and land-use regulations to control the movement of people. Residential segregation ordinances,⁴⁷ racially restrictive covenants,⁴⁸ zoning decisions,⁴⁹ and infrastructure placement⁵⁰ have all operated as formal or informal government-deployed methods of mobility control. Ordinances, covenants, zoning and traffic enforcement laws could all be deployed by states and localities today to restrict

⁴⁶ The Equal Protection Clause enabled the Court to bludgeon discriminatory laws throughout the last half of the 20th-century. *E.g.*, *Brown v. Board of Education*, 348 U.S. 886 (1954) (invalidating segregated public school systems); *Craig v. Boren*, 429 U.S. 190 (1976) (striking down gender-based alcohol sales laws); *United States v. Virginia*, 518 U.S. 515 (1996) (excluding women from an all-male state military college violated the Equal Protection Clause); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (extending the constitutional right to marry to same-sex couples). Even though the Court reached the “right” result in these cases, relying on the Equal Protection Clause requires the Court to engage in a convoluted, multi-step process. MICHAEL STOKES PAULSON, ET. AL., *THE CONSTITUTION OF THE UNITED STATES* 1561 (West Academic Publishing, 5th ed. 2023) (modern legal doctrine requires courts to identify the type of classification scheme used by government, place the classification scheme somewhere along the equal protection spectrum and then determine whether the government’s classification scheme is sufficiently justified). “These [equal protection] tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to [the Court] which test will be applied in each case.” *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

⁴⁷ Baltimore, Maryland was the first city in the United States to pass a city ordinance creating racially separate neighborhoods in 1910. Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179, 181 (1968). Richmond, Virginia quickly followed suit in 1911 as did many other southern and western cities before the Supreme Court finally declared such ordinances unconstitutional in 1917. *Id.* at 181-85.

⁴⁸ Adam Ewig, *Race, Space and Power in Richmond, Virginia*, THE VALENTINE, <https://thevalentine.org/explore/exhibitions/online-exhibitions/racial-equity-health-series/race-space-and-power-in-richmond-virginia/> (last visited Nov. 25, 2025) (Windsor Farms near Richmond, Virginia, was one neighborhood where restrictive covenants barred the sale, lease or division of land “to any person not of the Caucasian race”); Adam Faircloth, *BETTER DAY COMING* 194 (2001) (in 1944 racially restrictive covenants applied to nine-tenths of all housing in Chicago). State enforcement of racially restrictive covenants was finally ruled unconstitutional in *Shelley v. Kramer*, 334 U.S. 1 (1948). The Court again relied on equal protection analysis instead of vesting a fundamental right to intrastate movement in people. *Shelley v. Kramer*, 334 U.S. 1, 20 (1948) (“judicial enforcement of restrictive agreements ... denied petitioners equal protection of the laws”).

⁴⁹ James W. Dyke Jr., *The Use of Zoning Laws to Prevent Poor People from Moving into Suburbia*, 16 HOWARD L. J. 351, 353 (1971) (“A perfectly legal way of achieving this economic segregation is through the careful drafting of zoning laws which make it virtually impossible to construct low- and moderate-income housing in white suburbia.”).

⁵⁰ Proponents of the Federal-Aid Highway Act, which paved the way for the modern-day interstate highway system, touted the plan as a “good opportunity to get rid of Black neighborhoods.” John C. Finn, *Urban Renewal in Virginia*, ENCYCLOPEDIA VIRGINIA, <https://encyclopediaofvirginia.org/entries/urban-renewal-in-virginia/>, (Sep. 19, 2024). Infrastructure projects enabled state actors to not just limit where citizens could travel but also forcibly direct their travel by removing people from their homes and displacing entire neighborhoods. “The *Richmond Times-Dispatch* estimates that 1,900 Black families – approximately 10 percent of the city’s African American population” was displaced by the Richmond-Petersburg Turnpike, which is today part of I-95/I-64. *Id.*

protest movements, limit attendance at speaker events, and even stymie grassroots organizing. Absent recognizing a fundamental right to intrastate travel, there is no check on states and localities sweeping power to cabin people's physical mobility.

IV. ENTER TRAVEL TO RESIST

A. The travel right protected by the Constitution is the right of travel to resist.

When state action regulating the movement of people has been challenged,⁵¹ the Court consistently missed the opportunity to rely on substantive due process and codify a fundamental right to travel.⁵² Unlike equal protection, substantive due process analysis is streamlined: it requires courts to assess whether state action infringes upon a clear right, and, if it does, then the law is subject to heightened scrutiny.⁵³ Under this framework, the first task is to clearly define the right for which I advocate: the right of travel to resist. The second task is to determine whether constitutional protection for my carefully described right is consistent with “our Nation’s history, legal traditions, and practices.”⁵⁴ If travel to resist is deeply rooted in United States’ history and tradition, then it readily comports with the Court’s “established method of substantive-due-process analysis” and should be recognized “as a component of the ‘liberty’ protected in the Due Process Clause.”⁵⁵

⁵¹ *Supra* Part III.

⁵² Substantive due process is not without its critics, but even the current Supreme Court acquiesced to applying this doctrine. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 239-40 (“Substantive due process has at times been a treacherous field for this Court” but it still provides the guideposts for identifying what “the Fourteenth Amendment means by the term ‘liberty’” (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Criticisms aside, substantive due process is less convoluted than equal protection analysis; it includes a two-part analysis whereas equal protection invokes a multi-tiered approach to evaluating laws. *See supra* note 46.

⁵³ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state”).

⁵⁴ *Washington v. Glucksberg*, 521 U.S. at 710.

⁵⁵ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 260 (citing *Glucksberg*, 521 U.S. at 721).

Travel to resist has three components: (1) self-movement over any distance, (2) to dissent, advocate for change, or evade existing laws, (3) in a non-violent manner that complies with (permissible) regulations in effect at the time and location of each phase of travel. An easy example of the right in action is someone traveling in their personal vehicle to attend a protest. The state cannot encumber this person's right to reach the protest destination, but neither can the person ignore posted speed limits by asserting travel to resist. In contrast, a person for whom an arrest warrant has been issued cannot rely on travel to resist because their travel now violates the law.⁵⁶ Requiring compliance with the law when and where the act of movement-based resistance occurs preserves judicial manageability of this right. When someone asserts their right of travel to resist, Courts only need to identify *where* the alleged violation occurred and apply the law of that jurisdiction to the facts to assess whether the movement at issue was legal.

B. Travel to resist is deeply rooted in our Nation's history and tradition.

Travel to resist appears throughout every epoch of American history. Even before the Constitution was ratified, many colonists “decided to leave England and seek religious freedom in America.”⁵⁷ Pre-and-post-ratification, early Americans relied on travel to resist fledgling laws and customs with which they disagreed. Appalachia was the poster child for settlements established by “‘come-outer’ or dissenting elements” of early American society.⁵⁸ Quakers, Mennonites and Presbyterians all moved to Appalachia where they could build communities free from slavery.⁵⁹

⁵⁶ U.S. CONST. art. IV, § 2, cl. 2 (“A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime”). Critics will argue that this right is too narrow, but history and tradition, discussed *infra*, Part IV.B, confirms that travel to resist is only constitutionally protected when it is used to evade the law, not when it is used to *break* the law.

⁵⁷ *Engel v. Vitale*, 370 U.S. 421, 425 (1962). This early form of travel to resist exemplifies the non-violent nature of this right. Religious freedom-seekers eschewed bloody rebellion and “lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America.” *Id.* at 426.

⁵⁸ Richard B. Drake, A HISTORY OF APPALACHIA 38 (2003).

⁵⁹ *Id.* at 39, 82.

Similarly, Scotch-Irish and German immigrants moved to Appalachia where they could develop build communities embodying their own customs and barter-based economies.⁶⁰ These community movements were not passive responses to government encroachment, they were coordinated resistance movements deployed by discrete groups to guarantee self-determination and cultural preservation.

Education quickly emerged as another avenue in which travel to resist took center stage. This was especially true in the South where free and enslaved⁶¹ blacks were generally discouraged from receiving an education.⁶² Freed blacks evaded these oppressive educational schemes by sending their children to school in New England or moving out of the South all together.⁶³ The most moving education example of travel to resist is John Berry Meachum's Floating Freedom School. After Missouri "legislators passed a law prohibiting education for blacks whether slave or free," Meachum, a free black man, anchored one of his steamboats in the middle of the Mississippi River and opened the Floating Freedom School just outside of Missouri's jurisdiction.⁶⁴ Meachum would ferry students from the Missouri shoreline to the steamboat where they could participate in lessons without fear of criminal prosecution.⁶⁵ Meachum never broke the

⁶⁰ See generally, *Id.* at 35-38

⁶¹ I consciously omit the movement of fugitive slaves as a historical example of travel to resist. Before the Civil War and ratification of the Thirteenth Amendment slavery was legal. Thus, fugitive slaves didn't use travel to resist the law but rather to *break* the law. There were other ways that slaves deployed travel to resist. *E.g.*, Steven Hahn, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 67-68 (2005) (slaves permitted by their masters to collect the mail and travel to town developed their own codes to communicate with other slaves); Gregory, *supra* note 37 at 87-88 (during the Civil War slaves with travel passes would travel between the frontlines and plantations to spread news about the war that helped keep support for the war effort alive in the South).

but the movements of fugitive slaves falls outside my careful description of the right. See *e.g.*,

⁶² Laws discouraging education for blacks were an interesting Chimera. In Virginia, for example, it was never expressly illegal for a white person to teach a black person to read and write, but it was illegal to *assemble* blacks for that purpose. Antonio Bly, *Literacy and Education of the Enslaved in Virginia*, *ENCYCLOPEDIA VIRGINIA*, <https://encyclopedia.virginia.org/entries/slave-literacy-and-education-in-virginia/> (Dec 7, 2020).

⁶³ J. Clay Smith Jr., *In Freedom's Birthplace: The Making of George Lewis Ruffin*, the First Black Law Graduate of Harvard University, 39 *HOWARD L. J.* 201, 205 (1995) (the Ruffins were a prominent free black family from Richmond, Virginia, who left the South to provide their children with educations).

⁶⁴ Sue Thomas, *A SECOND HOME: MISSOURI'S EARLY SCHOOLS* 95-96 (2006).

⁶⁵ *Id.* "Records show that hundreds of African American children were educated in this Freedom School on the river during the 1840s and 1850s." *Id.*

law. Instead, he evaded proscriptive laws in one jurisdiction by peacefully transporting himself and others to another jurisdiction wherein their conduct fully complied with the law. Meachum deftly used travel to resist. This type of jurisdictional avoidance remains potent medicine for combatting oppressive home laws. Before the Court recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*,⁶⁶ for example, some same-sex couples could travel from their home state and obtain marriage licenses from states willing to recognize same-sex marriage.⁶⁷ Reproductive justice groups have long helped women avoid jurisdictional barriers by assisting women who travel to access abortion services.⁶⁸

Travel to resist continued to evolve both before and after the Civil War as new members of the body politic began organizing and advocating for change.⁶⁹ Abolitionists “took to the road with evangelical zeal, spreading their message and seeking converts in an ambitious reform effort” to eradicate slavery by amending the Constitution.⁷⁰ The American Anti-Slavery Society engaged in an “all-out pamphlet attack dedicated to undermining support” for the institution of slavery.⁷¹ Black women took on a remarkably mobile role long before they secured the right to vote by attending conventions, organizing their own political organizations, and even “travelling to the polls to make sure men cast the right ballots.”⁷² Women from all walks of life participated in state

⁶⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁶⁷ Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998). The movement of same-sex couples across state lines prompted several states to enact marriage evasion statutes. *Id.* These laws “void[ed the] marriages of persons who travel[ed] elsewhere in order to avoid their home state’s marriage restrictions.” *Id.*

⁶⁸ Lisa M. Kelly, *Abortion Travel and the Limits of Choice*, 12 FIU L. REV. 27, 46-47 (2016).

⁶⁹ *E.g.*, Hahn, *supra* note 61 at 107-08 (in January 1865, sixty-two colored citizens traveled to the Tennessee state constitutional convention in Nashville and delivered a petition “to abolish the last vestige of slavery by the express words of your organic law.” Shortly thereafter, nearly one hundred “black men gathered [in New Orleans] to establish the Equal Rights League of Louisiana and to demand the vote.”).

⁷⁰ Robert H. Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1151 (2012).

⁷¹ *Id.* at 1152.

⁷² Tera W. Hunter, *TO ‘JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR* 32 (1997).

and nation-wide suffragist efforts that marched to demand the vote.⁷³ Suffragists expanded travel to resist to include appearing before Congress to testify,⁷⁴ canvassing to get suffragist amendments on the ballot,⁷⁵ and travelling to the polls with coffee and biscuits to encourage enfranchised men to vote for women's suffrage.⁷⁶ Each step towards the right to vote involved women traveling to resist the status quo. Their success not only earned them the right to vote but also solidified travel to resist as integral to democratic participation.⁷⁷

Travel to resist continued to evolve as civil rights activists adopted the right to further their cause. Freedom Riders chartered buses and travelled deep into southern States to protest segregated public accommodations.⁷⁸ The Council of Federated Organizations previewed future get-out-the-vote mobilization efforts when they deployed in-person canvassers and erected makeshift polling places deep in rural Mississippi in a 1963 shadow election designed to give blacks in Mississippi an opportunity to vote for the first time.⁷⁹ Marches to Washington D.C. for jobs and freedom, marches from Selma to Montgomery, and daily marches in southern towns

⁷³ Suffragist parades attracted huge numbers of participants and observers, all of whom travelled to the parade route to march, watch, cheer, and even jeer. *20K March in Suffragette Parade*, NY TIMES, Oct. 28, 1917 ("The parade was remarkable for the representative character of the women in it ... Women of all ages, from the nearly feeble to the vigorously youthful, walked side by side—all seemingly fired by enthusiasm for their cause."); *50,000 Are Expected in Suffrage Parade*, NY TIMES, Oct. 23, 1915 (listing teachers, patrolmen's and letter carriers' wives, nurses and men among a suffrage parade's expected marchers); *400,000 Cheer Suffrage March*, NY TIMES, Nov. 10, 1912.

⁷⁴ *Police Idly Watched Abuse of Women*, NY TIMES, March 7, 1913 (recounting testimony of suffrage marchers before the "Senate subcommittee appointed to investigate the lack of police protection during the great suffrage demonstration").

⁷⁵ Rebecca Brown Mitchell, *Glimpses from the Life of Rebecca Brown Mitchell*, in BYU ARCHIVES at 5 (a manuscript found by Mitchell's daughter at the time of her death, Oct. 1903) ("I canvassed the State for the amendment, reaching many places where the other workers did not go").

⁷⁶ *Id.* at 5-6.

⁷⁷ Voter mobilization is pivotal to modern political candidates' success. Hannah Hartig, et. al., *Behind Trump's 2024 Victory, a More Racially and Ethnically Diverse Voter Coalition*, PEW RESEARCH CENTER, <https://www.pewresearch.org/politics/2025/06/26/voter-turnout-2020-2024/> (2025) ("voter turnout is often a key factor in understanding why there are changes in electoral outcomes year to year"). Dozens of social movements, all deploying travel to resist "have influenced American life and politics since the late 19th century." *Mapping American Social Movements Project*, CIVIL RIGHTS AND LABOR HISTORY CONSORTIUM, UNIVERSITY OF WASHINGTON, (last visited Nov. 29, 2025) <https://depts.washington.edu/moves/>.

⁷⁸ Faircloth, *supra* note 48 at 253-55; Smith-Drelich, *supra* note 37, at 1087-88; Thaddeus Morgan, *How Freedom Rider Diane Nash Risked Her Life to Desegregate the South*, HISTORY, <https://www.history.com/articles/diane-nash-freedom-rider-civil-rights-movement> (last updated May 28, 2025).

⁷⁹ J. Todd Moye, *LET THE PEOPLE DECIDE: BLACK FREEDOM AND WHITE RESISTANCE MOVEMENTS IN SUNFLOWER COUNTY, MISSISSIPPI, 1945-1986* 114-16 (2004).

demanding voting rights are obvious examples of travel to resist.⁸⁰ Less obvious is the simple act of travelling to attend or help others attend these marches.⁸¹ The Civil Rights Movement unlocked the full power of travel to resist and “set in motion democratizing change that seeped into every aspect of American life and transformed the structure of national politics.”⁸² Travel to resist continues to empower Americans to advocate for change or lodge their dissent when they are sufficiently moved to do so.

Originalists will criticize my decision to rely on more recent events to support my claim that travel to resist is deeply rooted in this Nation’s history and tradition.⁸³ My response to these critics is that history and tradition are distinct concepts, each requiring analysis. History indeed requires us to scrutinize circumstances and events at the time of ratification, but tradition demands evaluating everything that happened *after* enactment.⁸⁴ In *Washington v. Glucksberg* Justice Rehnquist was clear that “history *and* tradition” guide the quest for fundamental rights.⁸⁵ In fact, after completing his historical analysis, Justice Rehnquist turned to “this century” and considered the effect that the Model Penal Code and recent legislative trends had on the proposed right being

⁸⁰ Taylor Branch, *The Civil Rights Movement*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-resources/essays/civil-rights-movement>.

⁸¹ Charles Euchner, *NOBODY TURN ME AROUND: A PEOPLE’S HISTORY OF THE 1963 MARCH ON WASHINGTON*, Prologue (2010) (three boys from Gadson, Alabama rode buses, hitchhiked and walked to reach Washington D.C. in time for the March on Washington for Jobs and Freedom); Jonathon L. Entin, *Viola Liuzzo and the Gendered Politics of Martyrdom*, 23 HARV. J. L. & GENDER 249, 255 (2000) (Viola Liuzzo traveled from Detroit, Michigan to Selma, Alabama to participate in civil rights marches. She also used her personal vehicle to shuttle herself, protest organizers and participants to and from the marches. Tragically, she was shot and killed by three Klan members during one of these drives).

⁸² Branch, *supra* note 80.

⁸³ *E.g.*, *United States v. Rahmi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) (“generally speaking, the use of postenactment history requires some justification other than originalism simpliciter”); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L. J. 1439, 1452 (2022) (historically grounded interpretations of the constitution should consider how “the people who ratified the Fourteenth Amendment” understood the text).

⁸⁴ PAULSON, ET. AL, *supra* note 46 at 39 (historical analysis emphasizes the historical setting in which the Constitution was ratified, whereas arguments from tradition look to “a practice that is sufficiently early, long, or settled to ‘fix’ or ‘liquidate’ the meaning of an ambiguous constitutional provision”).

⁸⁵ *Washington v. Glucksberg*, 521 U.S. at 715-16 (emphasis added).

evaluated by the Court.⁸⁶ In fact, the pervasive tradition of travel to resist is almost sufficient by itself to self-effectuate constitutional protection for this right.

Travel to resist remains as robust today as it was when white women first opened their homes to educate black children in the Antebellum Era.⁸⁷ Long before *Dobbs*⁸⁸ rescinded constitutional protection for abortion, complicated regulatory schemes and onerous provider requirements forced women to travel increasingly greater distances to access abortion clinics.⁸⁹ In some cases, the effect of these laws was to make abortion facilities physically out of reach for many women across the United States.⁹⁰ It was within this landscape that doctors like Willie Parker⁹¹ and Shelly Tien⁹² activated their own physical mobility and travelled across state lines to provide abortion services to women who could not otherwise reach them. In this context, travel to resist didn't just help women circumvent practical barriers to abortion but also helped guarantee access to what was (then) a constitutionally protected right. Travel to resist became fundamental to our scheme of ordered liberty because it operated as a constitutional gap filler.

Attorneys too have deployed travel to resist as a tool to augment constitutional protections and help clients whom the black letter law has abandoned. Attorneys from the National Association for the Advancement of Colored People, for example, travelled into black

⁸⁶ *Id.*

⁸⁷ Philip S. Foner & Josephine F. Pacheco, *THREE WHO DARED: PRUDENCE CRANDALL, MARGARET DOUGLASS, MYRTILLA MINER: CHAMPIONS OF ANTEBELLUM BLACK EDUCATION* (1984) (recounting the attempts of three women to educate blacks during the Antebellum Period).

⁸⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S.

⁸⁹ Lisa M. Kelly, *supra* note 68 at 28-29 (TRAP laws and regulations “frequently require abortion providers to obtain privileges at local hospitals, outfit their clinics as ambulatory surgical centers, or pay higher licensing fees than providers of comparable medical services.” The effect of these laws was to “render abortion care more costly and in many instances shutter clinics all together”); Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L. J. 1081, 1100 (2021) (“though ostensibly aimed at ensuring the safety of the abortion procedure, [abortion regulations] often have minimal safety benefits, which are largely outweighed by their significant burden on abortion access”).

⁹⁰ *See*, Hill, *supra* note 89 at 1084.

⁹¹ Kelly, *supra* note 68 at 32-32 (Dr. Parker adopted travel as part of his abortion practice because women could not always physically get themselves to a provider).

⁹² Kyle Almond, *This Doctor Travels Across State Lines to Provide Abortions*, CNN (May 3, 2022), <https://www.cnn.com/interactive/2022/05/health/abortion-doctor-travel-cnnphotos/>.

communities where they met with students, parents, school personnel, congregations and community leaders to not only document facts integral to their success in court but also to galvanize community support for long and complex legal battles.⁹³ Since the NAACP's success in cases like *Sweatt v. Painter*⁹⁴ and *Brown v. Board of Education*,⁹⁵ lawyers continue to leverage travel to resist and meet with marginalized groups to help them develop litigation strategies.⁹⁶ Sometimes lawyers travel to resist takes on a simpler form; it can include organizing supportive picket lines and press conferences, accompanying clients to work, school or meetings, and even acting as interpreters.⁹⁷ More recently, lawyers have created and organized networks of attorneys willing to deploy when there is a sea change in the law. In the wake of President Donald Trump's first "Muslim Travel Ban," for example, hundreds of lawyers, organized in part by Becca Heller, travelled to airports, and later to courtrooms, to aid international travelers to the United States who were suddenly barred entry into the country.⁹⁸ Like the movements of early settlers to Appalachia,⁹⁹ attorneys travelling to meet clients in need are not haphazardly responding to changing laws, but rather are making a concerted effort to deploy travel to check, dissent from, and resist home laws.

C. Travel to resist is integral to preserving individual freedom and ordered liberty.

Travel to resist is fundamental to our scheme of ordered liberty because it has led to sweeping constitutional change, it has served as a powerful tool for protecting individual freedom,

⁹³ Mark V. Tushnet, NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 138-40 (1986).

⁹⁴ *Sweatt v. Painter*, 339 U.S. 629 (1950) (guaranteeing a black student admission to law school after the Court held that the Constitution guaranteed "legal education equivalent to that offered by the State to students of other races").

⁹⁵ *Brown v. Board of Edu.*, 349 U.S. 294 (1955) (holding that racial discrimination in public education is unconstitutional).

⁹⁶ Organizations such as the Community Development Project in New York City, for example, attend grassroots organization meetings, not to insert themselves into community activism, but rather to be available as a resource for community leaders and members. Tammy E. Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N. Y. CITY L. REV. 213 (2010).

⁹⁷ *Id.* at 216.

⁹⁸ Dhalia Lithwick, *LADY JUSTICE* 47-51 (2022).

⁹⁹ *Supra* at notes 56-58.

and it has become “an indispensable means of preserving other individual liberties.”¹⁰⁰ Travel to resist led to constitutional amendments no less than four times. Ratification of the Eighteenth Amendment¹⁰¹ was precipitated by women-staged sit ins at bars, pubs and drug stores to protest the sale of alcohol and even chastise male patrons.¹⁰² The physical presence of respectable women “in dozens of bars and drugstores [and] also in ... previously all-male courtroom environments” in support of prohibition galvanized (and possibly guilted) men to sign on to their cause.¹⁰³ The Nineteenth¹⁰⁴ and Twenty-Fourth¹⁰⁵ amendments were similarly preceded by a wide array of travel-based resistance tactics that injected new levels of participation into our democracy.¹⁰⁶ And youth-driven protests rallying around the Vietnam War era slogan “old enough to fight, old enough to vote” deserve credit for the Twenty Sixth Amendment,¹⁰⁷ which lowered the voting age to eighteen.¹⁰⁸ The fact that travel to resist has proven to be an integral step towards amending the Constitution proves that it is fundamental to the scheme of ordered liberty contemplated by the Founders.¹⁰⁹

Travel to resist is fundamental to our scheme of ordered liberty because it helps safeguard freedom. The Court has long recognized that “the Bill of Rights is designed to secure individual liberty.”¹¹⁰ This liberty includes the freedom to enter into and maintain intimate relationships and to define the self.¹¹¹ Travel to resist provides an opportunity to do both. Not only does it allow

¹⁰⁰ *Roberts v. U.S. Jaycees*, 468 U.S. at 618 (how the Court spoke about freedom of association).

¹⁰¹ U.S. Const. amend. XVIII (repealed 1933) (prohibiting the sale of “intoxicating liquors”).

¹⁰² Richard H. Chused, *The Temperance Movement’s on Adoption of Women’s Suffrage*, 53 AKRON L. REV. 359, 365-67 (2019).

¹⁰³ *Id.* at 365, 368.

¹⁰⁴ U.S. Const. amend. XIX (extending the right to vote to women).

¹⁰⁵ U.S. Const. amend. XXIV (proscribing poll taxes).

¹⁰⁶ *Supra* Part IV.B.

¹⁰⁷ U.S. Const. amend. XXVI.

¹⁰⁸ Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 65 (2017).

¹⁰⁹ The fact that the Founders included provisions for amending the Constitution suggests that they would have expected, welcomed and supported constitutional change, as well as any peaceful methods used to achieve it.

¹¹⁰ *Roberts v. U.S. Jaycees*, 468 U.S. at 618.

¹¹¹ *Id.* at 618-19 (“Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions

resisters to form intimate bonds through shared experiences,¹¹² but it also enables individuals to self-select what issues are worthy of resistive movement. Ironically, states have gone on record and advocated for the right of their citizens to travel. Pre-*Dobbs*, for example, states with restrictive approaches to abortion argued that their policies were constitutional because their residents remained free to travel to an abortion-permissive jurisdiction if they chose to do so.¹¹³ States expressly authorized residents to travel to “resist or dissent from” laws with which they disagreed.¹¹⁴ Even though *Dobbs* withdrew constitutional protection for abortion, the majority opinion made no indication that it was stripping away the state-sanctioned right of travel to resist.¹¹⁵ Traveling to another jurisdiction to resist or dissent from home laws remains just as lawful—and just as fundamental to protecting individual liberty—now as it was pre-*Dobbs*.

Rights, such as travel to resist, are fundamental to our scheme of ordered liberty where they are “an indispensable means of preserving other individual liberties.”¹¹⁶ Travel to resist, much like freedom of association, is necessary for the “purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”¹¹⁷ Indeed, travel to resist was on display in many of the Court’s infamous free speech

of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby ... act as critical buffers between the individual and the power of the State. ... Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty”).

¹¹² See, e.g., Faircloth, *supra* note 48 at 253-55 (Freedom Riders braved mob violence and jail time together).

¹¹³ Kelly, *supra* note 68, at 41 (Mississippi previously argued that where the “democratic majority in a state like Mississippi wishes to limit abortion through regulation, women can resist or dissent from this majority by moving or at least traveling to a more permissive state”).

¹¹⁴ *Id.*

¹¹⁵ Justice Kavanaugh voiced ongoing support for the right of interstate travel to resist or dissent from state laws prohibiting abortion within a state’s jurisdiction. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 346 (“the constitutional right to interstate travel” would prevent states from barring residents from traveling to another state to obtain an abortion) (Kavanaugh, J., concurring). In contrast, Justice Barrett made a disturbing aside about travel indicating that she would not support the right of travel to resist in the abortion context. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 277 (“a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman’s location?”).

¹¹⁶ *Roberts v. U.S. Jaycees*, 468 U.S. at 618 (how the Court spoke about freedom of association).

¹¹⁷ *Roberts v. U.S. Jaycees*, 468 U.S. at 618.

cases and not once did the Court denounce the combination of travel and speech to lodge dissent.¹¹⁸ Even more on point is the Court's Second Amendment jurisprudence. The Court has essentially already recognized that travel to resist is an element necessary to effectuate the core right of the Second Amendment that "covers *carrying in public* for self-defense."¹¹⁹ History confirms that travel to resist is concomitant with the right to bear arms. In Louisiana, for example, blacks took up arms and organized themselves into roving militias in the Reconstruction South to protect black life, black property and even the black vote.¹²⁰ The Court has already implicitly recognized movement as fundamental to preserving the individual liberties guaranteed by the Bill of Rights and it should not hesitate to go one step farther and recognize the right of travel to resist.

In addition to protecting individual liberties travel to resist undergirds our structural scheme of government because it promotes federalism.¹²¹ Federalism "allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a *mobile* citizenry."¹²² If people were stripped of their right to travel to resist then states would make no effort to pass laws designed at enticing residents to remain, visitors to come spend money, and employers to set up shop within a state's jurisdiction.

The evidence is clear: travel to resist satisfies the test the Court has long deployed when determining whether to recognize an unenumerated right. Resistive movements of early settlers, abolitionists, educators, suffragists, movement leaders, bus riders, doctors and attorneys prove that

¹¹⁸ *E.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (free speech afforded constitutional protection to Paul Robert Cohen when he chose to walk through a municipal courthouse wearing a jacket with the words 'Fuck the Draft' stamped across it); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (the First Amendment protected students' choice to wear black armbands to school); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is expressive conduct protected by the First Amendment).

¹¹⁹ *New York State Rifle & Pistol Assoc. v. Bruen*, 597 U.S.1, 18 (2022) (emphasis added) (internal citation omitted).

¹²⁰ J. Jacob Calhoun, *Reconstruction through Rifles: The Role of Violence in Black Americans' Fight for Liberty in the Postemancipation Era* (April, 2024) (Ph.D. dissertation, University of Virginia).

¹²¹ See generally, Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. J. 433 (1999) (the right to travel presently recognized by the Court blends individual rights and federalist principles).

¹²² *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (emphasis added). See also, Nzelibe, *supra* note 114 at 447 (individual mobility is essential to legal innovation and economic progress).

travel to resist is deeply rooted in this Nation’s history and tradition. The ability of travel to protect individual freedom, secure rights enumerated in the Bill of Rights and promote federalism evinces that it is fundamental to our scheme of ordered liberty.

V. THE THIRTEENTH AMENDMENT VITIATED STATE CONTROL OVER THE MOVEMENT OF PEOPLE

The Thirteenth Amendment fundamentally altered the balance of constitutional power that had been in place since the Founding by stripping states of their ability to control the movement of people both within and without state borders. Before the Thirteenth Amendment¹²³ was ratified, the Fugitive Slave Clause¹²⁴ enabled states to assert control over the movement of people anywhere within the United States. Senators from South Carolina first proposed adding the Fugitive Slave Clause during debates over states’ power to levy taxes on the imports or exports of other states.¹²⁵ Slave states appear to have been concerned that absent language “in favor of property in slaves,” states opposed to slavery could use their tax power to destroy the economy—or property—of slave states.¹²⁶ The Fugitive Slave Clause was ultimately included in the text of the Constitution. Despite its confusing syntax, everyone generally agreed “that the clause prevented bound servants and slaves from gaining legal sanctuary in states sympathetic to their plight.”¹²⁷ In other words, the Constitution expressly prohibited travel to resist.

A few years after the Constitution was ratified, Congress vested states with even more power to control the movement of people by enacting the Fugitive Slave Act.¹²⁸ One way this act

¹²³ U.S. Const. amend. XIII. (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation”).

¹²⁴ U.S. Const., art. IV, sec. 2, cl 3. (“No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service of labore may be due”).

¹²⁵ Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOLUME II 443 (Max Farrand, ed. 1911).

¹²⁶ *Id.*

¹²⁷ Baker, *supra* note 70, at 1137.

¹²⁸ *Id.* at 1139 (the Fugitive Slave Act was signed by President Washington on February 12, 1793).

vested power in the states was by granting them the ability to determine the status of people. Under the Act, “the power of determining status—for all people, not just fugitive slaves—fell under the aegis of states’ ‘police power.’”¹²⁹ This gave states total control over determining what “privileges, protections and restrictions” applied to each person within their jurisdiction.¹³⁰ Some scholars assert that the Court ratcheted down states’ power to determine the status of people when it decided *Prigg v. Pennsylvania*.¹³¹ In *Prigg*, the Court held that Pennsylvania’s personal liberty laws¹³² “must yield to the constitutional supremacy” of the Fugitive Slave Clause and the Fugitive Slave Act.¹³³ But the result in *Prigg* didn’t deprive states of the power to determine a person’s status, it merely shifted decision-making authority away from local jurisdictions in favor of home state laws. Even the Fugitive Slave Act of 1850, which empowered federal law enforcement to make status determinations, didn’t strip states of their power to control the movement of people through status determinations.¹³⁴ Instead the Act shifted the balance of power in favor of slave states and effectively made slave states’ status determinations the supreme law of the land.¹³⁵ Regardless of whether it was all states, just slave states, or the federal government making status determinations, the Fugitive Slave Clause curtailed travel to resist because it empowered some level of government to label people slaves, affix them with shackles of immobility and deprive them of the opportunity to lawfully rely on travel to resist or dissent from the law.

¹²⁹ *Id.* at 1141-42.

¹³⁰ *Id.* at 1142.

¹³¹ *Prigg v. Pennsylvania*, 41 U.S. 539, 570 (1842). *E.g.*, Baker, *supra* note 70 at 1156 (“*Prigg* was a legal attack on state sovereignty”).

¹³² Pennsylvania tried and convicted Prigg, the agent of a slaveholder in Maryland, for transporting a “fugitive slave” and her children from Pennsylvania to Maryland. *Id.* at 1156. The “fugitive slave” had lived in Pennsylvania for some time as a free woman and was thus deemed free pursuant to the Pennsylvania liberty law. *Id.*

¹³³ *Prigg v. Pennsylvania*, 41 U.S. 539, 570 (1842).

¹³⁴ Scott J. Basinger, *Regulating Slavery: Deck-Stacking and Credible Commitment in the Fugitive Slave Act of 1850*, 19 J. L. ECON. & ORG. 307, 309 (“The Fugitive Slave Act of 1850 created a new and unique federal law enforcement institution and took implementation of federal fugitive slave policy out of state and federal judges’ hands”).

¹³⁵ *E.g.*, *Id.* (“the Fugitive Slave Act stipulated that a commissioner be paid \$10 if he ruled in favor of the claimant (the slave owner), but only \$5 if he opted to free the accused slave”).

Ratification of the Thirteenth Amendment changed all of this by affirming victory of the anti-slavery states, abolishing slavery and “end[ing] the relevance of the Fugitive Slave Clause.”¹³⁶ More importantly, it recalibrated the balance of power between states and the federal government by declaring that “Congress shall have power to enforce this article by appropriate legislation.”¹³⁷ This was a cosmic shift. Where the Fugitive Slave Clause had empowered Congress to treat people as property and create private remedies tied to extradition and recapture of fugitive slaves, “the Thirteenth amendment delegated plenary power to Congress to enforce liberty” for all Americans.¹³⁸ The enforcement clause of the Thirteenth Amendment unlocked the door for people to move freely to resist *state* laws curtailing liberty. What the Thirteenth Amendment unlocked, the Fourteenth and Fifteenth Amendments pushed wide open. The enforcement clauses of each of these amendments¹³⁹ worked in concert to further rebuke slavery and the movement-restrictive Fugitive Slave Clause. They also rebuked state control over the movement of people where such control would deprive people of citizenship status, due process under and equal protection of the law,¹⁴⁰ or the right to vote.¹⁴¹ There is no longer any constitutional justification for state or local laws that target citizens moving peacefully within or leaving jurisdictional boundaries to dissent from, protest, or evade home laws.

VI. CONCLUSION

The carefully described right of travel to resist presented in this paper is deeply rooted in this Nation’s history, tradition and legal practices. Travel to resist galvanized social movements

¹³⁶ William J. Aceves, *Amending a Racist Constitution*, 170 PA. L. REV. ONLINE 1, 6 (2022).

¹³⁷ U.S. Const., amend. XIII, sec. 2.

¹³⁸ Jennifer Mason McAward, *McColluch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1782 (2012) (internal citations omitted).

¹³⁹ U.S. Const. amend. XIV, sec. 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”); U.S. Const. amend. XV, Sec. 2 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”).

¹⁴⁰ U.S. Const. amend. XIV, sec. 1.

¹⁴¹ U.S. Const. amend. XV, sec. 1.

and precipitated sweeping constitutional change. It is so fundamental to protecting individual freedom and advancing our scheme of constitutional democracy that the Court has come within a hairsbreadth of canonizing this right in both its First and Second Amendment doctrine. Some may even argue that announcing the right of travel to resist is superfluous because it is already engrained in the fabric of America. Even though that is likely true, the best way to operatize the right of travel to resist is to recognize it as a fundamental right so it can more forcefully be leveraged to combat abuses of state power. Reconstruction was intended to fundamentally alter the balance of power in America but the Court's cramped equal protection and substantive due process doctrines stymied efforts to effectuate this change. When presented with the opportunity, the Court should move swiftly to recognize travel to resist as a fundamental right and apply strict scrutiny to laws regulating or criminalizing resistive movements. History, tradition and doctrine all affirm that travel to resist is exactly the type of unenumerated right that our great-(great)-grandparents intended to vest in the people.