ARTICLE

ENSLAVED CONSTITUTION: OBSTRUCTING THE FREEDOM TO TRAVEL

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ABSTRACT

Does the Constitution protect a citizen's intra-state travel (within a state) from unjustified state prohibition? To date, the Supreme Court has not ruled directly on the issue, and many federal courts believe that the right to intra-state travel is not constitutionally protected. This Article explores the constitutional right of intra-state travel that is free from wrongful state infringement along public roadways by law-abiding citizens. Using critical legal history, this Article poses that federal courts' denial of the right to intra-state travel consciously or unconsciously reflects the antebellum, Southern legal doctrine of people as property, which regulated the travel of enslaved African descendants.

The constitutionality of intra-state travel arose most recently during the Hurricane Katrina Crisis when the City of Greta, Louisiana police barricaded a federal highway, denying would-be evacuees the ability to flee from the flooding City of New Orleans. In an ensuing action for infringement of the

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would-be evacuees' constitutional right to intra-state travel, Federal District Judge Mary Ann Vial Lemmon dismissed the matter in Dickerson v. City of Gretna*, holding that "[w]hile there is no doubt that a fundamental right of interstate travel exists, the Supreme Court has not ruled on whether a right of intra[-]state travel exists. This Court declines to find that there is a fundamental right to intra[-]state travel." The Fifth Circuit affirmed the ruling.*

This Article recommends that when federal courts assess whether there is a constitutional right to intra-state travel, they should embrace the American paradigm of liberty and abandon the antebellum, Southern paradigm of enslavement. Consistent with Professor Derrick Bell's "interest-convergence" principle, all Americans benefit when the Constitution protects the human rights of the least powerful American.

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> The Court declined to act on the constitutional issues the case presents and refused the plaintiffs an opportunity to offer evidence in proof of their case. It is not clear why it did . . . the crowning glory of American federalism . . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasions of fundamental rights and freedoms . . . . When the wrongful invasion comes from the State . . . federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not new . . . . It makes federalism workable.[1]
>
> - Judge John Minor Wisdom

I. INTRODUCTION: DOES THE CONSTITUTION PROTECT INTRA-STATE TRAVEL?

Does the Constitution protect a law-abiding citizen's intra-state travel,[2] the right to move freely from one place to another within the same state, from wrongful state infringement? This Article will explore the current appalling reality that under the Constitution, no American, regardless of class, gender, race, ethnicity, religion, marital status, or other distinguishing feature, has the right to travel[3] freely within the same state. This issue was recently raised following the Hurricane Katrina Crisis.[4] During the Crisis, hundreds of American citizens were denied the right to transverse the Crescent City Connection/Greater New Orleans Bridge to evacuate flooding sections of the City of New Orleans. Despite a statewide emergency evacuation order, the adjacent City of Gretna police barricaded the federal highway bridge,

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1. Dombrowski v. Pfister, 227 F. Supp. 556, 569-71 (E.D. La. 1964) (Wisdom, J., dissenting) (footnotes omitted) (involving a civil rights criminal prosecution regarding desegregation activities).

2. The term "intra-state travel," for purposes of this Article, refers to the ability to travel freely from one place to another within the same state. It is hyphenated in the Article to provide emphasis. Critically, it is defined to include access to opportunity, freedom, and the benefits of citizenship, including public accommodations, housing, transportation, education, employment, and association.

3. "Travel" is defined as "to make a journey, to go from one place to another." 18 OXFORD ENGLISH DICTIONARY 444 (2d ed. 1989). This Article defines "travel" as a citizen's legal ability and expectation to freely go from one place to another, mainly along public roads and bridges, so long as the citizen is not in violation of another's private property interest against trespass. This includes the general legal ability and expectation to move freely from place to place without permission or sanction. From this Article's perspective, travel is more than a legal expectation; travel is a series of real and psychological expectations, such as exploring life, visiting loved ones, learning from experiences, seeking opportunities, escaping from one reality to another, vacationing, hoping, dreaming, being and feeling free, fleeing, going, transitioning, and metamorphosing.

4. *See generally* DANIEL A. FARBER & JIM CHEN, DISASTERS AND THE LAW: KATRINA AND BEYOND (2006).

effectively denying citizens a right to intra-state travel, as reported in *Dickerson v. City of Gretna*.[5]

As a standalone issue, intra-state travel is clearly a critical constitutional issue, essential to the exercise of personal liberty and freedom. Intra-state travel is also vital to the exercise of many other constitutional rights, such as the right to vote, the right to associate, the right to exercise one's religion, the right to interstate travel, and the right to bear arms, to name a few. In addition, shedding light on intra-state travel illuminates many other important, tangential areas of constitutional inquiry and further validates intra-state travel's quintessential importance. These include criminal,[6] international/comparative,[7] disaster,[8] federalism,[9] undocumented aliens,[10]

5. No. 05-6667, 2007 WL 1098787 (E.D. La. Mar. 30, 2007). Three other companion cases, Alexander v. City of Gretna, No. 06-5405, 2008 WL 5111152 (E.D. La. Dec. 3, 2008), Cantwell v. City of Gretna, No. 06-9243, 2007 WL 4256983 (E.D. La. Nov. 30, 2007), and Ballet v. City of Gretna, No. 2:06-10859 (E.D. La. filed December 11, 2006), have been filed in federal district court and mirror the *Dickerson* allegations. All have been assigned to Judge Lemmon.

6. *See, e.g.*, Jonathan Hangartner, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203, 203 (1994); Michael George Smith, *The Propriety and Usefulness of Geographical Restrictions as Conditions of Probation*, 47 BAYLOR L. REV. 571, 571 (1995).

7. *See, e.g.*, Francesca Strumia, *Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity*, 12 COLUM. J. EUR. L. 713 (2006); Jonathan Pinkney-Baird, *Don't Tread on Me: Would a British Solution to Anti-Social Behavior Trample the U.S. Bill of Rights?*, 48 ARIZ. L. REV. 639 (2006).

8. *See, e.g.*, Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325 (2007); Sherrie Armstrong Tomlinson, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153 (2006).

9. *See, e.g.*, Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. U. L. REV. 433 (1999).

10. *See, e.g.*, Haley E. Olam & Erin S. Stamper, *The Suspension of the Davis Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145 (2006) (analyzing undocumented aliens' right of movement following Hurricane Katrina).

residency requirements,[11] stalkers/sex offenders ("buffer zone"),[12] terrorism,[13] homelessness,[14] tort,[15] and private property[16] issues.

This Article's thesis is that current judicial pronouncements that deny the existence of a constitutional right to intra-state travel are misguided and have their roots in the antebellum, Southern doctrine of "people as property"[17] and its laws regulating travel. This thesis views intra-state travel through the lens of critical legal history and Professor Derrick Bell's "interest-convergence dilemma." Critical legal history combines critical race theory[18] with legal history[19] and is demonstrated in Judge John Minor Wisdom's celebrated civil

11. *See, e.g.*, Mary C. Fowler, Comment, *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel*, 8 HARV. C.R.-C.L. L. REV. 591 (1973); Marc M. Harrold, *Constitutional Law—"Right To Travel"—Fourteenth Amendment Privileges or Immunities Clause Invalidates a State's Durational Residency Requirement for Full Welfare Benefits*, 69 MISS. L.J. 993 (1999).

12. *See, e.g.*, Jason S. Alloy, "*158-County Banishment" in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083 (2002); Alison Hill, *Banishment: Stopping Stalkers at the County Line*, 81 NOTRE DAME L. REV. 1123 (2006); Kelly A. Spencer, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and* Doe v. City of Lafayette, 36 U.C. DAVIS L. REV. 297 (2002).

13. *See, e.g.*, Rebecca Blackmon Joyner, *An Old Law for a New World? Third-Party Liability for Terrorist Acts—From the Klan to Al Qaeda*, 72 FORDHAM L. REV. 427 (2003); Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847 (2000).

14. *See, e.g.*, Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989).

15. *See, e.g.*, Bruce Epperson, *Permitted But not Intended:* Boub v. Township of Wayne*, Municipal Tort Immunity in Illinois, and the Right to Local Travel*, 38 J. MARSHALL L. REV. 545 (2004).

16. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (finding the Fugitive Slave Act of 1850 to be constitutional, thus ensuring federal enforcement of an enslaver's ability to return runaway enslaved blacks and to contradict free states' anti-kidnapping laws; finding that blacks were not and could not be United States citizens; and overturning the Missouri Compromise). *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

17. *See infra* Section IV.C.; *see also* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C R. & C.L. L. REV. 51, 51-169 (2005) (analyzing Justice O'Connor's swing vote opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), as a contemporary reflection of the antebellum judicial doctrine of "blackness as property," which denied African-American women the right to property).

18. *See generally* DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIAL, AND PROBLEMS (2003) (utilizing critical race theory in developing a black letter law casebook).

19. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2005).

rights cases.[20] Professor Bell's "interest-convergence dilemma"[21] is stated as follows:

> Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.[22]

This Article argues that when analyzing intra-state travel cases, courts should choose freedom over enslavement and should find for the existence of a constitutional right to intra-state travel. It will show that when courts deny the existence of a constitutional right to intra-state travel, they are consciously or unconsciously adopting a doctrine of "people as property." That doctrine was developed to control travel regulation of enslaved[23] blacks[24] in the

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20. *See, e.g.*, United States v. Louisiana, 225 F. Supp. 353, 356 (E.D. La. 1963) (holding that a state voter registration test was a "sophisticated scheme to disfranchise Negroes" and was "unconstitutional as written and as administered."); *see also* Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 324 (1985) ("Historical research provides the stone and mortar from which Judge Wisdom's opinions were crafted. History provides the 'facts' upon which the judgment of unconstitutionality is premised."). *See generally* JACK BASS, UNLIKELY HEROES (1981); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978) (describing Judge Wisdom's distinctive judicial style, especially in landmark desegregation decisions).

21. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

22. *Id.* at 523.

23. "Enslaved" is defined as "reduced to slavery." 5 OXFORD DICTIONARY, *supra* note 2, at 281. For purposes of this Article, the term "enslaved" is defined as the total embodiment of being dominated and exploited physically, sexually, economically, psychologically, spiritually, against one's will, culture, beliefs, values, and against the consciousness of morality, international law, and humanity. Some aspects of American enslavement include imprisonment, mutilation, destruction of family, rape, child molestation, mental abuse, floggings, murder, strangulation, and torture (both physical and emotional). This Article adopts Professor Adrienne Davis's terms "enslavement" and "enslaved," rather than "slavery" and "slave" to describe the political-economic-sexual economy in which blacks were legally and often physically held in bondage. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223 n.4 (1999) ("I do so in order to highlight the fact that people are not born into servitude. Others force such conditions onto them, with the assistance of state-sanctioned, and often state-sponsored, violence and coercion. Enslavement is not a one-time determination of status; rather, it must be enforced and maintained on an ongoing basis.").

24. "Black(s)" is defined as "[h]aving an extremely dark skin; strictly applied to negroes and negritos, and other dark-skinned races; often loosely, to non-European races, little darker than many Europeans . . . . Of or pertaining to the negro race." 2 OXFORD DICTIONARY, *supra* note 2, at 238. For purposes of this Article, the term "black(s)" refers to people of African heritage, who, in the American enslavement system, were generally enslaved. The term "black" is synonymous with the terms "Negro," "colored," "Black," and "mulatto," as those terms were used in the 1830, 1840, 1850, and 1860 United States Census. The enslavement economy used racial classification as a legal fiction to reinforce the political economy of enslavement to benefit the master class. *See generally* COLOR AND RACE (John Hope

antebellum South,[25] particularly to discourage "runaways"[26] (hereinafter known as "black travelers").[27] This is not to say that the low standard of human rights protection today targets only African-Americans; rather, all Americans suffer from a low human rights standard of justice, relative to travel rights, especially the un-empowered or the undesirable.

An overview of this Article is appropriate. Part I presents the legal issue of intra-state travel, its relevance, the Article's thesis, and its analytical lens. Part II analyzes the *Dickerson* case and the Fifth Circuit's denial of the right to intra-state travel, *Dickerson*'s consistency with other federal decisions, federal circuits that disagree with *Dickerson*, the Supreme Court's bases for recognizing a constitutional right to intra-state travel, and the Due Process Clause inquiry into intra-state travel. Part III lays the analytical foundation for understanding the antebellum Southern legislatures' regulation of travel, its travel options, and the rungs from enslavement to liberty. Part IV presents the Southern legislatures' legal principles, rules, and rationale for regulating blacks' right to travel. Part V reflects on the contemporary adoption of the people as property doctrine and on how an enslavement legacy relative to intra-state travel impedes the development of human rights principles.

This Article concludes that the antebellum, Southern doctrine of people as property and its laws regulating travel are the roots of the cancerous shoots of the *Dickerson* decision. It suggests that pursuant to Professor Derrick Bell's "interest-convergence dilemma," the U.S. will develop a protective human rights Constitution when each American recognizes that protection of his or her human rights is directly and intrinsically tied to ensuring and protecting the rights of the least empowered in our society.

Franklin ed., 1968); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

25. *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 28 (1956) (referring to the 1830-1860 time span as the "antebellum" period of American enslavement).

26. *See generally*, FRIEDMAN, *supra* note 19, at 158 (describing how Congress passed the fugitive slave laws in 1793 and in 1850 to flush out the Constitution's mandate to return runaway enslaved blacks to their masters or professional "slave-catchers" and to thwart "antikidnapping" state laws meant to protect former enslaved blacks from recapture). "Runaways" or "fugitive slaves" are historical terms that the enslavement system coined to describe blacks that fled from enslavement. From a critical race perspective, those terms focused on the enslavement locus, as in running away *from* the plantation, rather than the idea that liberated blacks were running away *to* freedom and liberty.

27. "Black traveler(s)" is defined for purposes of this Article as enslaved blacks and free blacks in the antebellum South who defied the restrictive regulations of travel and sought freedom and liberty over enslavement and control. For purposes of this Article, the term "black traveler" represents the aspiration of enslaved and free blacks to live free of enslavement, to be masters of their own fate, to mold their own destiny, to seek frontier, and to achieve the benefits of a free and open society that respects human dignity and protects human rights.

II. INTRA-STATE TRAVEL AND SUBSTANTIVE DUE PROCESS

> [T]he Supreme Court has not ruled on whether a right of *intra[-]state* travel exists. This Court declines to find that there is a fundamental right to *intra[-]state* travel.[28]
> - Judge Mary Ann Vial Lemmon in *Dickerson v. City of Gretna*

> 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.[29]
> - Justice Stevens in *City of Chicago v. Morales*

This section presents a recent judicial development on the issue of intra-state travel that arose during the Hurricane Katrina Crisis. It shows how the *Dickerson* court's denial of intra-state travel is representative of some, but not all, of the federal circuits. It also presents the Supreme Court's bases for a constitutional right to intra-state travel. Finally, this section introduces a substantive due process inquiry of intra-state travel, requiring an inquiry into the traditions and culture that led to the current state of the law.

A. Dickerson *Fails to Protect Intra-State Travel*

During Hurricane Katrina, hundreds of American citizens were denied the right to exit the flooding City of New Orleans when police from the adjacent City of Gretna barricaded a federal highway, as reported in *Dickerson v. City of Gretna*.[30] The Gretna police reinforced their blockade by admittedly shooting "guns into the air to ward off the attempted entry."[31]

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28. Dickerson v. City of Gretna, No. 05-6667, 2007 WL 1098787, at *3 (E.D. La. Mar. 30, 2007) (emphasis added).

29. Chicago v. Morales, 527 U.S. 41, 53 (1999) (quoting Williams v. Fears, 179 U.S. 270, 274 (1900)).

30. *See Dickerson*, 2007 WL 1098787, at *1. *See also* Rebecca Eaton, Notes & Comments, *Escape Denied: The Gretna Bridge and the Government's Armed Blockage in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV. 127, 130-31 (2006) (noting that in addition to the alleged violation of their right to travel, plaintiffs asserted violations of their rights to peaceful assembly, to due process, to equal protection, to protection against unreasonable search and seizure, and to protection against cruel and unusual punishment).

31. *See No Charges in Post-Katrina Bridge Blockade: Cops allegedly kept hundreds of evacuees from fleeing flooded New Orleans*, MSNBC, Oct. 31, 2007, http://www.msnbc.msn.com/id/%2021564539 (reporting that a grand jury declined to bring criminal charges in the 2005 blockade that kept hundreds from crossing the Mississippi River to safety after Hurricane Katrina). There is some question as to whether the police were operating pursuant to a state-ordered "contra-flow" plan to direct traffic in northern, eastern, and western routes away from the Hurricane's path.

In some evacuees' action for infringement of their constitutional right to intra-state travel, federal district Judge Mary Ann Vial Lemmon ruled against their claim, stating that "[w]hile there is no doubt that a fundamental right of *interstate* travel exists, the Supreme Court has not ruled on whether a right of *intra[-]state* travel exists. This Court declines to find that there is a fundamental right to *intra[-]state* travel."[32] The Court went on to say, "This Court is bound by the Fifth Circuit precedent of *Wright*, which found that intra[-]state travel is not a fundamental right protected by the Constitution. Accordingly, defendants' motion to dismiss is granted regarding plaintiffs' claims relating to intra[-]state travel." [33]The Fifth Circuit later affirmed the district court's ruling.

The *Dickerson* court relied on the Fifth Circuit's decision in *Wright v. City of Jackson*,[34] which affirmed the dismissal of the City of Jackson, Mississippi firefighters' complaint alleging that the city's residency requirement abridged their fundamental right to intra-state travel.[35] In analyzing the municipal residency requirement, the *Wright* Court stated that "nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental constitutional 'right to commute' which would cause the compelling government purpose test in *Shapiro* to apply."[36] In broadly applying *Wright* to a general right to intra-state travel, both the federal district court and the Fifth Circuit were valid in denying the *Dickerson* plaintiffs' claim of a constitutionally-protected right to intra-state travel.

B. Dickerson *Represents Federal Denial of Intra-State Travel*

At first glance, one might think that the *Dickerson* court was incorrect in its reading of the Constitution and Supreme Court cases on the intra-state travel issue. As every first-year law student knows, the Constitution protects *interstate* travel, as the *Dickerson* district court recognized.[37] Logically, why

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32. *Dickerson*, 2007 WL 1098787, at *3 (emphasis added). The case was brought on other constitutional and federal law bases and is continuing adjudication.

33. *Id.*

34. *Id.* (relying on *Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975), in holding that there is no constitutional right to intra-state travel).

35. *Wright*, 506 F.2d at 900.

36. *Id.* at 902 (denying the plaintiffs' assertion that both *Shapiro v Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), required the City of Jackson to demonstrate "a substantial and compelling reason" for imposing residency restrictions that interfered with their fundamental right to travel).

37. *Dickerson*, 2007 WL 1098787, at *2 ("The 'constitutional right to travel from one State to

would the Constitution protect interstate travel, travel from one state to another state, and not protect intra-state travel, travel that is solely within a state? Contrary to this logical conclusion, there is clear jurisprudence showing that not all travel is equal. For example, the Constitution affords less protection to the right to travel *internationally* than it does to the right to travel *interstate*.[38]

Similarly, *Dickerson* stands for the proposition that intra-state travel does not require the same constitutional protection as interstate travel. The *Dickerson* court does not stand alone in holding that there is *no* constitutionally protected right to intra-state travel: other federal courts agree,[39] including the Sixth,[40] Seventh,[41] and Eighth[42] Circuits. Perhaps complicating this analysis is the fact that there is no express provision in the Constitution guaranteeing intra-state travel, nor is there such a guarantee expressly provided for in *any* state constitution.[43] Hence, the *Dickerson* case and like cases support the proposition that the Constitution does not protect intra-state travel. This constitutional interpretation raises two obvious

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another' is firmly embedded in our jurisprudence." (quoting Saenz v. Roe, 526 U.S. 489, 498 (1999)). *See also* United States v. Guest, 383 U.S. 745, 757 (1966) (declaring that the "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."). *See also* Edwards v. California, 314 U.S. 160 (1941) (holding that the transportation of persons constitutes interstate commerce and therefore that California's prohibition by statute of the transportation of indigents into the state is an "unconstitutional barrier to interstate commerce").

38. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981) (citing Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (holding that, unlike interstate travel, the "right" to international travel is "no more than an aspect of the 'liberty' protected by the . . . Fifth Amendment" and therefore can be regulated within the bounds of due process); Zemel v. Ruck, 381 U.S. 1, 3 (1965) (upholding the Secretary of State's refusal to issue a passport to travel to Cuba). *See also* Louis L. Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 18 (1956) ("the passport problem centers around the power to forbid our citizens to leave the country for travel"); Note, *Constitutional Protection of Foreign Travel*, 81 COLUM. L. REV. 902, 905 (1981).

39. *See* Townes v. City of St. Louis, 949 F. Supp. 731, 734-35 (E.D. Mo. 1996), *aff'd mem.*, 112 F.3d 514 (8th Cir. 1997) (not finding a constitutional right to intra-state travel, showing a split between the First, Second, and Third Circuits (finding such a right generally) and the Fifth, Sixth, and Seventh Circuits (not finding such a right), and finding that only the Third Circuit has decided that the right to intra-state travel "includes a right to localized movement," citing *Lutz v. City of York*, 899 F.2d 265, 268 (3d Cir. 1990)).

40. *See* Wardwell v. Bd. of Ed. of Cincinnati, 529 F.2d 625, 627 (6th Cir. 1976) (denying that a citizen's right to intra-state travel has been afforded federal constitutional protection).

41. *See* Andre v. Bd. of Trs., 561 F.2d 48, 53 (7th Cir. 1977) (noting that the "right" to intra-state travel has been rejected by various courts, and declining to consider whether such a right should be acknowledged).

42. *See Townes*, 949 F. Supp., at 735 (declining to find a constitutional right to intra-state travel).

43. Based upon a Lexis search of state constitutions.

questions: Is the *Dickerson* court's holding that the Constitution does not protect intra-state travel universally held? And if the *Dickerson* holding is not universally held, why do some federal courts, including the *Dickerson* court, believe and hold that the Constitution fails to protect law-abiding citizens against unjustified state infringement when traveling intra-state?

C. Some Federal Circuits Disagree with Dickerson

In seeking to answer the first question, on the universality of the *Dickerson* holding, there is surprisingly little legal scholarship directly on the issue of a citizen's right to intra-state travel.[44] Yet there are some important works on the history of the common law tradition of freedom of travel.[45] Recent scholarship relative to intra-state travel concerns important, yet tangential judicial decisions relative to anti-cruising laws,[46] residency requirements,[47] curfews,[48] roadblocks,[49] undocumented aliens, stalkers/sex offenders ("buffer zone"), terrorism, homelessness, and tort law, to name a few.[50]

A closer look at the *Dickerson* holding shows that its reading of the Constitution relative to intra-state travel is not totally correct. In fact, it might be argued that the *Dickerson* court makes illogical assumptions in support of its denial of constitutional protection. That, along with the court's reliance on

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44. *See, e.g.*, Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956); Andrew C. Porter, Comment*, Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 837 (1992) (arguing that "logic, Supreme Court doctrine, history, travel jurisprudence, and due process liberty interests all necessitate" a fundamental right to intra-state travel); Nicole I. Hyland, Note, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will it Travel?*, 70 FORDHAM L. REV. 187, 229 (2001); Emilia P. Wang, *Unenumerated Rights—Are Unenumerated Rights a Viable Source of the Right to Intrastate Travel?* Watt v. Watt*, 971 P.2d 608 (Wyo. 1999)*, 31 RUTGERS L.J. 1053 (2000).

45. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *1, *130 (1765); ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 162 (1956).

46. *See, e.g.*, Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990).

47. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

48. *See, e.g.*, Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989).

49. *See, e.g.*, Sitz v. Dep't of State Police, 429 N.W.2d 180 (Mich. Ct. App. 1988), *rev'd*, 496 U.S. 444 (1990).

50. *See, e.g.*, Timothy Baldwin, Comment, *The Constitutional Right to Travel: Are Some Forms of Transportation More Equal than Others?*, 1 NW. J. L. & SOC. POL'Y 213 (2006); Gregory B. Hartch, Comment, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457 (1995); cases, *supra* notes 6-16.

a broad reading of the Fifth Circuit's decision in *Wright*, led the *Dickerson* court to deny the Katrina evacuees constitutional protection.

How is the *Dickerson* holding flawed? The *Dickerson* court admits that "the United States Supreme Court has not decided the question of whether the Constitution protects a right to intra[-]state travel."[51] Yet *Dickerson* concludes that there is no constitutional right to intra-state travel because the Supreme Court has not *explicitly* stated that the Constitution protects a citizen's right to intra-state travel. Logically, the Supreme Court's failure to explicitly find a constitutional right to intra-state travel does not automatically mean that the Court has expressly denied the existence of such a right. Silence does not and should not mean the denial of a fundamental right.

In fact, there are federal appellate courts that disagree with the foundation of the Fifth Circuit's decision in *Wright*. They read the void in Supreme Court decisions as support for, not opposition to, a constitutionally protected right to intra-state travel. Contrary to *Dickerson*, as recognized in the above-mentioned *Townes* case,[52] there is a split in the circuits on the issue of a general constitutional right to intra-state travel, with the First,[53] Second,[54] and Third Circuits[55] taking a position contrary to the *Dickerson/Wright* courts. These circuits read the Constitution as protective of the constitutional right to intra-state travel; and, as we will see next, they have Supreme Court support.

D. The Supreme Court Supports Intra-State Travel Protection

In addition to certain appellate decisions, and contrary to the *Dickerson* holding and the Fifth Circuit, Supreme Court Justices have provided several important bases for a constitutional right to intra-state travel. The first and perhaps most powerful justification of a constitutional right to intra-state travel is the "fundamental right" justification. That is, intra-state travel is

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51. Dickerson v. City of Gretna, No. 05-6667, 2007 WL 1098787, at *2 (E.D. La. Mar. 30, 2007) (citing Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974); Johnson v. City of Cincinnati, 310 F.3d 484, 496-97 (6th Cir. 2002); Doe v. Miller, 405 F.3d 700, 712 (8th Cir. 2004)).

52. Townes v. City of St. Louis, 949 F. Supp. 731, 734 (E.D. Mo. 1996).

53. *See, e.g.*, Coles v. Hous. Auth. of Newport, 312 F. Supp. 692 (D.R.I. 1970), *aff'd*, 435 F.2d 807 (1st Cir. 1970).

54. *See, e.g.*, Town of W. Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993) (a constitutional right to travel protects the right to travel freely within a single state); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971) (opining the fallacy of protecting interstate travel while not protecting intra-state travel).

55. Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990) (finding a federal constitutional right of intra-state travel).

fundamental to the right to liberty, which is guaranteed by the Fifth and Fourteenth Amendments.[56] Primarily, this substantive due process approach highlights the freedom of movement that originated as a fundamental right in the Articles of Confederation and has since manifested itself as the right to travel within the structure of the Constitution.[57] The principle of "travel as fundamental to liberty" was articulated in two early twentieth century Supreme Court cases. In *United States v. Wheeler*,[58] the court noted that under the Articles of Confederation, state citizens

> possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom.[59]

Likewise, in *Williams v. Fears*,[60] Chief Justice Fuller in the majority opinion stated that the right to intra-state travel is secured by the Constitution:

> 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 14th Amendment and by other provisions of the Constitution.[61]

In *Kent v. Dulles*,[62] following World War II, Justice Douglas echoed these early twentieth century positions, stating that the general right to travel was historically fundamental:[63]

> The right to travel is a part of "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontier in either direction, and inside frontier as well, was a part of our heritage . . . .

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56. *See, e.g.*, United States v. Laub, 385 U.S. 475 (1967); Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961) ("Even though one may not have a constitutional right to be in a certain place, the government may not prohibit one from going there unless by means consonant with due process of law.").

57. *See generally* David S. Bogen, *Precursors of Rosa Parks, Maryland Transportation Cases between the Civil War and the Beginning of World War I*, 63 MD. L. REV. 721, 721 (2004).

58. 254 U.S. 281 (1920).

59. *Id.* at 293.

60. 179 U.S. 270 (1900).

61. *Id.* at 274 (finding that the State of Georgia's license tax on emigrant agents did not violate the Constitution).

62. 357 U.S. 117 (1958).

63. *Id.*

> Freedom of movement is basic in our scheme of values . . . . "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."[64]

More recently, in *City of Chicago v. Morales*,[65] Justice Stevens recognized a general right to travel:

> On the other hand, as the United States recognizes, 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 "whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. . . .[66]

In the course of his analysis, Justice Stevens also recognized the relationship that legal history has to the contemporary rights debate when he stated that anti-loitering laws and vagrant laws were "used after the Civil War to keep former slaves in a state of quasi slavery."[67] This observation is important to the thesis of this Article and will be developed in greater detail.

The travel as fundamental or freedom of movement analysis finds support in the Substantive Due Process Clause of the Constitution, rather than in a commerce or statewide consideration level.[68] However, there is a dispute as to whether the freedom of movement doctrine is based on the notion of federalism or individual rights.[69] The federalist approach argues that making the right to travel an individual right creates a great deal of confusion regarding what level of scrutiny should be utilized and uncertainty as to what underlying norm is being protected.[70] But the federalist approach may lead to institutionalized racism against minorities and other underrepresented groups on a state-by-state basis. Relative to the Katrina Crisis, one would argue that

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64. *Id.* at 126 (footnotes and cases omitted) (relating to international travel and Congress's passport issuance regulation and denial because of political beliefs or associations); *see also* Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964) (affirming that "freedom of travel is a constitutional liberty closely related to the rights of free speech and association").

65. 527 U.S. 41 (1999).

66. *Id.* at 53-54 (citations and footnotes omitted).

67. *Id.* at 53 n.20 (citing T. WILSON, BLACK CODES OF THE SOUTH 76 (1965)).

68. *See generally* Wang, *supra* note 44.

69. *See generally* Nzelibe, *supra* note 9.

70. *Id.*

there is a basic, fundamental human right to law-abiding intra-state travel and that any state intrusion must be reasonable and justifiable.

A second justification for a constitutional right to intra-state travel is the "constitutional vehicle" justification. That is, intra-state travel is essential to facilitate the enjoyment and exercise of other constitutionally protected rights, such as the right to vote, the right of assembly, and the right to association.[71] In support of this justification, Justice Marshall in *Dunn v. Blumstein*[72] stated relative to a state residency requirement and the right to vote:

> Such laws [with durational residency requirements] force a person who wishes to travel and change residence to choose between travel and the basic right to vote . . . . Absent a compelling state interest, a State may not burden the right to travel this way.[73]

This "intra-state travel as a vehicle for other rights" justification makes a strong case for the extension of the freedom of movement doctrine, as well as the current right to travel. Relative to the Katrina Crisis, one might argue that the right to intra-state travel facilitates the right to be safe, the right to associate with family and friends, the right to worship (if seeking the comfort of one's church), the right to preserve one's life and property, and other constitutionally-protected rights.

A third justification for the right to intra-state travel is "equal protection," the right for each citizen to enjoy fundamental rights regardless of race, sex, religion, or class. This observation was made at the end of the nineteenth century in Justice's Harlan's dissenting opinion in *Plessy v. Ferguson*,[74] which laid out the principle that the Constitution ensures a citizen's rights regardless of their race or color:

> In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.[75]

This non-discrimination justification for intra-state travel was repeated in more recent Supreme Court opinions. In *Bell v. State of Maryland*,[76] Justice Douglass (with Justice Goldberg concurring in relevant part) stated:

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71. *See* Hangartner, *supra* note 6.
72. 405 U.S. 330 (1972).
73. *Id.* at 342.
74. Plessy v. Ferguson, 163 U.S. 537, 552-63 (1896) (Harlan, J., dissenting).
75. *Id.* at 554 (relating to a black's right to travel in a "white only" railroad car).
76. 378 U.S. 226 (1964) (Douglass, J., concurring).

> The right of any person to travel interstate irrespective of race, creed, or color is protected by the Constitution. Certainly his right to travel intra[-]state is as basic. Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensable to travel either interstate or intra[-]state.[77]

Relative to the Katrina Crisis, the equal protection justification might apply in that many of the would-be evacuees were African-American. Undercutting the equal protection justification relative to the Katrina Crisis is the fact that the Gretna police barricade denied the right to travel to non-African-American citizens as well. All citizens seeking to cross the Bridge were treated with the same non-existing level of constitutional protection.

A fourth justification for protecting intra-state travel is the "commerce" justification. That is, intra-state travel is essential to interstate travel and national commerce. In *Heart of Atlanta Motel, Inc. v. United States*,[78] Justice Clark, relative to the essential relationship between local activity and national commerce, provided an important test for the application of the Commerce Clause:

> In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interests.[79]

Later, in *Shapiro v. Thompson*,[80] Justice Brennan, recognizing intra-state travel's relationship to the common good and writing the majority opinion, cited with approval the decision of Chief Justice Taney in *The Passenger Cases*, 48 U.S. 283 (1849), as follows:

> For all the great purposes for which the Federal government is formed, we are one people, with one common country. We are all citizens of the United States; 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.[81]

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77. *Id.* at 255.

78. 379 U.S. 241 (1964) (upholding an injunction against a private motel operator refusing to rent to black guests and the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964).

79. *Id.* at 255.

80. 394 U.S. 618 (1969).

81. *Id.* at 630.

Relative to the Katrina Crisis, one could argue that there was a direct relationship between the local conditions and the regional and national interests, especially in light of the City of New Orleans's importance to the national and international oil and gas industry, as well as to the shipping of oil, gas, and other commodities.

Clearly, based on various justifications of several Supreme Court Justices, there is support for a constitutionally protected right to intra-state travel. Of course, the existence of a constitutional right does not give blanket authority to exercise that right absolutely in every instance. Rather, the individual exercise of constitutional rights faces various levels of scrutiny relative to other governmental interests. In *Zemel v. Rusk*,[82] Justice Warren stated that a general right to travel, whether intra-state or interstate, is not absolute and is subject to reasonable government restriction:

> The right to travel *within* the United States is of course also constitutionally protected, cf. *Edwards v. California*. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly or materially interfere with the safety and welfare of the area or the Nation as a whole.[83]

In light of the mandatory evacuation and flooding that the Katrina evacuees faced, one questions how the Gretna police barricade served the "safety and welfare" of the state. It would appear that the personal safety and welfare of the would-be evacuees would be paramount to most other state interests.

Therefore, contrary to the *Dickerson* court's assertion, there is considerable Supreme Court support for, as well as federal appellant decisions in favor of, a constitutional right to intra-state travel. In light of these Justices' opinions and court decisions, one must wonder why the Fifth Circuit and other federal circuit courts would deny the right to intra-state travel. This leads to the second question mentioned earlier: As it is clear that the *Dickerson* holding is not universally held, why do some federal courts believe that the Constitution fails to protect law-abiding citizens against unjustified state infringement when traveling intra-state?

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82. Zemel v. Rusk, 381 U.S. 1 (1965).

83. *Id.* at 15-16 (upholding the government's right to withhold a passport to citizens seeking to travel to Cuba) (citation omitted).

E. Due Process Clause: Traditions and Conscience of Our People

The *Dickerson* decision and others, which deny a citizen's constitutional protection to intra-state travel, present a constitutional conundrum. Why do some federal appellate courts find there is no constitutional right to intra-state travel? And why has the Supreme Court not expressly found a right to intra-state travel?

One court's discussion provides useful insights. In *Lutz v. City of York*,[84] the Third Circuit Court of Appeals decided, contrary to the *Dickerson* line of cases, that the right to intra-state travel includes the right to localized movement. In doing so, the Court examined six possible constitutional sources for the right to intra-state travel and concluded that "no constitutional text other than the Due Process Clauses could possibly create a right of localized intra[-]state movement . . . ."[85] The Third Circuit cited Justice Scalia's narrow test of substantive due process, which states, "[T]he Due Process Clause substantively protects unenumerated rights 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . . [T]he relevant traditions must be identified and evaluated at the most specific level of generality possible."[86] The Third Circuit found "that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"[87] The Third Circuit concluded, however, that the anti-cruising statute at issue was narrowly tailored to combat the safety and congestion problems identified by the city and was not an unconstitutional infringement on the right to intra-state travel.[88]

Is intra-state travel "so rooted in the traditions and conscience of our people as to be ranked as [a] fundamental" right?[89] In deciding *Lutz*, the Third Circuit followed the "liberty" tradition and culture of our nation, which will be referred to herein as the Freedom Dream paradigm. However, following Justice Scalia's test relative to intra-state travel does not always lead to an obvious pro-travel conclusion. The answer depends on where a court finds the sources of our nation's "traditions and conscience." Clearly, when one looks

84. 899 F.2d 255 (3d Cir. 1990).

85. *Id.* at 267.

86. *Id.* at 268 (quoting and citing Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J., plurality opinion)).

87. *Id.*

88. *Id.* at 270.

89. *Id.* at 268 (quoting and citing Michael H. v. Gerald D., 491 US 110, 128 n.6 (1989) (Scalia, J., plurality opinion)).

at American history, there are two different American experiences, one of which reflects a Freedom Dream paradigm. Unfortunately, our traditions and conscience are tortured and not always so pure. There is another competing paradigm: the Enslavement Nightmare. This American travel paradox, the conflict between the Freedom Dream and the American Nightmare paradigms, haunts the Constitution.

III. BATTLE OVER AMERICA'S SOUL: LIBERTY OR ENSLAVEMENT?

> 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 locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.[90]
>
> - Sir William Blackstone

> On the question of fugitive slaves, the Constitution was relatively firm. A fugitive slave "shall be delivered upon Claim of the Party to whom [his] Service or Labour [sic] may be due."[91]
>
> - Lawrence M. Friedman

These historical references evidence two important facts relating the right to travel and the American enslavement system. First, under common law, a citizen's right to travel was a fundamental, inalienable right.[92] Second, the Constitution encouraged the capture of liberated, formerly enslaved blacks even when located in free states.[93] These references also evidence two competing paradigms: freedom versus enslavement.

For many, America represents the land of liberty. But through the lens of history, the image of America the Free is somewhat cloudy. This section analyzes America's conflicted travel history and the various travel options that American society might have implemented. Finally, it describes the various levels of travel rights that enslaved blacks needed to negotiate from enslavement to liberty and freedom, by way of a "rights ladder" analogy.

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90. BLACKSTONE, *supra* note 45, at *134-38 (discussing specifically the rights against unlawful imprisonment and against unlawful banishment from one's country).

91. FRIEDMAN, *supra* note 19, at 155 (quoting U.S. CONST. art. 4, § 2, *repealed by* amend. XIII).

92. BLACKSTONE, *supra* note 45, at *134-38.

93. FRIEDMAN, *supra* note 19, at 155.

A. The American Travel Paradox

Travel in America is an enigma of two symbiotic paradigms: the Freedom Dream and the Enslavement Nightmare. The Freedom Dream heralded the land of liberty, unrestrained by the outmoded conventions of the past, where frontier stood as the codeword for unbounded liberty, growth potential, wealth-creation, and power.[94] The noted legal historian Lawrence M. Friedman summarized the American ideals of the early Republic:

> Between 1776 and the Civil War, dominant public opinion believed in exuberant, never-ending growth, believed that resources were virtually unlimited, that there would be room and wealth for all. The theme of American law before 1850, in Willard Hurst's famous phase, was the release of energy. The ethos was: Develop the land; grow rich; a rising tide raises all boats.[95]

For the Founders, there was no need to ensure the fundamental right to travel. Liberty was the very reason for the American Revolution.[96] Yet their vision of life, liberty, and the pursuit of happiness was not enjoyed by all. It was restricted to landholding, Anglo-Saxon men. Unfortunately for many, expansion into the frontier by some came at a great and tragic cost to others, including Native Americans.[97]

Contradictory with, but symbiotic to, the Freedom Dream paradigm, exists the Enslavement Nightmare paradigm. Under this paradigm, the nation benefitted from an antebellum enslavement economy[98] built upon the uncompensated labor of captured and enslaved Africans.[99] By 1830, it was legally accepted in enslavement states that enslaved blacks were property and

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94. *See* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1920) (presenting a ground-breaking view of the role of "frontier" on the American psyche).

95. FRIEDMAN, *supra* note 19, at 254 (citing J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES ch. 1 (1956)).

96. *See* CHAFEE, *supra* note 45, at 188.

97. As to the constitutional development procuring white control of Native American title to land, see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823): Native Americans lacked title to land they "occupied" unless the United States government had expressly given them specific recognition of title to specific lands.

98. The term "enslavement political economy" or "enslavement economy" reflects the plantation society described in EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY 15-16 (1965) ("The essential element in this distinct civilization was the slaveholders' domination, made possible by their command of labor. Slavery provided the basis for a special Southern economy and social life, special problems and tensions, and special laws of development.").

99. *See generally* LESLIE HOWARD OWENS, THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH (1976); ULRICH B. PHILLIPS, LIFE AND LABOR IN THE OLD SOUTH (1929).

that their place was under the strictest control on the plantation.[100] Enslavement both legally imprisoned blacks and forbade their travel. Enslaved blacks' lack of travel rights reflected their legal status: bondage.

America's Enslavement Nightmare stripped enslaved blacks of their travel freedom. The patrollers system promoted the principle that all white men, not just slave-owners, had the right and state authority to physically and psychologically cripple African descendants, to strip them of their dreams, and to prohibit them from enjoying the liberty of travel. It took from African people the personal and economic value of their person, thus devaluing their position as stakeholders.

Blacks who sought to and/or were able to escape the enslavement political economy were doubly punished. The enslavement system labeled them as outlaws. At the same time, some in the black community also viewed them as traitors for abandoning their enslavement homeland: the plantation. Still, many in both the North and the South celebrated the runaway as a victor over tyranny—a hero for breaking the chains of enslavement.

These two paradigms—Freedom Dream and Enslavement Nightmare—complemented one another and shared a quintessential nexus: the regulation of blacks' right to travel to promote the physical, economic, and psychological exploitation of enslaved blacks' labor and to elevate the physical, economic, and psychological status of wealthy slaveholders.[101] Overall, the Enslavement Nightmare was an unfortunate corollary to the principles of the Freedom Dream; enslavement of one race enhanced the freedom of the other.

The history of American travel law is rife with contradiction. On the one hand, the Freedom Dream paradigm promotes an open society, a culture of freedom and liberty, through principles of free travel, public transportation, and public accommodations. It seeks to promote upward mobility, thus negating the belief that one's place in life ends where it begins. It represents the victory of liberty, living for today, property as a commodity, and the pursuit of happiness. On the other hand, the Enslavement Nightmare Paradigm promotes a closed society, a culture of imprisonment and prohibited travel, through principles of blockades, restricted transportation, and limited public accommodations. It seeks to promote the belief that one's place in life ends where it begins. It represents the victory of tyranny, being chained to the past, people as property, and the frustration of dreams. These competing paradigms

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100. *See* FRIEDMAN, *supra* note 19, at 156-66.

101. *See* ULRICH B. PHILLIPS, AMERICAN NEGRO SLAVERY 401 (2d ed. 1969) ("Plantation slavery had in strictly business aspects at least as many drawbacks as it had attractions. But in the large it was less a business than a life; it made fewer fortunes than it made men.").

make up the tortured traditions and conscience of American life, providing competing sources of substantive due process analysis relative to intra-state travel.

B. America's Travel Regulatory Options

Before describing how the antebellum South regulated enslaved blacks' travel, it is insightful to assess various travel options. Travel options have two analytical aspects: first, an enslaved black's ability to enjoy mobility, and second, a free white's right to promote black mobility without restrictions.

The first of these black travel options, at one end of the rights spectrum, is the "optimal rights" theory. With optimal rights, a black person (enslaved or free) would be afforded all the travel rights and privileges enjoyed by a white person. Under optimal rights, a black person would receive all benefits of freedom, including all rights-seeking opportunities. The optimal rights option would have welcomed efforts by whites to promote black mobility.

The second option, at the other end of the rights spectrum, is "total prohibition." Under total prohibition, a black person (enslaved or free) would be absolutely prohibited from all travel of any kind. With total prohibition, whites would be absolutely prohibited from promoting black mobility; to do so would run afoul of both criminal and civil laws.

There are several alternatives between these two extremes, but two of them are particularly noteworthy. One is the "travel with papers" option, wherein blacks would be allowed limited travel rights but only with express white permission and/or with white accompaniment. This option would legitimize the travel rights of blacks but only when their travel serviced the needs of whites. The immediate beneficiaries of the travel with papers option would be the white master and the enslavement economy.

The other is the "state permitted" option or theory, wherein a white man and a black person (enslaved or free) could not legally travel without the state's express permission. Under the state permitted option, a black person would receive some travel rights, but only if expressly sanctioned by the state. Under the state permitted option, both blacks who wished to travel and whites who promoted black mobility would be required to comply with state travel regulations.

There are other legal considerations in analyzing these hypothetical travel options. One is the general white population's relationship to the options. For example, what if the white population supported the general suppression of black rights of all kind? Another is the effect that the black person's legal

status might have on these options. For example, what if a black person were legally free, not enslaved?

Another common question in antebellum jurisprudence concerns the travel rights of a black person who had mobilized to a free state or a free nation. Did an enslaved black's residence in a free state liberate him? Does his master have the right to recapture him or her?

With these many options, antebellum Southern legislatures chose total prohibition of enslaved people's rights to travel. In limited instances, the legislatures gave some deference to slaveholders to regulate their enslaved people's travel under state supervision through the issuance of travel papers. In rare instances, where it benefited the enslavement economy, select free and enslaved blacks, especially those in urban environments, were allowed to travel in an apparently free manner within certain boundaries. Before we answer the how and the why of the regulation of blacks' travel, the following discusses the ten levels of travel rights, from enslaved to free.

C. Ten Rungs from Enslavement to Freedom

To better understand enslaved blacks' relationship to freedom, it is helpful to view travel through a "rights ladder" analogy.[102] At the bottom rung of the ladder was captivity, enslavement, and oppression, where enslaved people were stripped of their natural freedoms, denied travel rights, physically and psychologically imprisoned, and subjected to personal abuse for attempting to travel. At the top rung of the ladder was freedom, where privileged people enjoyed all the legal and psychological travel benefits of American citizenship. These included the rights to explore life, to visit loved ones, to learn from experiences, to seek opportunities, to escape from one reality to another, to vacation, to hope, to dream, to be and feel free, to flee from, to go to, to transition, and to metamorphose. A legal history of enslaved African descendants' struggles to obtain the full civil benefits of freedom is valuable in understanding contemporary constitutional rights issues, including the right to intra-state travel. It also helps legal scholars better understand the development and the nature of constitutional rights.

Relative to travel rights, enslaved people had to negotiate a ten-step "rung" process from enslavement to freedom.[103] Step one was oppression,

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102. The author refers to the various levels of American citizenship as the "rights ladder" to help the reader visualize the different levels or "rungs" of citizenship, from enslaved status to freedom.

103. The discussion of the ten steps makes little reference to supporting sources; those sources can be found in the discussion of the black travel regulations in Section IV of this article.

from enslavement shacks in Africa to enslavement shacks on plantations. Black travel often originated in Africa with the brutal transportation of millions of Africans through the Middle Passage. Thereafter, black travel comprised the enslavement auction or blocks and further transportation throughout the majority of states, from the eastern seaboard to states west of the Mississippi. It ended with the continuing physical and psychological imprisonment on plantations.

Step two was the right to restricted, supervised socialization within the enslavement community. The reinforcement of the plantation as "black place" was not subtle; it included state sanctioned curfews and enslavement patrols, and condoned violent means to police any travel off the plantation. Step three was the right to restricted, supervised movement within the confines of the plantation, that is, movement from enslavement shacks to fields. Step four was the right to restricted, supervised movement from the enslavement shacks to the big house, a right reserved for "house Negroes."

Step five was the right to restricted, supervised movement of house Negroes accompanying their masters and/or their families while their masters traveled. Step six was the right to restricted, supervised movement from the plantation to designated outside places dictated by the master but without accompaniment. Step seven was the right to travel within the confines of an urban center, often reserved for "free blacks." Step eight was the right to travel freely within one's domicile state, or to travel intra-state. Step nine was the right to travel freely beyond one's domicile state to other states, or to travel interstate. Finally, step ten was the right to travel freely as a citizen without restriction. This allowed intra-state, interstate and even international travel. These ten steps help contextualize the regulation of black travel by demonstrating where enslaved blacks started and how far they had to go to achieve freedom.

IV. REGULATING LIBERTY'S DREAM

> The federal Constitution left the slave trade untouchable until 1808; until that year "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress."[104]
>
> - Lawrence M. Friedman

104. FRIEDMAN, *supra* note 19, at 75 (quoting U.S. CONST. art. 1, § 9).

> The fact remains that the slave as property is central to any consideration of the relationship between slavery and the law.[105]
>
> - Thomas D. Morris

As the constitutional provision quoted above shows, from the start of the republic the Constitution supported the enslavement economy. The enslavement law that developed from this foundation regulated the movement of enslaved blacks. The state maintained a role in patrolling these travel regulations, and the courts provided a legal rationale for controlling the travel of enslaved blacks. These restrictions on black travel are tragic aspects of the Enslavement Nightmare paradigm.

A. Regulation of Black Travel in the Antebellum South

One tragic feature of the Enslavement Nightmare was the legal regulation of enslaved blacks' movement, hereinafter referred to as "black travel." In the antebellum South, the regulation of black travel can be illustrated through an analysis of "enslavement law."[106] "Enslavement law" combines three sources: the state enacted "slave codes,"[107] "plantation law,"[108] and enslavement case law or judicial pronouncements.[109] While enslavement law was relatively consistent throughout the Southern states,[110] the following discussion, which

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105. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 2 (1996).

106. *See* 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 235-39 (Univ. of Ga. Press 1999) (1858); PETER KOLCHIN, AMERICAN SLAVERY 1619-1877, at 122-24 (1993); JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 6 (1994) [hereinafter SCHAFER, SLAVERY]; ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 157 (1991) (summarizing the legal status of enslaved blacks); JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837). *See generally* JOHN CURTIS BALLAGH, A HISTORY OF SLAVERY IN VIRGINIA (Johnson Reprint Corp. 1968) (1902); 1, 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES (1858); 1-4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1926) (compiling and annotating enslavement cases); THE NEGRO LAW OF SOUTH CAROLINA (John Belton O'Neall, collector and digester 1848); 44 THE CENTURY EDITION OF THE AMERICAN DIGEST: SHIPPING-SUBSCRIBING WITNESSES (1903).

107. *See* PHILLIPS, *supra* note 99, at 489-514.

108. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 47 (1974) (referring to the master's control in enslavement law as a "system of complementary plantation law," in which the State deferred enslavement jurisdiction to the slave master).

109. Non-statutory or judicial case law is often referred to as the common law and composes a body of principles or precedents derived mainly by judges. *See generally* 1-4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 106.

110. *See* STAMPP, *supra* note 25, at 206 ("Fundamentally the slave codes were much alike."). *See also* IRA BERLIN, SLAVES WITHOUT MASTERS 317 (1974) (noting that "as the nineteenth century wore on, Southern legislators reviewed each other's statute books and gradually made their laws uniform.").

analyzes ten rules by which the enslavement economy regulated black travel, focuses on the law of Louisiana.[111]

The first most significant black travel rule in the antebellum South was that a master[112] could and did physically imprison black people with the force of law. An enslaved black could only move "at the bidding of his master, who may, of his own will, imprison or restrain him . . . ."[113] The state gave great deference to the masters to keep enslaved blacks in bondage. As a result, plantations became legal prisons for enslaved blacks. Forms of enslavement and imprisonment included capture and recapture, shackling, jailing, mutilation to handicap escape, torture of unsuccessful escapees, and other forms of physical and emotional torture. "When they were caught, the typical punishment for runaways on both the Barrow and Surget plantations was whipping and/or incarceration in irons or the stocks. Other proprietors preferred to chain returning runaways, especially if they suspected a recurrence of the offense."[114]

The second black travel rule was that masters could and did psychologically enslave black people. Masters did so by legally enforcing their wills over enslaved blacks and by demanding total subservience from them.

> Slaves themselves had little claim on the law for protection. A South Carolina judge, in 1847, put the case bluntly. A slave, he said, "can invoke neither *magna charta* nor common law . . . . In the very nature of things, he is subject to despotism. Law as to him is only a compact between his rulers." The Louisiana Black Code of 1806 (sec. 18) declared that a slave "owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and . . . is . . . to execute all . . . orders."[115]

Masters commanded total subservience through many forms of psychological and emotional torture, including punishing enslaved blacks for attempting to escape, whipping, mutilation, rape, castration, sale of one's family members, and intimidation.

> Added to the slave's fear of the lash was the dread of being separated from loved ones. To be sold away from his relatives or stand by and see a mother, a sister, a brother, a wife, or a child torn away from him was easily the most traumatic event of his life.[116]

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111. *See* PHILLIPS, *supra* note 99, at 493-94 ("Louisiana alone in all the Union, because of her origin and formative experience as a Latin colony, had a scheme of law largely peculiar to herself.").

112. *See generally* WILLIAM KAUFFMAN SCARBOROUGH, MASTERS OF THE BIG HOUSE: ELITE SLAVEHOLDERS OF THE MID-NINETEENTH CENTURY SOUTH (2003).

113. COBB, *supra* note 106, at 105.

114. SCARBOROUGH, *supra* note 112, at 209.

115. FRIEDMAN, *supra* note 19, at 162.

116. *See* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY 297 (2d ed. 1979) (describing the

The third black travel rule was that masters could and did legally buy and sell enslaved black people and transport them to enslavement markets. This rule served the masters' needs, which included the sexual exploitation of black women.[117] In fact, as demonstrated by enslavement market reports, there is evidence that some masters legally bought enslaved women merely for their sexual and physical attraction and for pleasure. "Some slaveholders preferred to use 'bright mulattoes' as domestics; a few paid premium prices for light-skinned females to be used as concubines or prostitutes."[118]

The fourth black travel rule was that masters could and did legally empower non-slaveholders to hunt down, maim, and capture enslaved blacks who ran away from enslavement and toward freedom. Enslaved black people often sought freedom by escaping from their bondage. The Underground Railroad was one organized means of escape from enslavement. Other means of escape included running away from one plantation to another plantation. Masters often hired non-slaveholders to hunt down escaped blacks and often authorized these bounty hunters to use whatever means necessary to recapture the escaped blacks. Various legal means were used to enforce the enslavement regime, including the enrollment of whites, free blacks, and even Native Americans[119] in the patrolling, hunting, capture, and return of runaway enslaved blacks.

The fifth black travel rule was that masters could and did sometimes find it to their benefit to authorize blacks to limited travel with a travel pass or passport, commonly referred to as "papers."[120] Masters issued travel papers as evidence that a travelling black was authorized by his or her master to travel. As a result, some enslaved blacks enjoyed travel privileges if granted by the master and if met with state approval. The passport system also applied to free blacks. One example of such passport legislation was the 1852 Louisiana law that provided that free black sailors of a vessel docked in New Orleans be

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psychological effect on black families separated by sale).

117. *See* EDWARD R. SULLIVAN, RAMBLES AND SCRAMBLES IN NORTH AND SOUTH AMERICA 210 (London, Richard Bentley 1853) (noting the desirability of enslaved black women on the sale block: "Their movements are the most easy and graceful that I have ever seen . . . . A handsome quadroon could not, though the market is well supplied at that price, be bought for less than one thousand or fifteen hundred dollars.").

118. STAMPP, *supra* note 25, at 196.

119. *See generally* JAMES H. MERRELL, THE INDIANS' NEW WORLD (1989) (documenting the use of Native Americans as hunters of runaway enslaved blacks).

120. COBB, *supra* note 106, at 107, 109.

imprisoned if their captain did not obtain from the mayor a passport to go ashore, with a $1,000 fine against the captain for each violation.[121]

The sixth black travel rule was that the enslavement system promoted community participation in policing black travel restrictions by empowering and obligating all citizens to police black travel. The urban environment proved particularly challenging and required great efforts to restrict blacks' mobility and behavior.[122] One example of urban community policing was curfew legislation. Under a curfew, such as in the City of New Orleans, enslaved blacks were prohibited from late night travel without papers from their owners.[123] Under the curfew system, all citizens were expected to assist in policing enforcement so as to keep blacks off streets and roads at night.

The seventh black travel rule was that anyone who facilitated black mobility was criminally and civilly liable to the masters and to the state. Such was the enslavement system that all whites, including masters and non-slaveholders, and all blacks, including enslaved and free blacks were forced to comply with a system of apartheid. Those who broke black travel restrictions were subject to state sanctions.

The eighth black travel rule was that free blacks were legally provided mobility within urban settings with certain travel restrictions. This small number of blacks were free following manumission by their white masters[124] or a freedom lawsuit.[125] For a time, some were provided, throughout various parts of the antebellum South, with extensive travel privileges.[126] On the eve of the Civil War, however, state legislatures passed new laws effectively giving free blacks a one-way ticket out of the state. The laws required them to leave the state and forbade their return, thereby reinforcing the racist principle that no black in the state should be allowed to travel freely within the state.[127]

The ninth black travel rule was that in some very unique circumstances, state legislatures permitted masters in Louisiana, along with South Carolina,

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121. *Id.* at 138 ("In 1859 the Louisiana legislature scrapped the passport system and required free black stewards and cooks to go to jail or remain on board their vessel until the ship left port.").

122. *See generally* CLAUDIA D. GOLDIN, URBAN SLAVERY IN THE AMERICAN SOUTH, 1820-1860 (1976) (listing numerous city ordinances designed to control enslaved blacks).

123. JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846-1862, at 105 (2003) [hereinafter SCHAFER, FREE].

124. *See generally id.* at 141.

125. *See generally* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213 (1993) (discussing Virginia's early enactment of statutes enabling a judicial remedy for otherwise free blacks that were subject to illegal enslavement).

126. *See generally* BERLIN, *supra* note 110.

127. SCHAFER, FREE, *supra* note 123, at 146-47.

to legally facilitate the travel of enslaved black women concubines and their racially mixed children.[128] The issue of whether an enslaved black became free once touching what was referred to as "free soil" won favor in the Louisiana state courts, after enslaved blacks successfully sued for their freedom on the basis that they had traveled to free states, territories, or countries. "From 1791, French law held that slaves became free as soon as their foot touched the free soil of France."[129] The argument that touching free soil granted permanent freedom became the grounds for the historic *Dred Scott* case.

The tenth black travel rule was that the United States Constitution guaranteed masters the property right to recapture an enslaved black who had travelled to free states or territories. The most significant constitutional law travel case was the *Dred Scott* case,[130] which sounded the battle cries leading to the Civil War. In that case, the travel and, arguably, citizenship rights of Mr. and Mrs. Dred Scott challenged the constitutionality of the Fugitive Slave Law of 1850, which sought to neutralize the Underground Railroad and state anti-kidnapping laws. The Supreme Court found that the Scotts did not acquire free status by having lived in a free territory and additionally that no black, enslaved or free, was or could be a citizen of the United States.

* * *

In summary, when it came to black travel, antebellum Southern legislatures promoted a brutal system of physical and psychological enslavement, imprisonment, and torture of blacks. This system largely deferred to the master class the primary means of state-sanctioned control and intimidation. It also established a state-sanctioned patrol system to ensure that both enslaved blacks *and their masters* stayed in their regulated places. The discussion will now turn to an analysis of how the state sanctioned this enslavement patrol system.

B. The State as Supreme Patroller of the Enslavement Economy

The Enslavement Nightmare resulted from the operation of both master-created regulations and state-sanctioned controls. Enslaved blacks were

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128. *See generally* SCHAFER, SLAVERY, *supra* note 106.

129. SCHAFER, FREE, *supra* note 123, at 15.

130. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857) (The United States Supreme Court held, *inter alia*, that the enslaved Dred Scott's long residence with his owner in a "free" territory did not automatically emancipate him. Chief Justice Taney's opinion for the Court stated that "the right of property in a slave is distinctly and expressly affirmed in the Constitution" and that the Fifth Amendment Due Process and Just Compensation clauses prevented Congress from outlawing enslavement, as that would deprive enslavers of their property.).

enslaved in an apartheid imprisonment through patrols and pass laws, which regulated movement of enslaved blacks, as well as through laws on unlawful assemblies and laws on enslaved runaways.[131] Out of all the black travel rules, the state's sanctions against black travel through the patrol system and the passport system combined to form a formidable network to prohibit the mobility of enslaved blacks.

As previously mentioned, the state created and promoted "patrollers,"[132] a state-sanctioned police system, to reinforce the black codes, especially to regulate black travel and to prevent runaways or fugitive slaves, hereinafter referred to as black travelers.[133] As a symbolic threat to the established legal order, the black traveler became a major part of the battleground between the North and the South.[134] In reality, the black traveler posed little threat to the enslavement of millions of blacks; it is estimated that there were only one thousand reported black travelers a year.[135]

Under the patrol system, all citizens were expected to participate in enforcing the enslavement regulations of black travel. The enslavement economy was built on racism, and therefore, the law required that the personal liberty of all enslaved blacks was a matter of interest and control by all whites.[136] The enslavement patrol system was established to support the entire enslavement economy and not just the individual master of an enslaved black. Sometimes the master's interests were not properly served by the patrollers, as in *Richardson v. Saltar*, wherein the master Richardson sued a patroller and three others for whipping Richardson's enslaved black man after he was discovered visiting the adjacent Owen plantation without a valid pass.[137]

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131. MORRIS, *supra* note 105, at 337.

132. "Patroller(s)" is defined for purposes of this Article to describe non-slaveholding whites that participated actively and unconsciously in regulating black travel. Patrollers included police; providers of public accommodations; providers of means of travel, such as owners and operators of trains; members of the judicial, legislative, and executive branches of government who supported the enslavement political-economic-social order; and all persons, organizations, and governments who benefited from the enslavement system. *See generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001) (documenting the use of violence and intimidation to suppress, in addition to other conduct, black travel in the antebellum South).

133. *See supra* note 27 (defining the term "black traveler").

134. *See* FRIEDMAN, *supra* note 19, at 156 ("The runaway issue was a constant irritant in North-South relations . . . .").

135. *Id.* (citing WILLIAM A. LINK, ROOTS OF SECESSION: SLAVERY AND POLITICS IN ANTEBELLUM VIRGINIA 99 (2003) (estimating that 1,000 slaves became runaways each year, including the 600 runaways from Virginia throughout the 1850s)).

136. COBB, *supra* note 106, at 106 ("[A]ll of the superior race shall exercise a controlling power over the inferior." (footnotes omitted)).

137. Richardson v. Saltar, 4 N.C. (Taylor) 505 (1817); HADDEN, *supra* note 132, at 78-79, 264.

In addition to patrolling for black travelers, the patrol system was established to police black conduct. The enslavement economy feigned that enslaved blacks had ample free time: "The long hours of the night, the Sabbath day, and the various holidays, are times when, by the permission of masters, slaves enjoy a quasi-personal liberty."[138] For these reasons, the enslavement economy developed "[t]he various police and patrol regulations, giving white persons other than the master, under certain circumstances, the right of controlling, and in some cases, correcting slaves."[139]

Enslavement patrollers not only regulated black travel, they intimidated enslaved blacks through violence and other means even when those blacks were not traveling. For example, they were authorized to search enslavement dwellings for enslaved blacks from other plantations and to disperse gatherings of enslaved blacks, including during worship.[140] "Slave patrollers closely scrutinized Baptists and Methodists, whose ministers encouraged African-American attendance and participation in worship."[141]

Enslaved blacks universally despised the patrollers, whom they considered unruly, unprincipled, poor whites. For example, Booker T. Washington remembered the general disdain for patrollers:

> The "patrollers" were bands of white men—usually young men—who were organized largely for the purpose of regulating the conduct of the slaves at night in such matters as preventing the slaves from going from one plantation to another without passes, and for preventing them from holding any kind of meetings without permission and without the presence at these meetings of at least one white man.[142]

W.L. Bost, a former slave from western North Carolina, who was interviewed by WPA workers in 1937, shared his memories of the patrollers:

> Then the paddyrollers they keep close watch on the pore niggers so they have no chance to do anything or go anywhere. They jes' like policemen, only worser. 'Cause they never let the niggers go anywhere without a pass from his masters. If you wasn't in your proper place when the paddyrollers come they lash you til' you were black and blue. The women got [fifteen] lashes and the men [thirty]. That was for jes bein' out without a pass. If the nigger done anything worse he was taken to the jail and put in the whippin'post.[143]

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138. COBB, *supra* note 106, at 106-07.

139. *Id.* at 106.

140. HADDEN, *supra* note 132, at 106-09.

141. *Id.* at 126.

142. BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY 77-78 (photo. reprint 1986) (1901).

143. HADDEN, *supra* note 132, at 71.

Used in conjunction with the patrol system, the second significant feature of the state-sanctioned regulation of black travel was the passport system. Under the passport system, a master could grant an enslaved black limited travel privileges. One popular enslavement guidebook provided in detail the terms of a passport or pass:

> No one is to be absent from the place without a ticket, which is always to be given to such as ask for it, and have behaved well. All persons coming from the Proprietor's other places should shew [sic] their tickets to the Overseer, who should sign his name on the back; those going off the plantation should bring back their tickets signed.[144]

Enslaved blacks hated the state-sanctioned passport system as much as they hated the patrollers. "The pass system had been one of the most resented aspects of slavery, and slaves frequently traveled to prove to themselves that their freedom was real."[145]

While these two systems of travel regulation—the patrol system and the passport system—appear benign, they were not. The criminal laws of the state provided for strict enforcement of the systems. There is evidence that the American criminal justice system has its roots in great measure in the American enslavement economy. The modern American police system, especially in the Southern states, has its roots in night watchmen patrolling enslaved black travel and curfews.[146] The American prison system has been traced back to the American enslavement economy,[147] and many criminal laws themselves were created to regulate enslaved blacks.[148] Ultimately, the state used capital punishment to keep enslaved blacks in check: "In spite of humanitarian, republican, and even self-interested reforms, 628 slaves would still be hanged from government-owned ropes between 1785 and 1865 for a variety of offences."[149]

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144. *Rules for the Government and Management of Plantations*, 22 DEBOW'S REV. 38 (1857).

145. HADDEN, *supra* note 132, at 190.

146. *Id.* at 51-61, 223-24 (referring to other works including, DENNIS ROUSEY, POLICING THE SOUTHERN CITY: NEW ORLEANS, 1805-1889 (1996); H.M. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA (1914)).

147. *See* MICHAEL S. HINDUS, PRISONS AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878 (1980).

148. *See generally* PHILIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAW OF VIRGINIA, 1705-1865 (1988).

149. *Id.* at 195.

The patrol system and the passport system were state-sanctioned policing mechanisms that ensured that enslaved blacks were constantly reminded of their enslaved status. In addition, these mechanisms were used to hunt, capture, and punish the black traveler. They became the forerunners of our modern police force and had the backing of criminal law to enforce their authority. Many blacks that sought to challenge or disobey black travel regulations were subjected to capital punishment by hanging. On what basis could a legal system treat people so cruelly and totally restrict their freedom?

C. "People as Property" Rationale in the Enslavement Economy

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[150]
>
> - William Blackstone

Enslavement of people was and is inherently contrary to natural law, as all people have the natural right and ability to move from one place to another. Blackstone believed that people possessed the right of personal liberty, along with the rights of personal security and of personal property, as "absolute rights, which are vested in them by the immutable laws of nature,"[151] the maintenance and regulation of which are "the first and primary end of human laws."[152] To legally enslave people and take away their natural mobility required that the law create a legal fiction.[153]

Antebellum Southern law reiterated Blackstone's principles, recognizing the "three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property."[154] Yet when it came to enslaved blacks, the enslavement legal system made an important exception. "The right of personal liberty in the slave is utterly inconsistent with the idea of slavery, and whenever the slave acquires this right, his condition is *ipso facto* changed."[155] Of course, denying a person the natural right of movement is counter-factual:

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150. BLACKSTONE, *supra* note 45, 2 COMMENTARIES *2.

151. *Id.*, I COMMENTARIES *124.

152. *Id.*

153. *See generally* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia's Civil Law*, 50 OHIO ST. L.J. 511 (1989).

154. COBB, *supra* note 106, at 83.

155. *Id.* at 105.

people generally have the physical ability to move. To deny the physical ability of enslaved people to move, the antebellum South created a legal fiction called "a quasi-personal liberty": An enslaved black had "the power of locomotion, mov[ing] not as his own inclination may direct, but at the bidding of his master, who may, of his own will, imprison or restrain him."[156] In other words, while an enslaved black had the physical ability to move, he or she lacked the legal authority to move without his or her master's and the state's authority.

To support this "Simon says" approach to the right to movement, the antebellum, Southern legal system also developed a peculiar rationale for its denial of freedom to blacks. This was the doctrine of "blackness as property,"[157] more broadly referred to herein as the "people as property" doctrine. This required the creation of another legal fiction. "Property" has historically been seen as a legal interest in a thing, such as land, that is synonymous with the thing itself. However, under the law of enslavement, property was "reified" or abstracted so as not to be reflective of a tangible object, a human being.[158] Under that doctrine, enslaved blacks were the legal property of their masters, no different from real property or chattel.[159] Thus, the enslavement economy and black travel were based on two legal fictions: that enslaved blacks enjoyed quasi-personal liberty and that people were property.

In the antebellum South, the people as property doctrine controlled all aspects of the enslavement economy, including the provision of the law's rationale for its travel regulations of enslaved blacks. As property, an enslaved black had no free will; the master's control and domination over him or her was absolute.[160] As property, enslaved blacks had no travel rights; they were

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156. *Id.*

157. *See generally* Crusto, *supra* note 17. *See also* JUDGE A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 15 (1978) (explaining "how the American legal process was able to set its conscience aside and, by pragmatic toadying to economic 'needs,' rationalize a regression of human rights for blacks").

158. *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (analyzing the "dephysicalization" of property and the resultant broadening of property law to include valuable interests not traditionally treated as or considered property).

159. *See generally* MORRIS, *supra* note 105, at 62 (1996) (pointing out that, despite moral objections, enslaved blacks themselves were held as "property," not just for their labor). *See, e.g.*, LOUISIANA'S BLACK CODE (1806) ("Slaves shall always be reputed and considered real estates [sic]."); CIVIL CODE OF THE STATE OF LOUISIANA art. 461 (1825) ("Slaves, though movables by their nature, are considered as immovables, by the operation of the law.").

160. *See, e.g.*, CODE NOIR or BLACK CODE OF LOUISIANA, Acts Passed at the First Session of the First

mere commodities, bought and sold, passed by will, attachable for debts, insurable, subject to taxation, transported, or prohibited from travel.[161]

As we shall next see, the antebellum, Southern doctrine of people as property did not end with the Civil War, the Emancipation Proclamation, or the Thirteenth Amendment prohibiting enslavement.

V. THE TRAVEL CONUNDRUM: CONTEMPORARY REFLECTIONS OF AN ENSLAVEMENT LEGACY

> The [Civil War], the Emancipation Proclamation, and the Thirteenth, Fourteenth, and Fifteenth Amendments ended American slavery and gave the blacks the right to vote. The Fourteenth Amendment also gave them (ostensibly) the equal protection of the laws.[162]
>
> - Lawrence M. Friedman

African-Americans have a tragic relationship with the legal history of travel restrictions. They share with American constitutional law a history intrinsically tied to the development of American travel and accommodation law.[163]

Unfortunately, vestiges of our enslavement legal system continue to haunt us today,[164] especially relative to the antebellum South's regulation of travel. Relative to enslaved blacks' travel rights in the antebellum South, Bell's interest-convergence principle[165] describes how law was reflective of the enslavement system's interests: economic and sexual oppression required that enslaved blacks have no right to travel, no right to leave the plantation, and no right to dream of liberty. The legal history of restraints on African-American

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Legislature of the Territory of New Orleans, § 18 (1806) (repealed 1868) ("The condition of a slave being merely a passive one, his subordination to his master and to all who represent him, is not susceptible of any modification or restriction . . . . [H]e owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and he is consequently to execute all the orders which he receives from him, his said master, or from them.").

161. *See* FRIEDMAN, *supra* note 19, at 74.

162. *Id.* at 381.

163. *See, e.g.*, Bogen, *supra* note 57. *See generally* WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN, HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES (1974).

164. *See, e.g.*, OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 113 (Joshua Cohen et al. eds., 2003) (noting that the vestiges of enslavement, Jim Crow segregation, and welfare policies have created poor black ghettos that cry out for "a bold program of reconstruction"); MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 12-15 (2003) (showing how "durable racial inequality" persists today as a result of the negative effects of inequality on blacks and the long-term positive effects of institutional discrimination on whites—the ratio of black to white income is 62%, but the ratio of black to white median net worth is just 8%).

165. *See* Bell, *supra* note 21, at 523.

travel reflects Professor Bell's interest-convergence principle; specifically, it reflects that poor, inner city African-Americans have little-to-no interest convergence with those of the power structure, as evidenced by their impoverished condition.[166] Because the travel rights of poor, disenfranchised people have no value to powerful America, these rights do not exist.

The antebellum South's legal doctrine of people as property was its rationale for black travel policies. Unfortunately, that doctrine did not end with the legal prohibition of enslavement: its effects continued through "Jim Crow" segregation laws.[167] It continues today unconsciously and consciously through racism and classism, with deep tentacles in our Constitution.

A. "Jim Crow": Post-Civil War Legacy of an Enslavement Culture

There is a historical bridge between the enslavement restrictions on black travel and today's travel issues. The issue of black mobility did not end with the legal end of enslavement. It became a pressing issue for Union forces during the Civil War. As a result, Union military authorities established a pass system that applied to all persons regardless of color or rank. Oddly, the Union pass system mirrored the antebellum, Southern patrol work: "To former slaves, it may have seemed as if little had changed: white men still attempted to control their mobility."[168] For newly-freed blacks, it was business as usual "because Union army officers often delegated enforcement of the pass laws to local police forces, composed of Southern whites, who were all too eager to reimpose the old restrictions of servitude."[169]

Following the Civil War, there was an opportunity within the law to reform travel rights. During Reconstruction, some travel rights for more affluent or politically empowered blacks changed briefly for the better,[170] especially in the City of New Orleans.[171] One representative case is the

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166. *See generally* Christopher J. L. Murray et al., *Eight Americans: Investigating Morality Disparities across Races, Countries, and Race-Counties in the United States*, 73 PLOS MED 1513 (Sept. 2006), *available at* http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371/journal.pmed.0030260.

167. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

168. HADDEN, *supra* note 132, at 191-92 (footnote omitted).

169. *Id.* at 192 (footnote omitted).

170. *See, e.g.*, Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. AM. HIST. (SPECIAL ISSUE) 863 (1987); Hendrik Hartog, *The Constitution of Aspiration and 'The Rights that Belong to All of Us*," 74 J. AM. HIST. (SPECIAL ISSUE) 1013 (1987).

171. *See generally* JOHN W. BLASSINGAME, BLACK NEW ORLEANS 1860-1880 (1973).

Supreme Court's decision in *Hall v. DeCuir*,[172] which held that a Louisiana law permitting discrimination on account of race or color in common carriers was unconstitutional.[173] But this change in travel law was short-lived. As clearly reflected in the post-Reconstruction, Jim Crow era, many white Southerners "could not conceive of a society in which whites and blacks were equal"[174] and renewed their demand for a heightened status for all white people.

Jim Crow laws continued to restrict blacks' right to travel,[175] which guaranteed a cheap labor pool for rich landowners.[176] By 1883, the South returned to its antebellum restrictions on blacks' right to travel, as seen in the *Civil Rights Cases*.[177] In 1896, with the landmark case of *Plessy v. Ferguson*,[178] the Constitution adopted Southern, antebellum principles, thus ensuring that the antebellum, Southern restrictions on blacks' right to travel would be the nation's constitutional standard for nearly the next hundred years of American history.

From the end of the Civil War through World War I, blacks fought and lost many battles for black mobility.[179] Throughout the first half of the twentieth century, travel restrictions in the form of vagrancy laws served Southern states as a legal vehicle to "re-enslave" African-Americans.[180] In

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172. 95 U.S. 485 (1877).

173. *Id.* at 490 (In this case, an aristocratic, wealthy woman of color was denied a place in the cabin set aside for whites in a steamboat from Vicksburg to New Orleans.).

174. *See* BERLIN, *supra* note 110, at 199-200:

> The desire to be rid of free Negroes, perhaps all Negroes, stood at the heart of the racial policies of the Upper South. Believing that blacks were a people yearning for liberty but forever barred from enjoying it in America, Upper South whites saw only three alternatives: amalgamation, race war, or physical separation . . . . "[T]he only rational and Christian alternative is colonization."

175. *See generally* WOODWARD, *supra* note 167.

176. FRIEDMAN, *supra* note 19, at 383 ("Around them a tight network of law and practice tied them to the soil. The network consisted of lien laws for landlords, vagrancy laws, enticement laws (which made it a crime to lure workers from their jobs, even by offering them better wages and conditions), laws against 'emigrant agents,' who were more or less labor brokers, and even laws that made it a crime to quit work 'fraudulently.'").

177. The Civil Rights Cases, 109 U.S. 3 (1883) (wherein the Supreme Court held that the Civil Rights Act of 1875, which promoted the ability of blacks to travel freely by protecting the right to public accommodations, was unconstitutional as applied to private parties, as compared to state discrimination).

178. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing the long-standing and laughably-named doctrine of "separate but equal," relative to public accommodations and racial inequality). *See generally* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

179. *See generally* Bogen, *supra* note 57.

180. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (documenting how the convict labor

addition to general restrictions on black travel, the legal system developed new obstacles to black mobility, such as the Mann Act.[181] The mob culture of patrolling and regulating black travel continued well into the twentieth century through the activities of the Ku Klux Klan, which used illegal lynching as an enforcement mechanism.[182]

With World War II, the winds of change began to blow. The federal government began changing the paradigm for African-American travel restrictions to facilitate black troop enrollment in the World War II military. Supporting the military effort was the critical rationale behind the Supreme Court's apparently liberal stance in the case of *Brown v. Board of Education I*[183] and *II*.[184] While these cases stand for desegregation of public education, they were critical to the war effort and the desegregation of the military.[185]

Throughout the 1960s, freeing African-Americans from undue travel restrictions was clearly at the forefront of the Civil Rights Movement. The Civil Rights Act of 1964 sought to ban discriminatory practices in public accommodations, housing, education, and employment.[186] Consistently, the Supreme Court decided that it was constitutional for Congress to regulate privately owned hotels and restaurants for localized racial discrimination, as they might serve interstate commerce.[187]

As reflected in the language of the times, the "freedom riders," the "movement," and "freedom marches" all show real and symbolic protests over historical travel restrictions. In the antebellum South, the black traveler was the early "Freedom Rider." They were the predecessors of other notable black travelers, including Sojourner Truth, Frederick Douglass, Homer Plessy, the Pullman porters, the Tuskegee Airmen, Josephine Baker, and Rosa Parks, to name just a few.

As this Article shows, the battle for freedom of movement continues today. Travel regulation and enslavement laws have contemporary effects on

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system effectively perpetuated enslavement of blacks well beyond the end of the Civil War).

181. *See* Hoke v. United States, 227 U.S. 308 (1913) (upholding the constitutionality of the Mann Act, which regulated the transportation of white women across state lines for interracial sexual activities).

182. *See generally* LEON F. LITWAK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

183. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

184. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

185. *See* Bell, *supra* note 21, at 524-25.

186. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 42 U.S.C.).

187. Katzenbach v. McClung, 379 U.S. 294 (1964) (Ollie's Barbecue in Birmingham, Alabama); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (hotel discrimination).

all Americans. So strong is the culture of the Enslavement Nightmare paradigm that even in a time of emergency, such as in the Katrina Crisis, American citizens of various backgrounds, including African-Americans, were legally denied the right to escape from rising flood waters, civil insurrection, and chaos. In response to claims for constitutional protection, the federal courts failed to find a constitutional right to intra-state travel. This activity is reminiscent of the antebellum, Southern doctrine of people as property. To the people of New Orleans who were denied the right to intra-state travel, there remains the question: Is the Constitution haunted by its enslavement past?

B. Katrina Crisis, Race Relations, and Travel Rights

The past is a prelude to the present and perhaps to the future. This Article analyzes how the antebellum South developed legal principles regulating travel. Unfortunately, *Dickerson* and other federal decisions denying the right to intra-state travel evidence how our Constitution is shackled by our enslavement past in several ways. First, they ignore a critical legal history analysis of travel and, as a result, fail to see the constitutional issues presented in these travel cases. Second, they deny human beings the right to personal safety over the right of police discretion; for example, they failed to ensure the right to flee from a natural disaster. Third, they treat people as state property, giving the state absolute control over self-locomotion. In so doing, they consciously or unconsciously reiterate and adopt the people as property doctrine from America's enslavement past.

The *Dickerson* case and like cases stand for the proposition that all Americans, including the very privileged, are subject to governmental infringements on their travel rights. They also promote an environment in which African-Americans and other racial and ethic minorities face heightened suspicion when they travel, as represented by racial profiling. *Dickerson* has a chilling effect on travel and a negative effect on the national economy; the fear of being harassed, imprisoned, or physically harmed is both psychologically damaging and harmful to an economy premised on the free movement of labor and markets.

Black travel restrictions supported an enslavement economy. Now that slavery is legally abolished, why would federal courts deny citizens the right to intra-state travel? There are three theories to explain why some courts choose to deny citizens this constitutional right. The first theory is the concept of legal precedent. Since the Supreme Court has not decisively found for a constitutional right to intra-state travel, some lower courts are reluctant to find the right on their own.

The second theory is the concept of private property, privilege, and police power. This theory is that the restriction of travel rights of some, enforced by unbridled police power, protects the exclusive private property interests of others. We are becoming or have become a nation of gated interests with the rise of the gated community, the cooperative, the condominium, the restricted community, and the like. As a result, there are many who would trade an open society for the policing of interests in community property and real property values, protection of family from strangers, protection of schools from newcomers, and arguably protection from criminals. While many of these private property and family and community safety interests are legitimate, they must not be the reason to deny law-abiding citizens the right to travel freely. Such exclusivity, power, and status also promote the negative psychological effects of being powerless and disenfranchised.

The third theory is conscious and unconscious racism. "Equal under the law" means that impoverished African-Americans would have the same travel rights as affluent, powerful Americans. For many, this was and is politically, socially, and economically unacceptable. As a result, constitutional theory and practice have created and maintain certain devices or fictions, such as travel denial rationales, to ensure that social undesirables, including some African-Americans, would continue to have their travel restricted.

Throughout our nation's legal history, there have been various rationales for denying travel rights. The travel denial rationale under the *Dred Scott* case was the conclusion that blacks would not have certain rights guaranteed to citizens because they were not citizens. The travel denial rationale under the *Plessy* case was that blacks were separate but equal, meaning that even as citizens their travel could be legally unequal and restricted. The travel denial rationale under the *Dickerson* case is history and tradition, in that the Supreme Court has historically failed to recognize a constitutional right to intra-state travel and therefore that such a right must not exist. The *Dickerson* case fails to recognize that for some Americans, equal access to these inalienable rights has been a two-century long constitutional struggle,[188] rooted in America's enslavement, victimization, and discrimination of and against African-Americans.[189] The *Dickerson* case unconsciously adopts the current travel denial rationale denying African-Americans the right to intra-state travel and

188. *See generally* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2000).

189. *See* HIGGINBOTHAM, *supra* note 157, at 391 (identifying "a nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties today. The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed.").

thereby denies the right to all Americans. *Dickerson* is an enslavement legacy case. It is an example of how our Constitution needs emancipation from our enslavement history.

When will the enslaved view of the Constitution change? Pursuant to Professor Derrick Bell's interest-convergence dilemma, an American human rights revolution relative to the right to intra-state travel will occur when there is an interest convergence. That is, when powerful, privileged Americans recognize that the protection of their human rights is directly and intrinsically tied to ensuring and protecting those rights of the least empowered Americans. In other words, only when the Constitution expressly embraces its citizens' fundamental human rights and applies them to all Americans will we have an emancipated, human rights Constitution.

VI. CONCLUSION

The Supreme Court has not explicitly found that a general right to intra-state travel exists. The federal circuit courts are divided on the issue. In many federal jurisdictions, relative to intra-state travel, a citizen has little constitutional protection, unless one can show that the travel in question is a means to a constitutionally protected end, such as the right to vote or to facilitate interstate travel. As a result, in many cases where there is an alleged infringement of localized travel within a state, the state wins and the individual loses.

The failure to recognize a constitutionally protected right to intra-state travel results from a conscious or unconscious treatment of people as property and has its judicial roots in American enslavement law. Even if such a general right to intra-state travel existed, it would not be absolute. Yet in the current state of the law, there is no need to balance an individual's rights against state interests. This situation is untenable and promotes tyranny and a totalitarian, police state. Put simply, failing to protect an American's right to intra-state travel is domestic terrorism.

The strongest argument in support of a constitutional right to intra-state travel is substantive due process. According to Justice Scalia, in determining whether a right meets the substantive due process test, that right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[190] When it comes to the right to intra-state travel, America's

190. Lutz v. City of New York, 899 F.2d 255 (3d Cir. 1990) (quoting and citing Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J., plurality)).

traditions and conscience are a paradox—a conflict between the Freedom Dream and Enslavement Nightmare Paradigms. When a judge is given the opportunity to look to our traditions and conscience relative to the freedom of intra-state travel, a federal judge should choose the best of what America represents: freedom and liberty unencumbered by unjustified governmental infringement. A human rights constitution should include a citizen's right to intra-state travel. Protecting a citizen's right to intra-state travel will emancipate our Constitution and our people from an enslavement history.