

Road Wary: Mobility, Law, and the Problem of Escape

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I. INTRODUCTION

The COVID-19 pandemic has created a new collection of “digital nomads,” individuals with the means and inclination to take flight from what they see as the dangers of sheltering in place for extended periods are relocating, for a fixed or uncertain period of time, to other climes.¹ As a New York Times report from July indicated, “while many who can afford it stayed proudly in their home

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1. Erin Griffith, *The Digital Nomads Did Not Prepare for This*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/08/business/digital-nomads-regret.html> [<https://perma.cc/R2CF-7BKP>].

cities, some decided to move, ‘Green Acres’-like, to less-infected pastures.”² They have neither moved, nor are they merely visiting. They have, as I put it, escaped. I suggest that *escape* is a meaningful category that describes individuals who flee from their homes for some period of time to take refuge elsewhere. This is short of an actual move (although in some cases this escape may presage such a move), but more than a transient visit. Because their intentions are to relocate for only some time, they will not cut their ties with their home; they will not change their residence; they will not count themselves as a new member of the community in which they alight.³

Some have suggested that this portends an important shift from crowded cities to suburban or even rural locations.⁴ While we can only speculate whether this movement augurs a reconfiguration of residency,⁵ we can say with more confidence that COVID-19 has generated some meaningful shifts in workplace and in lifestyle. Individuals are not merely traveling to visit friends or touring, but they are escaping. The consequences of this movement for the social, economic, and political conditions of contemporary America, in this pandemic and (god-willing) post-pandemic period, are worth considering closely, or so I will suggest in this symposium Essay.

The implications of these relocations might be significant.⁶ It can seriously impact property values in the areas from which people leave. It could impact the service economies in the exporting and importing areas, in ways that are meaningful, if uncertain in scope and duration.⁷ Whether we should judge such decisions harshly or approvingly will depend upon our position and perspective. Surely our legal culture supports the basic freedom of individual choice and, with it, the choice of where to travel.⁸ The Constitution has long

2. Jessica Shaw, *They Fled the Coronavirus. Now They're in Scenic Limbo.*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/11/style/they-fled-the-coronavirus-now-theyre-in-scenic-limbo.html> [https://perma.cc/QEC2-7CWY].

3. This is consistent with trends measured by Pew in a survey from earlier in the summer of 2020. The survey found that approximately “one-in-five U.S. adults . . . [have] either . . . [relocated] due to the pandemic or know someone who did.” D’Vera Cohn, *About a Fifth of U.S. Adults Moved Due to COVID-19 or Know Someone Who Did*, PEW RSCH. CTR.: FACT TANK, (July 6, 2020), <https://www.pewresearch.org/fact-tank/2020/07/06/about-a-fifth-of-u-s-adults-moved-due-to-covid-19-or-know-someone-who-did> [https://perma.cc/CT6X-49KY].

4. Jeff Rose, *Time to Move? Data Suggests Americans May Flee to Rural Areas Post-COVID*, FORBES (Aug. 6, 2020, 12:14 PM), <https://www.forbes.com/sites/jrose/2020/08/06/time-to-move-data-suggests-americans-may-flee-to-rural-areas-post-covid> [https://perma.cc/B5MQ-3C56].

5. Authors of a recent essay in the Wall Street Journal believe that this exodus may be effectuating more permanent changes. See Richard Florida & Adam Ozimek, *How Remote Work is Reshaping America’s Urban Geography*, WALL ST. J. (Mar. 5, 2021, 11:01 AM), <https://www.wsj.com/articles/how-remote-work-is-reshaping-americas-urban-geography-11614960100> [https://perma.cc/B6QC-WFX2] (describing the emergence of “Zoom Towns”).

6. See *id.* (“Such changes may begin to reverse the increasingly winner-take-all nature of America’s economic geography”).

7. See Sara C. Bronin, *Rules of the Road: The Struggle for Safety & the Unmet Promise of Federalism*, 106 IOWA L. REV. 2153, 2156–57 (2021) (discussing the impact on service economies).

8. See *infra* text accompanying notes 76–80.

valorized the freedom of movement, the ability to choose where to live, where to visit, and where to take shelter from the storm.⁹ And yet the promiscuity of this effort at relocation raises important issues, issues which suggest that invoking the right to travel just begins, not ends, the discussion. Such decisions have consequences, consequences for the places they leave behind and the places to which they alight. It is important to consider these impacts and to develop appropriate legal strategies to deal as best as possible with these impacts. And the current pandemic, while not revealing a new problem, brings this issue into sharper relief.

With Americans looking with ever more urgency in this pandemic age to escape, what, if anything, does the law have to say constructively about this phenomenon? First, we know that law affects individual mobility decisions all the time. Certainly, zoning has this impact. Moreover, the law deals, albeit unsteadily, with the benefits and costs associated with citizens' mobility decisions, especially relocation and residency, in myriad uses. And so, whether or not we think that the government should stick its nose in our business when we consider escape, we should acknowledge that the impacts of these decisions may have repercussions that warrant government intervention, even if principally *ex post*.¹⁰

While no one seriously advocates depriving us of the opportunity to escape, nor can we seriously advocate in our United States that a state can or should pull up the drawbridge. But within the parameters of what is constitutional, practical, and normatively desirable as a matter of incentive-based public policy, greater imagination should be devoted to dealing with the phenomenon of escape.

In Part II, I argue that this is a coherent and meaningful category, and not just an opaque rationale for why we might imagine folks travel and move around the country. I further explore why we might regard escape as a problem, one in need of further scrutiny and regulatory strategies. In Parts III and IV, I look to the way in which law and policy affects the capacity of individuals to escape, first by exploring some dimensions of modern travel and, next, by looking at the ways in which our Constitution, through the dormant commerce clause and the right to travel, structures the freedom of mobility and also its limits. As the COVID-19 pandemic and its consequences for relocation and escape loom large in the analysis here, I look squarely at some of the legal issues surrounding state restrictions on individual travel. Part V brings us back to the heart of the matter, which is how we might confront sensibly the problem of escape, and I conclude in Part VI.

9. See *infra* text accompanying notes 76–80.

10. Indeed, we can see the field of fiscal federalism as, in both its positive and normative form, focused on just these sets of issues. See Wallace E. Oates, *Toward a Second-Generation Theory of Fiscal Federalism*, 12 INT'L TAX & PUB. FIN. 349, 350–54 (2005).

II. WHAT IS ESCAPE AND WHY IS IT A PROBLEM?

A clever tag line from a recent Southwest Airlines ad asks us “wanna get away?” Folks travel for all sorts of reasons, but certainly one common motivation is to get away and to someplace appealing, even if for just a spell. Big swaths of our economy are built upon this interest. The pull of tourism has long been strong and our transportation and travel system is built on Americans’ persistent desire to see the world outside their home base.¹¹ The push can matter also, and hence Southwest Airlines’ reminder that there are times you just want to escape from your conditions. This is not a point about psychology, as this is likely to be largely unknowable, but it is a practical legal point. They are not moving, and yet they are not necessarily just visiting; and the legal consequences that flow from this choice are meaningful, precisely because the law deals with issues of location through the legal construct of residence.

The concept of legal residence is surprisingly opaque, given its significance for at least two key economic considerations, state and local tax liability and, in the case of public post-secondary education, eligibility for admission and the level of tuition and fees.¹² This is not the place to canvas the various state approaches to establishing residency and domicile. Suffice it to say that the phenomenon of escape that I am considering here is something that will not implicate residency and the attendant obligations of a resident unless either: (1) the “refugee” does in fact make locational choices that, under relevant state law, change his or her residency, in which escape presages relocation, or (2) state governments insist on imposing economic and other legal responsibilities on individuals who are in their state for some period of time, even if this period is uncertain. Transient taxes of different sorts capture this phenomenon, and, again at the risk of minimizing a complicated body of law, states are given a wide, but not unlimited, berth in imposing such exactions.¹³ In all, the law shapes mobility choices, and therefore the nature of what it means to escape and find refuge elsewhere. We can surmise, even if here as a stipulation, that individual choice is affected by legal conditions, transparent, impactful, and evolving.

Escape has become more common as a result of the expanding fear of staying put. The COVID-19 pandemic is a preoccupation of this Essay given the times we are in, but there are other persistent issues involving economic stress

11. See generally Thomas Weiss, *Tourism in America before World War II*, 64 J. ECON. HIST. 289 (2004) (describing the origins of tourism in the United States).

12. See generally Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH J. INT’L L. 271 (2017) (discussing the tax implications of states defining residence by domicile versus by statute).

13. The law is unsettled with respect to the line between transient occupancy taxes and taxes on short-term rentals. See, e.g., *Short Term Rental or Transient Occupancy Tax (TOT)*, CITY OF OAKLAND, <https://www.oaklandca.gov/services/transient-or-temporary-occupancy-taxes-tot> [<https://perma.cc/YX6Q-YMBF>].

(not unrelated, to be sure, to the pandemic), racial strife, concerns about disorder, and other considerations that cause folks to choose flight over fight.

Why not simply move? What are the virtues of a more temporary escape? Many reasons, we can suppose, but one which I will focus on here comes from the various structural-legal impediments to mobility. In an important recent article on residential stagnation and its discontents, David Schleicher collects data on the law and economics of residential segregation.¹⁴ Interstate relocation is in steady decline, he notes.¹⁵ This stagnation, Schleicher argues, is largely the result of legal structures, including land use and fiscal policies are various sorts, that make relocation difficult.

Whether or not this is a significant social problem is controversial.¹⁶ Declining interstate relocation has distributional consequences which may be deleterious, argues Schleicher.¹⁷ Moreover, stagnation impedes mobility to larger, and generally more urban enclaves, populated with individuals who would benefit from clustering.¹⁸ This point is central to the literature on so-called “agglomeration economics.”¹⁹ However, scholars including Richard Florida and Naomi Schoenbaum have made powerful arguments against relocation, suggesting that this greater mobility has meaningful social costs.²⁰

Normative considerations to one side, one key takeaway of this analysis is that the law makes it difficult to move permanently. And, in doing so, it creates incentives to move temporarily. That is, it creates incentives to escape and take refuge, even if this is for a temporary period. We will say more in the next Part about some of the additional capacities for this escape, flowing from our system of interstate travel and the widening availability of temporary housing. However, here, the key point is that our multifaceted systems of fiscal policy and legal regulation impede interstate mobility, while encouraging temporary relocation as a substitute.

14. See generally David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017) (exploring data around law, economics, and racial segregation).

15. See *id.* at 78.

16. See generally Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J.F. 498 (2017) (advocating for, while outlining structural barriers to, mobility). But see generally Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480 (2017) (critiquing Schleicher’s article by raising the issue of costs new migrants incur by moving to new regions).

17. See Schleicher, *supra* note 14, at 104–07.

18. See *id.*

19. See generally NAT’L BUREAU OF ECON. RSCH., *AGGLOMERATION ECONOMICS* (Edward L. Glaeser ed., 2010) (discussing the benefits stemming from firms and people clustering in industrial areas, known as “agglomeration economics”).

20. See generally RICHARD FLORIDA, *THE NEW URBAN CRISIS* (2017) (discussing the problems associated with the “back-to-the-city movement” including the disappearance of the increasingly rare middle-class neighborhood); Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J.F. 458 (2017) (arguing policies promoting moving to larger cities harms critical relationships and attachments to locations); Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169 (2012) (discussing the costs associated with “long-distance movers”).

Also relevant to this matter of escape is the changing configuration of work, this resulting directly from the pandemic. In late spring, many workers went immediately remote.²¹ This remote work has persisted for many months, including in the academic world relevant to most readers of this Essay. The adaptation has been unsteady, and the evaluation of the success of these remote schemes is now, and will likely long remain, incomplete.²² However, the best analyses of this phenomenon, undertaken by consultants who make informed predictions for a living, is that remote working will continue past the pandemic,²³ at least for those segments and sectors of the economy which can adapt to these new modalities of work performance.²⁴ Without being tethered to work in a fixed locale, individuals who can work remotely will have considerably more flexibility and the capability of individuals to escape will grow, and likely by a considerable amount.

The law could make this phenomenon more or less difficult. First, employment law could strengthen employers' prerogatives to severely limit remote work. In the absence of contractual protections or union-fueled guarantees, employees expect to be at the mercy of employers and the same employers who acted with great flexibility during the long pandemic period may well curtail this option, and the law would generally be amenable, in the absence of laws protecting employees, to these prerogatives. Further, the expansion of the employers' footprint through accelerating remote work may well raise intricate matters of taxation. Where does the employer who has employees distributed across the country working remotely do business? For multistate companies, this has long been a matter of legal scrutiny. But what remote work does is expand the attention to smaller companies, those who would otherwise be viewed as local, and treated as such from a regulatory and taxation perspective.

Viewed as a whole, there are several distinct reasons why escape might matter to an assessment of law and legal structure. First, because of the reasons why folks chose to escape their surroundings, there may be new and unanticipated burdens faced by the communities into which these fleeing citizens go. One particular threat squarely raised by COVID-19 is the threat to

21. See, e.g., Stephen Phillips, *Working through the Pandemic: Accelerating the Transition to Remote Working*, 37 BUS. INFO. REV. 129, 129–30 (2020); Luke Tredinnick & Claire Laybats, *Working in the World of the Pandemic*, 37 BUS. INFO. REV. 97, 97 (2020).

22. See, e.g., Jared Lindzon, *The Office as We Know It Is Over—and That's a Good Thing*, FAST CO. (Jan. 21, 2021), <https://www.fastcompany.com/90593744/the-office-as-we-know-it-is-over-and-thats-a-good-thing> [<https://perma.cc/F57R-GGSG>]; Caroline Castrillon, *This Is the Future of Remote Work in 2021*, FORBES (Dec. 27, 2020, 4:00 PM), <https://www.forbes.com/sites/caroline-castrillon/2021/12/27/this-is-the-future-of-remote-work-in-2021> [<https://perma.cc/9F7H-LQ7M>].

23. See Florida & Ozimek, *supra* note 5 (“[A]s much as a quarter of the 160-million-strong U.S. labor force is expected to stay fully remote in the long term . . .”).

24. See Mark W. Johnson & Josh Suskewicz, *Does Your Company Have a Long-Term Plan for Remote Work?*, HARV. BUS. REV. (July 20, 2020), <https://hbr.org/2020/07/does-your-company-have-a-long-term-plan-for-remote-work> [<https://perma.cc/B8YS-LQPQ>].

the region's public health. And long before this current pandemic, public health law dealt, with greater or lesser success, with these issues through various mechanisms including quarantines, sheltering orders, and the *cordon sanitaire*.²⁵ And courts from a century ago proved accommodating to these draconian steps, even when they affected the freedom of individuals to travel.²⁶ In addition to public health considerations, importing jurisdictions may worry about the economic burdens placed on their communities. The biggest burden, not so easily solved of course, is the increase in real estate and rental prices as a consequence of wealthier individuals coming into less wealthy areas.²⁷ Some of the economic impacts are nuanced but important. So, for example, individuals who escape their pandemic by coming into a jurisdiction and renting through Airbnb or VRBO will pay the owner and generally also the rental company, but they will not be reliable taxpayers, save for contributions to their local economy through sales taxes and perhaps a tax on rentals that is passed through.²⁸ The ability of importing jurisdictions to account for these burdens depends upon an unsteady combination of foresight, planning, and legal power. Finally, certain areas may fear the change in character that fleeing individuals pose to their communities. The concerns that full-time residents have with transients is significant, and of ever more consequence as short-term rentals become more common. These concerns are varied, but much of the criticism stems from what full-time residents see as the lack of concern for, and investment in, the communities in which these refugees are staying. This tracks the perennial conflict between owner-occupiers and renters;²⁹ and some of it is classist and worse. However, the point here is not to judge the concern with any normative precision, but just to note that policymakers can be expected to be responsive to the voices of full-time residents who complain about the rise of short-term renters and threaten reprisals and restrictions or even exit.³⁰ We have seen these conflicts emerge with a vengeance in this era of readily available short-term rentals.

25. See generally Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007) (discussing past pandemics, their effects on various groups, and the interactions between government response and the resulting state of wellness among vulnerable people).

26. See *infra* notes 76–80 and accompanying text.

27. Catherine Rampell, *Rents for the Rich are Plummeting. Rents for the Poor are Rising. Why?*, WASHINGTON POST (March 22, 2021), <https://www.washingtonpost.com/opinions/2021/03/22/rents-rich-are-plummeting-rents-poor-are-rising-why> [<https://perma.cc/3RTE-9E6K>] (noting a “surge in demand for lower-price-point homes ended up bidding those rents higher”); see also Schleicher, *supra* note 14, at 117 (finding “high-skilled individuals” can take advantage of opportunities while “less skilled workers [can]not”).

28. On tax incidence more generally, see JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 482–513 (3d ed. 2000).

29. See Peter Van Doren, *Airbnb and Neighborhood Conflict*, CATO INST. (Oct. 16, 2018, 1:14 PM), <https://www.cato.org/blog/airbnb-neighborhood-conflict> [<https://perma.cc/Q5U4-MXFE>].

30. See Shirley Nieuwland & Rianne van Melik, *Regulating Airbnb: How Cities Deal with Perceived Negative Externalities of Short-term Rentals*, 23 CURRENT ISSUES TOURISM 811, 813–14 (2018).

Second, the jurisdictions from which individuals escape, and, more to the point, the residents in these jurisdictions, may worry about the impact of these disappearing residents on their communities. The economic burdens are one obvious worry. We should note the obvious fact that ability to escape is tied squarely to wealth, and so the economic burdens will be felt, and sometimes deeply so, as a steadily (or, as in the pandemic, rapidly) developing stream of upper middle- and upper-class residents escape to their vacation homes or short-term rentals. Localities and even states must confront the circumstances of their community members who are left behind.

Third and finally, as has been the case of white flight and other classic redistribution of discernible population cohorts in the modern era, folks who have the economic means are the ones who leave; those without these opportunities are left behind. To be sure, there may end up being advantages to residents in place, as property values and rental prices, as well as the other amenities of urban life, may decrease, to the advantage of those who remain. Ultimately, this problem of escape is a variation on the familiar theme that reshuffling creates complex economic consequences and, too, predicaments with respect to the racial patterns of living, working, and connecting in extant communities. Fourth and finally, we could look at this from a national perspective and assess whether the United States should have any serious stake in how individuals' sort among jurisdictions, where escape is an important consideration.

III. MODALITIES OF MOBILITY

The phenomenon of escape is made up of a mix of incentives and capabilities. In the previous Part, we considered how the structure of the law incentivizes short-term rather than long-term relocation and therefore promotes escape as a strategy. We also explored reasons why we might view this as a problem to be addressed. Among the practical considerations that might impact individual choice and the overall pattern of escape and refuge is the financial capacity of individuals. Escape is an opportunity available only to those who can afford this option. This includes, among other considerations, the matter of transportation and of lodging.

The law incentivizes, even if indirectly, individual escape by the way in which travel and accommodation operates in our modern world. In sum, escape as a meaningful phenomenon in contemporary America is encouraged in important ways by our transportation and lodging infrastructure. It is also encouraged by our structure of constitutional law, a claim that awaits consideration in the next Part.

A. *A NATION ON THE MOVE: PLANES, TRAINS, AND AUTOMOBILES*

Americans can move around the country in the third decade of this new millennium in various ways, shapes, and forms. Travel on the whole has steadily increased over the last century. In the past three decades in particular, per-

person travel miles have doubled.³¹ Of the for-hire mode, air travel is by far the most common method, with 840 billion passenger miles in 2013 by air in contrast to 6.8 billion passenger miles by passenger rail (Amtrak).³² But travel by automobile dominates both of these other modes.³³ To be sure, the biggest chunk of this increase comes from local car travel. However, interstate travel miles have increased, as has overall passenger transit miles via air, rail, and car, over the last 15 years.³⁴

The coronavirus crisis has brought monumental challenges to the airline industry.³⁵ However, the most recent data indicates a steady recovery.³⁶ Whether this recovery will persist will depend upon intermediate and long-term travel predilections, and there is so little we now know about this. It will also depend importantly on the adjustments made by domestic air carriers. It is conceivable, and maybe even probable, that regional service will be curtailed, perhaps permanently, and that individuals who could previously count on reliable air travel through a combination of regional carriers and hub-and-spoke systems will be left out in the cold.

Passenger rail service has followed some rather similar patterns to the domestic airline industry, even though they are, at least on certain routes, substitutes for one another in the ordinary economic sense. Warts and all, Amtrak has been a steadily important mechanism for transporting individuals across significant distances, especially in the Northeast Corridor, where the backbone of the service (revealing important demand by business commuters, especially) is located.³⁷ “Can’t live with it, can’t live without it” might summarize well American’s love/hate relationship with Amtrak. Still and all, Amtrak, too, has been devastated by the COVID-19 crisis, with passenger rates falling

31. The latest data I have found is from 2015. While a bit dated, the Department of Transportation put out a wonderfully comprehensive report in that year, with great detail about transportation patterns. See BUREAU OF TRANSP. STAT., U.S. DEP’T OF TRANSP., PASSENGER FACTS AND FIGURES 3 (2015), https://www.bts.gov/sites/bts.dot.gov/files/legacy/PTFF_Complete.pdf [<https://perma.cc/G9LF-H7CF>]. For whatever reasons, there has not been as useful a survey since that time, so I use this document for reference, with the caveat that more recent data (even leaving to one side the shock to the system from the COVID-19 pandemic) might reveal different conclusions.

32. *Id.* at 4.

33. *Id.* at 11.

34. *See id.* at 63.

35. *See generally* Sakkakom Maneenop & Suntichai Kotcharin, *The Impacts of COVID-19 on the Global Airline Industry: An Event Study Approach*, 89 J. AIR TRANSP. MGMT., Aug. 2020, at 1 (observing that COVID-19 has led to a decrease in airlines’ stock value).

36. *See* Olivia Delagrangé & Paula Petit, *COVID-19 and the Aviation Industry—The Start of the Recovery*, KENNEDYS (Sept. 17, 2020), <https://kennedyslaw.com/thought-leadership/article/covid-19-and-the-aviation-industry-the-start-of-the-recovery> [<https://perma.cc/EK73-P98M>].

37. *See generally* RAIL PASSENGERS ASS’N, AMTRAK FACT SHEET: NORTHEAST CORRIDOR SECTOR (2020) (reporting 3,836,469 business passengers in 2019 for the Northeast Corridor Amtrak), <https://www.railpassengers.org/site/assets/files/3433/nec.pdf> [<https://perma.cc/AB3H-76KR>].

dramatically.³⁸ The road to recovery will be a long one, and it remains to be seen whether this quasi-public corporation will survive roughly intact on the other end of the pandemic.³⁹

So, the jury is still very much out on the enduring impact of COVID-19 on our ability to travel via rail and air service. We can toss medium and long-haul bus service into the mix as well. Yet, even assuming a major change in the patterns of air-train-bus travel, we should not jump to the conclusion that American domestic travel will experience major melt. Americans can and do move around through their personal vehicles, for trips long as well as small.

Our interstate highway system, a system unfurled with fanfare in the mid-1950s and reaching fruition two decades later, enabled individuals to travel by car for long distances with reasonable convenience. This was a major advance over what had been in place in the first half of the twentieth century as automobile ownership and use had been steadily increasing. Despite important progress in national infrastructure through the first half of the twentieth century, especially during the New Deal, road construction was principally funded by the states and so it was uneven and the results largely unreliable. Americans craved greater mobility after the war, and so plans were put in motion in the postwar period to improve our schemes of long-distance travel, including air and rail and road travel across highways.⁴⁰

The big bang moment was in 1956, with the enactment of the Federal Aid Highway Act.⁴¹ This Act authorized the construction of an over 40,000 mile highway network, at a price tag of over \$25 billion.⁴² (This figure would balloon to over \$130 billion by completion several decades later).⁴³ The Federal Aid Highway Act of 1956 was the lodestar of these efforts.⁴⁴ The Act was funded

38. *Amtrak Fiscal Year 2020: Prioritized Customer Safety, Advanced Infrastructure and Fast-Tracked Technology*, AMTRAK MEDIACENTER (Nov. 23, 2020), <https://media.amtrak.com/2020/11/amtrak-fiscal-year-2020-prioritized-customer-safety-advanced-infrastructure-and-fast-tracked-technology> [https://perma.cc/5QK9-VZJR]; see also Mike Christensen, *Op-Ed: Middle America Won't Survive Losing Amtrak to COVID-19*, STREETS BLOG USA (Sept. 21, 2020), <https://usa.streetsblog.org/2020/09/21/op-ed-middle-america-wont-survive-losing-amtrak-to-covid-19> [https://perma.cc/C4L6-QCBE] (“Local public transit is not the only service threatened by COVID-19. Amtrak also faces budget shortfalls due to a significant drop in ridership caused by the pandemic.”).

39. See Oliver Cuenca, *Amtrak Releases Plan to Restore Long-Distance Services*, INT’L RY. J. (Aug. 18, 2020), <https://www.railjournal.com/financial/amtrak-releases-plan-to-restore-long-distance-services> [https://perma.cc/6Z85-RXY8].

40. See generally TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* (2013) (discussing how highway development heavily influenced modern America).

41. See *id.* at 121–22.

42. See Taylor Jaworski, Carl T. Kitchens & Sergey Nigai, *The Interstate Highway System and the Development of the American Economy* 8 (July 12, 2018) (unpublished manuscript), <https://eh.net/eha/wp-content/uploads/2018/06/Kitchens.pdf> [https://perma.cc/S6BM-46B5].

43. See Tom Lewis, *Eisenhower’s Roads to Prosperity*, L.A. TIMES (Dec. 26, 2008, 12:00 AM), <https://www.latimes.com/la-oe-lewis26-2008dec26-story.html> [https://perma.cc/Q8UZ-BU7J].

44. See Federal Aid Highway Act of 1956, 16 U.S.C. § 503 (2018) (repealed 1958); 23 U.S.C. § § 101–70 (2018).

primarily through a national motor vehicle fuel tax, which was originally three cents a gallon but is now up to 18.4 cents.⁴⁵ The next 30 years were a time in which the federal government dominated surface transportation policy and the focus was build, build, build.

The highway system built over the next three decades changed the American landscape and lifestyle in fundamental ways. As a report from the Smithsonian Institution Magazine summarized the impact of land use, “the pattern of community development in America was fundamentally altered and was henceforth based on the automobile.”⁴⁶ While the relatively sanitary look and feel of these new highways engendered some nostalgia for the diversity of roadways in the earlier era,⁴⁷ American drivers took to the roads in massive numbers, and the contiguous states of the United States became much more navigable for citizens of middle class means and those with a taste for tourism and other occasions for travel.

The impact of the highway system on interstate mobility is clear from the data. “From 1956 to 2018, . . . vehicle miles of travel . . . increased by 418 percent, from 626 billion miles driven, to approximately 3.2 trillion miles driven.”⁴⁸ While “[our] population increased by 95 percent” during this period, “the number of vehicles in the nation increased by 357 percent.”⁴⁹

The interstate highway system has had consequences that go beyond facilitating point A to B travel.

[One] report found that U.S. counties either on an Interstate highway or within 20 miles of an Interstate are anticipated to grow in population through 2060 at a rate approximately seven times greater than counties that are at least 20 miles from an Interstate highway (36 percent versus five percent).⁵⁰

Moreover, as a comprehensive report by TRIP indicated this summer, “[b]y greatly increasing the number of areas that are within a reasonable driving

45. JAMES M. BICKLEY, CONG. RSCH. SERV., RL30304, THE FEDERAL EXCISE TAX ON GASOLINE AND THE HIGHWAY TRUST FUND: A SHORT HISTORY 3 (2012), <https://fas.org/sgp/crs/misc/RL30304.pdf> [<https://perma.cc/AE7C-YNZT>]; *How Much Tax Do We Pay on a Gallon of Gasoline and on a Gallon of Diesel Fuel?*, EIA (Mar. 2, 2021), <https://www.eia.gov/tools/faqs/faq.php?id=10&t=10> [<https://perma.cc/8ZXY-53XK>].

46. Kat Eschner, *Three Ways the Interstate System Changed America*, SMITHSONIAN MAG. (June 29, 2017), <https://www.smithsonianmag.com/smart-news/three-ways-interstate-system-changed-america-180963815> [<https://perma.cc/T6DE-X65B>] (quoting the Our Documents project).

47. See, e.g., “When we get these thruways across the whole country, as we will and must, it will be possible to drive from New York to California without seeing a single thing.” JOHN STEINBECK, *TRAVELS WITH CHARLEY IN SEARCH OF AMERICA* 66 (50th-anniversary ed. 2012).

48. TRIP, RESTORING THE INTERSTATE HIGHWAY SYSTEM: MEETING AMERICA’S TRANSPORTATION NEEDS WITH A RELIABLE, SAFE & WELL-MAINTAINED NATIONAL HIGHWAY NETWORK 3 (2020), https://tripnet.org/wp-content/uploads/2020/06/TRIP_Interstate_Report_2020.pdf [<https://perma.cc/RCE8-VX3J>].

49. *Id.*

50. *Id.* at 13.

distance, the Interstate system has significantly increased access to jobs, housing, recreation, healthcare, shopping and other amenities.”⁵¹ Finally, the increased speed of movement of goods has enhanced American competition and improved our economic condition.⁵²

Whether and to what extent, the interstate highway system has been a success depends upon how we assess the admixture of benefits and burdens. It has certainly provided new opportunities for Americans to travel by car.⁵³ And yet it has contributed to highway injuries and fatalities and has also impacted poorer areas and communities of color in unfortunate ways.

The COVID-19 pandemic threatens the commitment by state and federal officials to maintain the systems of road, rail, and air transportation. As to auto travel, the financial forecast is grim so far as revenue to states is concerned. The American Association of State Highway and Transportation Officials estimates that state transportation revenues will be decreased by at least 30 percent—approximately \$50 billion—over the next 18 months due to the reduced level of vehicle travel as a result of the COVID-19 pandemic.⁵⁴ It is not inconceivable that this decline in revenue will have negative impacts on the conditions of roads. In a related vein, the meltdown of the hotel and restaurant industry will likely have an impact on the convenience of long-distance highway travel. This is undoubtedly a perfect storm, with the perilous economy affecting individuals’ discretionary money to travel, to purchase and maintain automobiles suitable for road trips, to refuel, and to take precautions adequate to protect from not only the coronavirus but the ordinary burdens of travel.

As for airline travel, we need to separate short-term impacts from long-term projections. For many months beginning in March of 2020, folks were not getting on airplanes, and airlines adjusted by slashing flights, curtailing routes, and engaging in other emergency measures to cushion the blows. As indicated above, the effects on the airline industry have been massive.⁵⁵ At the time of this writing, however, there has been a steady recovery. Air travel remains

51. *Id.* at 34.

52. *Id.*

53. The result was a massive increase in interstate travel, with more than a trillion miles in annual aggregate travel and a decrease, according to a 2018 study, by 30 percent in the aggregate time of travel between U.S. counties. *See supra* note 48 and accompanying text; Jaworski et al., *supra* note 42, at 1.

54. Letter from Patrick K. McKenna, President, AASHTO & Dir., Missouri Dep’t of Transp. & Jim Tymon, Exec. Dir., AASHTO, to Nancy Pelosi, Speaker, U.S. House of Representatives, Mitch McConnell, Majority Leader, U.S. Senate, Kevin McCarthy, Republican Leader, U.S. House of Representatives & Charles E. Schumer, Democratic Leader, U.S. Senate, at 1 (Apr. 6, 2020), <https://policy.transportation.org/wp-content/uploads/sites/59/2020/04/2020-04-06-AASHTO-Letter-to-Congress-on-COVID-19-Phase-4-FINAL.pdf> [<https://perma.cc/CG25-PDBA>].

55. U.S. Department of Transportation figures indicate that domestic airline travel is down 67 percent from August 2019 to August 2020. *U.S. Airline August 2020 Passengers Decreased 70% from August 2019 but Rose 2% from July 2020 (Preliminary)*, BUREAU OF TRANSP. STAT. (Oct. 9, 2020), <https://www.bts.gov/newsroom/us-airline-august-2020-passengers-decreased-70-august-2019-rose-2-july-2020-preliminary> [<https://perma.cc/F5D3-NPR3>].

significantly down, but the direction is positive. What remains to be seen is both how the airline industry recovers and what this portends for flyers and whether COVID-19 seriously impacts the demand for air travel as one of the means of travel. The bottom line is we do not know whether individuals, when they are ready, willing, and able to travel interstate will choose auto, rail, and bus over planes and to a meaningful extent. My instinct, and it is only that, is that individuals will make the marginal calculus that air travel carries disease contagion risks that are not easily ameliorated and will make the choice in favor of alternative means of travel. Furthermore, business travel may decrease, this for various reasons, further impacting airline trips. Apparently, business travel accounts for 75 percent of airline profit (on a base of 12 percent of total travel being business-related) and so this decrease, if it comes, may well be devastating to the airline industry, further exacerbating the problem.⁵⁶

B. TAKING REFUGE: LODGING AND LOCATION

Making their escape during periods of panic or unease is just part of the battle. Their capacity to escape depends upon the availability of lodging.

The rise of the short-term rental market over the past several years, enabled by companies such as Airbnb, Vrbo, or other companies, and, relatedly, the increase purchase of vacation homes for the purpose of long-term and short-term rentals, has created a much greater capacity than ever before for individuals looking to escape and take suitable refuge.⁵⁷

The short-term rental market, following a drop in the first two months of the pandemic, has thrived. The occupancy rates have proved not only resilient

⁵⁶. *Business Travel by the Numbers*, TRONDENT DEV. CORP., <https://www.trondent.com/business-travel-statistics> [<https://perma.cc/GV8V-7GLT>].

⁵⁷. The explosion in short-term rentals has occurred in just a decade or so's time. See Taylor Valore, *The Short-Term Rental Industry Is Likely to Recover by Year End*, *Forbes* (Jan. 27, 2021, 8:00 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2021/01/27/the-short-term-rental-industry-is-likely-to-recover-by-year-end> [<https://perma.cc/3W7Z-U4L6>] ("Short-term rental websites existed before the establishment of Airbnb in 2008, but in the decade-plus since Airbnb's founding, a lot has happened. Similar platforms emerged, and home-sharing experienced exponential growth.") Companies such as HomeAway and Vrbo (the latter has recently acquired the former) were around first, but Airbnb is the bigger corporate story, having driven enormous growth in this industry. See *Expedia Group Retires HomeAway U.S. Brand to Focus on Vrbo and Streamline Its Vacation Rental Portfolio*, VRBO (June 23, 2020), <https://www.vrbo.com/media-center/press-releases/2020/expedia-group-retires-homeaway-us-brand-to-focus-on-vrbo-andstreamline-its> [<https://perma.cc/M8N4-EJUQ>]; Jaessa Bustamante, *Airbnb Statistics*, IPROPERTYMANAGEMENT, <https://ipropertymanagement.com/research/airbnb-statistics> [<https://perma.cc/W5GB-T7V3>]. Airbnb has been valued as high as \$31 billion but has declined to \$18 billion in its latest valuation, largely as a result of the pandemic. Dennis Schaal, *Airbnb's Valuation Almost Halved to \$18 Billion*, SKIFT (Apr. 8, 2020, 5:45 PM), <https://skift.com/2020/04/08/airbnbs-valuation-almost-halved-to-18-billion> [<https://perma.cc/7XHZ-DHY7>]. There are nearly 700,000 property listings in the United States alone. Rupert Neate, *How the COVID-19 Crisis Locked Airbnb Out of Its Own Homes*, *GUARDIAN* (Apr. 4, 2020, 3:00 PM), <https://www.theguardian.com/technology/2020/apr/04/how-the-covid-19-crisis-locked-airbnb-out-of-its-own-homes> [<https://perma.cc/ZH8W-DQ9j>].

in the last four months but have compared very favorably with hotels.⁵⁸ One report indicates that travelers are staying for 58 percent longer during this pandemic period.⁵⁹ The flight to less urban areas has accelerated and short-term rentals have benefited.⁶⁰ As one title from a news story indicates, “[r]ural Airbnb bookings are surging as vacationers look to escape the coronavirus.”⁶¹ The hospitality industry has coined the term “staycationers” to capture this phenomenon and is actively marketing the safety and amenities of longer-term rentals (whether in hotels, resorts, and elsewhere) for individuals aiming to escape.⁶² Another, even more mod label, is “[f]lexcation,” this to capture the trend of longer stays, and well beyond the summer period, to account for flexible work arrangements and also remote schooling for K-12 children.⁶³ These “changing family travel habits” are accelerating demand for certain types of lodging and in areas that are viewed as safer and more practical.

Despite the wide availability of short-term rentals, renters continue to struggle with full-time residents and therefore with legal authorities. Legal controversies have persisted during the lifespan of Airbnb and other rental companies.⁶⁴ As an urban planning scholar at McGill University noted in 2018, “[y]ou can’t throw a rock in the country right now without hitting a city that’s moving to more aggressively regulate short-term rentals.”⁶⁵ The pandemic has created a new layer of controversy, as localities have scrambled to impose

58. See David Oliver, *Travelers Are Flocking to Airbnb, Vrbo More Than Hotels During COVID-19 Pandemic. But Why?*, USA TODAY (Aug. 26, 2020, 8:37 PM), <https://www.usatoday.com/story/travel/hotels/2020/08/26/airbnb-vrbo-more-popular-than-hotels-during-covid-19-pandemic/5607312002> [<https://perma.cc/KG6M-E6ZU>]; Jon Porter, *Airbnb Reports Surge in Demand for Local Stays*, VERGE (June 8, 2020, 6:40 AM), <https://www.theverge.com/2020/6/8/21283706/airbnb-coronavirus-covid-19-local-holidays-global-trend-vacation-homes-hotels> [<https://perma.cc/PEE5-9S7V>].

59. See Oliver, *supra* note 58.

60. *The Impact of COVID-19 on Traveler Search and Bookings*, VRBO: DISCOVERY HUB, <https://www.vrbo.com/discoveryhub/tips-and-resources/improve-performance/covid-19-traveler-search-bookings> [<https://perma.cc/3KP8-CUPU>]. This Vrbo destination map from last Spring indicates that by far the greatest demand has been in Southern, and especially Florida, resort communities. *Id.*

61. Michelle Gao, *Rural AirbnB Bookings Are Surging as Vacationers Look to Escape the Coronavirus*, CNBC DISRUPTORS (Aug. 6, 2020, 1:35 PM), <https://www.cnbc.com/2020/08/06/rural-airbnb-bookings-are-surging-as-vacationers-look-to-escape-the-coronavirus.html> [<https://perma.cc/22DR-A8L2>].

62. *Staycationers Are Saving Hotels and Airbnb from COVID-19*, ECONOMIST (Aug. 31, 2020), <https://www.economist.com/business/2020/08/31/staycationers-are-saving-hotels-and-airbnb-from-covid-19> [<https://perma.cc/MMB8-62L3>].

63. Vrbo, *New Vrbo Data Shows Changing Family Travel Habits due to COVID-19*, CISION (Aug. 5, 2020, 10:03 AM), <https://www.prnewswire.com/news-releases/new-vrbo-data-shows-changing-family-travel-habits-due-to-covid-19-301106242.html> [<https://perma.cc/N77M-JC6Z>].

64. See, e.g., Scott Zamost, Hannah Kliot, Morgan Brennan, Samantha Kummerer & Lora Kolodny, *Unwelcome Guests: Airbnb, Cities Battle Over Illegal Short-Term Rentals*, CNBC (May 24, 2018, 7:00 AM), <https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html> [<https://perma.cc/6N7P-FPMN>].

65. *Id.* (quoting David Wachsmuth).

occupancy restrictions and party prohibitions to ensure that short-term rentals do not become new loci of super spreading events.⁶⁶ Indeed, Airbnb on its own initiative in late August banned parties and limited occupancy to a maximum of 16 at all of its worldwide properties.⁶⁷

In addition to short-term rentals and extended hotel stays, there is an emerging shift by individuals to purchase second homes, usable not merely or even especially as investment or rental properties, but as oases to which individuals can escape. There is some indication that this has been exacerbated by the COVID-19 pandemic,⁶⁸ although this may well reflect a larger phenomenon tied to financial considerations such as the high carrying costs of primary residences in expensive markets. A Mansion Global report suggests,

[w]ith people realizing they can successfully work from home, many feel they don't need to be based in the city anymore. Combine that with a desire for more space, both indoors and out, and a less dense environment, buyers are looking outside urban centers for property while keeping their rental apartments, at least in the short term.⁶⁹

These second homes, traditionally styled "vacation homes," can become increasingly available for escape and refuge from areas seen as too expensive and too risky in other ways. This is not a theoretical point. Sales of such homes have been surging, even in this precarious economy.⁷⁰

One of the lessons of this alignment of interest and resources is that both circumstances and legal structure can create the conditions for certain relocation strategies. Greater ease of mobility, through modern mechanisms of transportation and the wider availability of suitable lodging can and does affect the calculus of those considering escape. Incentives matter here as elsewhere and the COVID-19 pandemic has illustrated well that folks who can manage it will adapt their behavior around what they perceive as difficult predicaments associated with their location and residence.

IV. INTERSTATE MOBILITY AND LEGAL LIMITS

Over the summer of 2020, as the coronavirus pandemic surged, a number of states imposed restrictions of various sorts on individuals traveling into those

66. *See id.*

67. *Airbnb Announces Global Party Ban*, AIRBNB: NEWS (Aug. 20, 2020), <https://news.airbnb.com/airbnb-announces-global-party-ban> [<https://perma.cc/4YBR-HV24>].

68. *See V.L. Hendrickson, More Renters Becoming Second-Home Owners*, MANSION GLOB. (June 28, 2020), <https://www.mansionglobal.com/articles/more-renters-becoming-second-home-owners-217111> [<https://perma.cc/244W-9UF4>].

69. *Id.*

70. *See Candace Taylor, East Coasters Are Snapping Up Vacation Homes Amid Coronavirus*, WALL ST. J. (July 16, 2020, 12:10 PM), <https://www.wsj.com/articles/east-coasters-are-snapping-up-vacation-homes-amid-coronavirus-11594915853> [<https://perma.cc/92SK-6PML>].

states.⁷¹ Although no state imposed an outright ban, the edicts were reasonably burdensome, often requiring travelers to quarantine for a certain period of time (14 days).⁷² Folks travel to states for different reasons—tourism, visiting family and friends, relocating, etc. But what state officials fretted about, as Florida Governor Ron DeSantis was rather explicit about, was the diaspora of New Yorkers coming to the Sunshine State to take refuge from the coronavirus outbreak in New York.⁷³ These travel bans were directed toward exit for the purposes of escape.⁷⁴

The idea that individuals should be able to be freely mobile, and that they should be able to avail themselves of the roadways for their leisure and their business was established early on in our constitutional tradition, and never seriously disputed. If anything, this principle was profoundly reinforced by the practical circumstances of air travel and also the steady importance of the automobile and the highways to the life of our citizens.

The Constitution embodies a right to travel across the states. “Despite its insecure origins,” Jide Nzelibe writes, “the right to travel never has been questioned seriously. Its implications may have been debated, but the right almost always has been taken for granted.”⁷⁵ In *Saenz v. Roe*, Justice Stevens summarized the state of the law as it went back for a century:

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.⁷⁶

The freedom of movement was a fundamental privilege of citizenship, and so was encompassed in the Privileges and Immunities Clause as the Court had held as early as *Corfield v. Coryell*⁷⁷ and in other key cases over the years. As Justice

71. For a survey of state travel restrictions over the 2020-21 period (noting that at the time of writing these regulations are still evolving, see *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) [<https://perma.cc/EQ45-TMVC>]).

72. *Id.*

73. See Cleve R. Wootson Jr. & Lori Rozsa, *Florida Gov. DeSantis Urges New Yorkers to Stay Away Due to Coronavirus, Derides Those ‘Bringing the Virus’ From Hot Zone*, WASH. POST (Mar. 24, 2020, 6:28 PM), https://www.washingtonpost.com/national/coronavirus-florida-new-york-desantis/2020/03/24/1313a2e4-6e11-11ea-a3ec-70d7479d83fo_story.html [<https://perma.cc/gUQA-YMH7>].

74. See Tracey Tully & Stacey Stowe, *The Wealthy Flee Coronavirus. Vacation Towns Respond: Stay Away.*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/03/25/nyregion/coronavirus-leaving-nyc-vacation-homes.html> [<https://perma.cc/LG48-TTBY>].

75. Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. U. L. REV. 433, 434 (1999) (footnote omitted).

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

77. See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

Washington said in *Corfield*, the “fundamental” rights protected by the Privileges and Immunities Clause include “[t]he right of a citizen of one state to pass through, or to reside in any other state.”⁷⁸ This freedom was reaffirmed repeatedly, and notably in 1941 in *Edwards*, where the Court was reconsidering a Dustbowl era restriction on entry by “paupers” and various other individuals which the state thought undesirable.⁷⁹

In a series of cases beginning in 1969 with *Shapiro*⁸⁰ and continuing through *Saenz*, the Court shaped this freedom of movement into a broad right to travel.⁸¹ Solid majorities of the Court confirmed that states should not be able to treat out-of-state citizens differently by, for example, requiring a waiting period before being entitled to benefits or, as in *Saenz*, limiting the amount of benefits to that which they would receive in their former home.⁸² To be sure, this right to travel was not unlimited; and so we accept, if controversially, the prerogative of the state to charge non-residents different rates of tuition or even impose higher standards for entrance to state colleges and universities and we also accept manifestly protectionist regulations such as the requirement that a would-be lawyer licensed in one jurisdiction has to pass a state bar before she is licensed in her new home.⁸³ Still, the right to travel is a fundamental right, long incorporated to the states through the Privileges and Immunities Clause,⁸⁴ gaining oxygen from our robust modern equal protection doctrine as well as the dormant commerce clause and its skepticism about differential treatment of outsiders.⁸⁵

With that constitutional edifice in place, it seems difficult to imagine that a state would have the authority to pull up drawbridges of any consequence to individuals looking to come into, or pass through, their state.

78. *Id.*

79. *See Edwards v. California*, 314 U.S. 160, 173 (1941) (“The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance. . . .”); *see also id.* at 176–77 (discussing state interests in limiting immigration of “paupers”).

80. *See generally Shapiro v. Thompson*, 394 U.S. 618 (1969) (establishing a right to travel in U.S. law).

81. *See generally Saenz*, 526 U.S. 489 (protecting the right of a citizen of one state to enter and to leave another state, to be treated equally when visiting, and for those who elect to become permanent residents of another state, ensuring they enjoy the same rights as long-term residents of that state).

82. *Id.* at 493.

83. *See generally Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985) (finding that there is no substantial reason for New Hampshire to exclude non-residents from the state bar).

84. *See Saenz*, 526 U.S. at 501–02. *See generally Paul v. Virginia*, 75 U.S. 168 (1869) (holding that a company is not a citizen viewed under the Privileges and Immunities Clause).

85. *See generally Meryl Chertoff, The Right to Travel and National Quarantines: Coronavirus Tests the Limits*, GEORGETOWN L., <https://www.law.georgetown.edu/salpal/the-right-to-travel-and-national-out-oes-coronavirus-tests-the-limits> [<https://perma.cc/95FU-8RV6>] (discussing various limitations of the right to travel).

So where does this leave the various state (and local) regulations arising out of the COVID-19 pandemic? To answer this question, we need to look at *Jacobson v. Massachusetts*, the 1905 case that establishes the basic framework for considering the tradeoff between state public health powers and civil liberties.⁸⁶ *Jacobson* concerned a compulsory vaccination law enacted by the Massachusetts state legislature.⁸⁷ The defendant objected that this regulation interfered with his privileges and immunities, and his due process and equal protection rights under the U.S. Constitution.⁸⁸ He added that this regulation violated “the spirit of the Constitution” in that it infringed on his liberty.⁸⁹ The Supreme Court rejected Mr. Jacobson’s claim. “This [C]ourt,” wrote Justice Harlan for the majority, “has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.’”⁹⁰ This is especially pertinent in the case of an important public health regulation, for

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.⁹¹

What is left for consideration by courts in these right to travel/freedom of movement cases, as they continue to be litigated in court, is how to apply the basic framework of *Jacobson* to these regulations. As this case has become singularly important in COVID-19 constitutional litigation, the analysis tends to focus on one or another school of thought. One view sees *Jacobson* as essentially an injunction to courts that they should look with maximum deference at governmental decisions based upon public health considerations. As Justice Jackson was to say many years later in another context, the Constitution is not “a suicide pact,”⁹² so there are emergency situations in which civil liberties should be tempered in order to enable the government to respond rapidly and effectively to these emergencies. As to the factual burden that the government is expected to bear, the lesson drawn from explicit language in *Jacobson* is that the courts are ill-suited to second guess public health authorities. “Upon what sound principles as to the relations existing between the different departments

86. See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that a law requiring vaccinations was a valid exercise of police power as it was necessary for public health).

87. *Id.* at 12.

88. *Id.* at 13–14.

89. *Id.* at 14.

90. *Id.* at 26 (quoting *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

91. *Id.* at 29.

92. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

of government can the court review this action of the legislature?”⁹³ No one seriously reads *Jacobson* as holding that the Constitution is suspended during times of public health emergencies. And so folks who might say something to the effect that *Jacobson* is *Ex Parte Milligan* 2.0⁹⁴ have it wrong. Rather, *Jacobson* counsels a more deferential standard of review—if pressed, I would say somewhere in between rational basis and intermediate scrutiny—in evaluating government regulations in public health crises.

If travel regulations are viewed through this lens, the governments are almost certain to prevail. A mandatory quarantine, while burdensome, is much less than a ban on entry. To be sure, it may temporarily eradicate tourism, as has been the case in Hawaii,⁹⁵ but this is a burden, after all, voluntarily undertaken by the state. The would-be tourists would need to make the calculus of whether a 14-day quarantine is worth the trip. An even more draconian restriction, say, a requirement that travelers bring along evidence that they do not have COVID-19—what might be called a “health passport”⁹⁶—as a condition for stepping foot into the state would, too, seem well within the bounds of constitutionally acceptable conduct by the state. The obvious imposition on the freedom of movement would be outweighed by the government’s interest in protecting everyone in the state, not merely their residents, but everyone, from individuals who might well infect others. Indeed, if this regulation would fall prey to the right to travel notwithstanding *Jacobson*, it would be unlikely that any mandatory quarantine would be constitutional. If prohibiting you from entering another state is unacceptable, then prohibiting you from leaving your home *a fortiori* is unacceptable.

However, there is another school of thought with regard to the *Jacobson* holding. As law professors Lindsay Wiley and Stephen Vladeck wrote in a widely noticed article, *Jacobson* should be read narrowly, as holding that the Massachusetts vaccination requirement was valid in that it did not impose any serious burden on the civil liberties of citizens of that state.⁹⁷ As a matter of costs and benefits, it brought a large public health benefit at little cost to individual freedom.⁹⁸ And yet *Jacobson* did not decide, they argue, any of the more difficult

93. *Jacobson*, 197 U.S. at 31.

94. See generally *Ex parte Milligan*, 71 U.S. 2 (1866) (suspending habeas corpus during the Civil War).

95. On the devastating economic impacts of Hawaii’s travel restrictions, see Allison Schaefer, *Hawaii’s Economic Woes Expected to Widen*, HONOLULU STAR-ADVERTISER (Aug. 19, 2020), <https://www.staradvertiser.com/2020/08/19/hawaii-news/hawaiis-economic-woes-expected-to-widen> [https://perma.cc/UC9G-XEGJ].

96. On the concept of COVID health passports, see “Immunity Passports” in the Context of COVID-19, WORLD HEALTH ORG. (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19> [https://perma.cc/282A-8N2Z].

97. See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 190–91 (2020).

98. See *id.* at 190 (noting Justice Harlan “adopted a quintessential balancing test” when upholding the vaccination mandate).

questions that would arise where a fundamental right was at stake.⁹⁹ In a case in which a right was indeed implicated, the courts should, say Wiley and Vladeck, use the ordinary standards of review.¹⁰⁰ That would mean, of course, strict scrutiny, with the government put through its paces to establish that it had a compelling state interest, and that the law was the least restrictive means of achieving that interest and was, further, narrowly tailored to the need advanced. The only role for deference to play in this rendering of *Jacobson* as a rather unremarkable case so far as constitutional review is concerned is deference to the interest advanced by the government, that is, the strong interest in protecting the public health. Rest assured, however, there is much more the government would need to do in the typical case in which a fundamental right is implicated to assure the court that this regulation is well-tailored to meet the objectives stated.

Coming back to the right to travel, the government would have a harder, but certainly not an impossible time, in demonstrating that these regulations were warranted. It would presumably be easy for the government to establish that the interest is compelling, given the nature, scale, and scope of the pandemic. But would this regulation be narrowly tailored? This is unclear.

The prohibition is on anyone coming into the state from a certain state, that is, those with a high rate of infections. Yet, there is no accounting for: (1) where the person came from (maybe a town where the rate was very low?); (2) with whom the person came into contact over the past many days or weeks (were they sheltering in place or were they out and about?); (3) what they intended to do in the state where they were entering; or (4) whether they were just passing through. These considerations would likely bear on the court's assessment of whether this restriction was or was not narrowly tailored. Moreover, so far as the least restrictive means element of the analysis is concerned, we could come back to the question of whether the state could have protected its citizens and visitors through other devices, such as requiring a negative test over a specified period of time as a condition for entry. Or consider this possibility: The court might say that the individuals in a given state could be protected against infection by the requirement imposed on all to wear a mask or through the expectation that they would socially distance from one another. In short, there seems to be a menu of less restrictive alternatives than, say, a mandatory quarantine (or even a ban, if that is what a state contemplated). And so the outcome in a COVID-19 right to travel case could well turn on whether *Jacobson* is right one way or another with respect to the standard of judicial review.

99. *Id.* at 194.

100. *Id.*

V. CONFRONTING THE PROBLEM OF ESCAPE

In the previous two Parts, we considered two distinct aspects of mobility under American law. First, we considered the practical impact of widely available travel and lodging and the related ease with which individuals could seek an escape, for whatever period, from their perceived predicaments. Second, we considered the structure of law which strongly favors the freedom of movement, unencumbered by either state regulation under constitutional limits of drawbridge strategies or by federal regulation which remains largely agnostic regarding movement, for whatever reasons. The government has basically two choices available to it, broadly speaking: impose restrictions on individuals who seek to escape or create mechanisms to ameliorate the impacts of escape on the community of origin and the community of arrival. I want to suggest that the first approach has a web of problems that make it mostly unsatisfactory as a practical matter, while the second approach can potentially yield some fruitful strategies.

A. DESTINATION AND PURPOSE

As we considered in Part III, the twin foundations of our federalism architecture, the dormant commerce clause and the right to travel, impose serious limits on the ability of states to restrict interstate mobility. The COVID-19 pandemic raises what is perhaps the strongest case for permitting state restrictions; and, indeed, the *Jacobson* framework will support more flexibility for states in controlling inflow. Certainly, the states which imposed travel restrictions during the summer of 2020 were counting on deference by the courts.

And yet state officials will need to be careful in configuring their regulatory strategies. A travel restriction of indefinite duration will be problematic; and the lifting of these restrictions in the late summer period perhaps reflects the acknowledgment that interstate mobility remains important as a constitutional value and indeed as a requirement. Moreover, these limitations are incredibly difficult to enforce. To undertake a major effort to impose quarantines for incoming travelers—whether they are just visiting or moving or somewhere in between—requires a commitment of resources that states will have a hard time devoting to the task, especially in this period of state fiscal stress.

In addition to these legal and practical problems, there is an intriguing question of whether and how states could impose special burdens on individuals who are seeking refuge of some (perhaps uncertain) period of time within their state. As described in Part II, this could well be a concern of a state that has to manage the influx of temporary residents, individuals who will consume state and local resources while paying neither income nor property taxes. What can states practically do to control the influx of escaping newcomers?

To begin with, the notion that the government should seriously interrogate individuals to learn the reasons for their travel is a non-starter. People travel to another state for various reasons: to move for work, to visit a new or familiar

place, to attend school, to undertake a temporary work assignment, or to see friends or family. So, when we talk of interstate movement we are talking about many different scenarios—the traveler from Dallas who wishes to watch the Chicago Cubs play the Rangers at Wrigley, the student who is attending Stanford from Iowa, etc. So we cannot really expect the government to base its approach to escape on a factual inquiry as to why the person is traveling. After all, the law does a fairly terrible job when it undertakes to measure intent behind actions.¹⁰¹ The history of antidiscrimination law illustrates that,¹⁰² for reasons that are largely beyond the scope of this Article. But suffice it to say that both legislation and judicial doctrine has moved a good deal away from a focus, if not mechanical than still artificial in perhaps unavoidable ways, on the motivations behind governmental actors in setting up rules that impact the lot of traditionally disadvantaged groups.

The legal structure that protects the freedom of movement is agnostic about the reasons why individuals travel. Therefore, investigating reasons for travel seems no more promising as an object of legal inquiry. There is precious little reason to believe that the quest would be more fruitful in examining the motivations for individuals leaving a jurisdiction. We would not interrogate individual motivation by way of fact-gathering. Nor could we imagine proxies for discovering motivation, that is, where folks are relocating from, say, a COVID-19 hotspot to more healthier enclaves. So long as individuals are not obliged to give reasons for their stay, as they might in a formal immigration context involving international travel, we would not be able to plumb the motivations for their travel, and so we could not distinguish between escape and other personal reasons for exit.

B. PANDEMICS AND PANIC

COVID-19 sheds important light on the strategies states can follow to deal with the problems of escape. Let us begin with the epidemiology of transmission. The strategy of flattening the disease curve is multifaceted; but undergirding it is the expectation that individuals will largely stay put. The public campaign to keep our distance when out in public is a component of a larger campaign that, especially when the crisis is most severe, we should keep our distance by simply staying home.

Staying home does not mean just staying indoors. It means not venturing out in medium and long distances. Air travel has a triple disadvantage, in that it increases the proximity to other individuals, from various places, in the airport, encloses them in a metal tube for some period of time, and potentially

101. See generally David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059 (2010) (discussing how intent is defined and why it matters); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. a (AM. L. INST. 2020) (same).

102. See, e.g., Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1476–77 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 321–24 (1987).

brings COVID-19 to your destination. Train and bus travel offers little improvement. Car travel is probably the least risky, for the traveler and the folks encountering that traveler—although, here too, long road trips present new perils, in the need for accommodation, sustenance, gasoline, and other necessities of life, all of which may bring folks in contact with the virus and vice versa. The bottom line is the world can be a dangerous place during a pandemic and countenancing escape as a price we pay for protecting our freedom of movement means tolerating as a society, and through law, a heightened amount of danger.

Yet states and the federal government do little to regulate interstate car and air travel, even where they can do so. As to air travel, there is a lack of clarity about the Department of Transportation's authority under current statutory law to mandate masks on airlines, but there is precious little doubt that the Constitution would permit Congress to enact legislation to require masks or give authority to the FAA to impose such a mandate.¹⁰³ As to automobile travel, no level of government has required travelers to, say, present a negative test as a condition for using the roads, or for refueling their cars, or for any purpose whatsoever. A hypothetical traveler who has the coronavirus could travel through any state, without interference, so long as they are passing through on their way to a destination state. It is not obvious why state governments permit this to happen; and it is not obvious why they could not set up roadblocks to monitor the COVID-19 status of travelers coming through their state or check on individuals staying in a hotel for a night or two.

C. COHERENT REGULATORY STRATEGIES

Our system of constitutional federalism gives state governments an enormously wide birth in creating means of protecting their citizens, and ensuring their safety and welfare. They must not do so in a way that discriminates against out-of-state residents, including those who have come into their state to establish residency there. This is the principal takeaway from the Court's modern right to travel jurisprudence.¹⁰⁴ But there remains a strong tradition, reflected in public policy and in law, including constitutional law, of deference to state action which aims to look after individual citizen well-being.

Indeed, the state police power, the fulcrum of state regulatory authority and the classic manifestation of the principle that state constitutions are documents of limit, not grant, gets its primal force from the idea that states have

103. See Press Release, House Comm. on Transp. & Infrastructure, Chairs DeFazio and Larsen Lead 18 Members of Congress on New Legislation Requiring Passengers to Wear Masks on Airplanes and in Airports (July 30, 2020), <https://transportation.house.gov/news/press-releases/chairs-defazio-and-larsen-lead-18-members-of-congress-on-new-legislation-requiring-passengers-to-wear-masks-on-airplanes-and-in-airports> [<https://perma.cc/C4UD-PCC6>].

104. See *supra* Part IV (discussing right to travel cases).

an obligation to keep their citizens safe and healthy.¹⁰⁵ The wide berth given to state authorities to regulate individual and business activity and to impose such draconian restrictions as shelters-in-place and quarantines reveals the law's commitment to this idea.

Where states act to protect their citizens by imposing limits on citizens of other states, the matter becomes more complicated. We want state governments to look after their citizens, but our commitment to a union of United States, with common interests and objectives means that we want them to attend to the welfare of others as well. The problem of escape is one faced by the states who are losing their citizens to safer pastures and also those states who want to pull up the drawbridge to keep out individuals who might threaten the health and welfare of their citizens. That these issues raise asymmetrical considerations points to national solutions. And our commerce clause jurisprudence reinforces this point.¹⁰⁶

COVID-19 has pulled back the curtain on the deficits in state decision-making, in the limits to one or several states undertaking the task of balancing interests and tackling wicked problems, including the conundrum of how best to protect the welfare of their own citizens while looking after the commonwealth. The aggregate choices of 50 different state governments, ideologically and economically diverse, and without any serious influence over the decision-making over officials in other states, has disserved us in arresting a pandemic that knows no geographical bounds and is very contagious.

As mentioned above, the right to travel can be limited without regard to mandatory quarantines and checkpoints. For example, a sheltering-in-place requirement makes it practically more difficult to travel, if not by exact operation of law, then through the message sent by governmental authorities to stay off planes and trains and buses and likewise off the roads. To be sure, the impact on travel during the COVID-19 pandemic is well known. There was a 70 percent decline in air travel in August 2020 from the previous year¹⁰⁷ and while there has been a rebound, things are far from back to normal. This decline has had major economic impacts.¹⁰⁸ Amtrak suffered an equivalent hit with a 95 percent decrease in ridership this summer from the previous summer

105. See generally Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J.L. & LIBERTY 662 (2015) (discussing state police power in relation to the limitations of state authority).

106. See, e.g., *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459–62 (2019); *Cooley v. Bd. of Wardens*, 53 U.S. 299, 303–09 (1851). See generally Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005) (providing an overview of the Dormant Commerce Clause jurisprudence and arguing that "the Dormant Commerce Clause may not be overridden by Congress.").

107. BUREAU OF TRANSP. STAT., *supra* note 55.

108. See INT'L CIV. AVIATION ORG., EFFECTS OF NOVEL CORONAVIRUS (COVID-19) ON CIVIL AVIATION: ECONOMIC IMPACT ANALYSIS 4 (2021), https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf [<https://perma.cc/U8AZ-CDSW>].

on some routes.¹⁰⁹ The data with respect to car travel is more equivocal, and the results more turbulent, but the decline was meaningful.¹¹⁰

Sheltering orders did not seriously limit individuals' travel to other states; they did not, in other words, curtail their ability to escape. Whether they discouraged escape in any way is hard to measure, but there was certainly a reduction of interstate travel by any mechanism (plane, train, auto, and bus) during the period in which the sheltering orders were in place. Such travel has increased as these sheltering restrictions have been lifted and so escape has become more common.

The government has mechanisms available to discourage escape short of flat-out travel restrictions. Tolls could be significantly increased¹¹¹ and to a level where folks might reconsider their plans. Governments could hike fees on individuals traveling by air or by rail. They might be able require a clean bill of health in order to exit the state, a requirement that could conceivably be applied to residents and nonresidents alike. To be sure, these mechanisms would need to be justified by resort to public health considerations. So, for example, the tolls and fees would be designed explicitly to discourage out-of-state travel and would be explained as a means of keeping a state's citizens from going out into the world and potentially infecting others. These would be defended as mechanisms to assist with sheltering orders, where such orders are operative, and also with successful contact tracing, on the theory that individuals are easier to trace, to contact, and, where necessary, to control, when they are closer to home.

The focus here has been on state strategies. However, the federal government can also develop strategies to ameliorate the negative consequences of escape. Here are some ideas in that regard.

First, there should be a coherent fiscal strategy, one that looks at the mix of taxes, state and local regulations, and economic investments, designed to affect mobility choices, including temporary dislocation. This is not a novel insight at a grand level, as there are familiar strategies the federal government follows to incentivize residential decisions,¹¹² or the locational decisions of businesses.¹¹³ When individuals seek escape to other states, they face a choice

109. See Elizabeth Castillo, *A Bumpy Ride for California's Amtrak as Pandemic Surges*, S.F. CHRON. (Dec. 20, 2020 4:00 AM), <https://www.sfchronicle.com/travel/article/A-bumpy-ride-for-California-s-Amtrak-as-15815715.php> [<https://perma.cc/69DX-NNS9>].

110. In the last two weeks of March and the first week of April 2020, the decline was 68–72 percent. Tony Dutzik, *America on Pause: Vehicle Travel During COVID-19 and What Comes Next*, U.S. PIRG, <https://uspig.org/blogs/blog/usp/america-pause-vehicle-travel-during-covid-19-and-what-comes-next> [<https://perma.cc/3ANK-JHJ8>].

111. On state versus national road tolling authority, see generally CONG. RSCH. SERV., *TOLLING U.S. HIGHWAYS AND BRIDGES* (2017), https://www.everycrsreport.com/files/20170804_R44910_c76604aac9c4d77c05ccdc41eb91c04217507a36.pdf [<https://perma.cc/22DL-QJT8>].

112. See Schleicher, *supra* note 14, at 122–32.

113. See generally Nathan M. Jensen, *Job Creation and Firm-Specific Location Incentives*, 37 J. PUB. POL'Y 85 (2017) (describing how “[g]overnment economic development programmes provide

among a menu of practical considerations, including state (and local) tax policy, regulatory burdens on their activities as non-residents within the state, amenities available to them as renters, and other considerations. All of these considerations are configured by public and quasi-public authorities through law. These authorities can make it easier or harder on their escapees; and without making any general pronouncements about which strategy is best, I will simply observe that these authorities should take account of the benefits and burdens of having these refugees in their communities when they establish policy. For the footprint of these visitors are likely to become ever more important, for the reasons we have canvassed in this Essay, to the communities in which they are staying, for some time, and often a rather substantial period.

Perhaps the most far-reaching approach to capturing the burdens imposed by individuals escaping their communities for a time and taking refuge in another locale is a reconfiguring of current state tax law. The domicile basis of the state income tax is well established, but it is neither enshrined in the Constitution nor universally supported by scholars who have looked closely at these matters. As Edward Zelinsky recently noted, states have already been moving from a rigid conception of domicile, a conception that has proven “too subjective to be the sole criterion for residence for income tax purposes,” to what has been called “statutory residence” standards.¹¹⁴ We can imagine schemes to impose income tax burdens on individuals who are dwelling for certain periods as refugees; and the fact that this entails some amount of dual taxation could be justified on the grounds that these folks are accruing benefits from both residences and are imposing costs on the community in which they are staying for extended periods, even though technically transients.¹¹⁵ This Essay does not work out the details of such an arrangement, but just notes that this is a potential regulatory strategy to deal with the persistent phenomenon of escape.

In a related vein, states and localities should be thinking creatively about housing strategies, these in order to create disincentives to flee and, likewise, disincentives to absorb frightened residents from others states. As to the former predicament, states and localities can resort to zoning and subsidies to improve the conditions for individuals to stay put. Think of something as important, albeit not straightforward to enact into law, as a more muscular business deduction for home office space, something that would enable individuals to take greater advantage of remote work and therefore augment safety precautions while also making the prospect of sheltering in place in an urban

opportunities for firms to leverage financial incentives for business expansion and relocation,” which “promote[s] employment”).

114. See Zelinsky, *supra* note 12, at 274.

115. See Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 540–41 (2014) (comparing forms of income and the proper jurisdiction(s) they are to be taxed in).

area where their living conditions may be more manageable with this financial benefit. And, so far as the latter is concerned, constructive schemes of regulation of short-term and intermediate-term rentals would assist states and localities that are concerned about a large influx of visitors who are determined to relocate for a meaningful, and perhaps even uncertain, period, thereby imposing risks and burdens on their temporary (?) new home. Without taking a strong position on any particular regulatory strategy, suffice it to say that there is a menu of options which determined governments can consider to make individual decisions that account for these externalities.

In addition to place-based strategies, we can look back at the modalities of mobility, that is, our infrastructure of travel, in order to create new ways of capturing the externalities of escape from one state to another. To be sure, the federal government could be expected to look carefully at these state policies. Even the matter of tolls on interstate highways may implicate issues of national authority and federalism. And air travel fees would be problematic given the web of federal control. It might have to be creatively engineered as a transport tax, focused on the airport rather than the flight (and even that might be problematic). The dormant commerce clause might not impose a barrier, given that the discrimination is directed toward the states' own citizens, but if we look at this doctrine as not only about protectionism, but also about actions that impede the free flow of commerce, even if that imposition is directed at a state's own citizens, there may well be a decent constitutional objection to this strategy.

Consider regulations and subsidies involving public transportation, and also gas taxes, etc. These will impact mobility decision-making. So, as a thought experiment, consider a state that imposes a \$5 per gallon gas tax, this as a way to encourage folks on the interstate roads to drive rapidly through their state in order to get to the other side. Or localities that impose a hotel tax at such a level where the incentive to come and stay for a night or two or three or . . . is lessened. They are fanciful and plausible variations on these examples. The central point is that governments have mechanisms available to incentivize individual choice. And that they can do so suggests that there are strategies available to deal with the problem of escape, and in both directions (influx and outflux).

There is more to say about these transportation-related strategies; but the main point here is that there must be some studied thought about how state governments could look at our transportation system as a vehicle (pardon the expression) for limiting the ability to escape through raising the costs of exit.

Second, the federal courts should look at the right to travel as a right to be considered in light of sound choices by the government to limit mobility and entrance in order to protect not only their own citizens from infection, but also in order to promote national health strategies.¹¹⁶ So, for example, a state law

116. A comprehensive report on national health strategies early in the pandemic (March 5) proved prescient in this regard. *See* John L. Hick, Dan Hanfling, Matthew K. Wynia & Andrew T.

that requires individuals who have come into a state to check in regularly in order to assist in the project of rational contact tracing should not be struck down on the grounds that it violates the right to travel. Sensible health strategies need not be viewed as protectionist, but rather as means of addressing the difficult consequences of a very mobile, and freedom loving, society. Just as our colleges and universities are currently undertaking strategies – such as mask requirements and mandatory vaccination – that under ordinary circumstances would be regarded as heavy-handed, local governments should have wide latitude to take their own key steps to safeguard public health.

Third, and finally, we should be open to national strategies that look at the best allocation of benefits and burdens when our nation's citizens take advantage of easy modern transportation to move around. Many Americans do indeed “wanna get away” and often for more than a vacation. Our traditional freedom of movement rightly puts a heavy thumb on the scale of permitting such free choice. And yet the federal government might weigh into these decisions through constructing an appropriate mix of incentives. It is to the federal government that we look, through the lens of our constitutional scheme and philosophy, to show us that we are all in this together. Central government can uniquely push initiatives that nudge us in the direction of cooperative effort, including committing to our communities, our home and neighborhood that wants us and needs us in order to survive and to thrive post-pandemic.

VI. CONCLUSION

The problem of escape is not merely one of motivation, but of what citizen escape leaves in its wake. The idea that we are all in this together might seem like a quaint relic, and one that belies the appeal of mobility and new beginnings that undergird our popular mythology of the traveling soul who, like Johnny Cash in the song, has been everywhere. But the commitment to staying and working to improve one's place—fight, not flight—is important as well.

The law deals with this tradeoff in the context of interstate mobility and it regulates ordinary travel and tourism in ubiquitous ways. However, the law has not confronted in any systematic way a phenomenon that has become more important in the COVID-19 era. I call this “escape” and have undertaken to raise some general and specific issues about how the law might manage this common and complicated situation.

Pavia, *Duty to Plan: Health Care, Crisis Standards of Care, and Novel Coronavirus SARS-CoV-2*, NAT'L ACAD. MED. (Mar. 5, 2020), <https://nam.edu/duty-to-plan-health-care-crisis-standards-of-care-and-novel-coronavirus-sars-cov-2> [<https://perma.cc/F3PT-CUJ7>].