FREEDOM OF MOVEMENT AT A STANDSTILL?

TOWARD THE ESTABLISHMENT OF A FUNDAMENTAL RIGHT TO INTRASTATE TRAVEL

Kathryn E. Wilhelm[*]

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INTRODUCTION

The majority of Americans will likely live a lifetime and never consider whether they have an intrinsic, fundamental right to travel. They will go to

[*] J.D. Candidate, Boston University School of Law, 2011; B.A., Michigan State University, 2008. I am grateful to my friends and family, especially Jim and Tammy Wilhelm, for their unqualified love and support. I also thank the editorial staff of the *Boston University Law Review* for their thoughtful comments.

work and school, do their grocery shopping, and visit friends and family without a second thought about their right to do so. It will not occur to them that these activities might be restricted by the state or municipality in which they live.

The right to travel is different from the right to free speech,[1] to bear arms,[2] and to equal protection under the law.[3] These enumerated rights have become culturally salient; nearly everyone confronts these rights daily and is reminded that certain constitutional protections follow wherever they go. Even some rights declared in Supreme Court cases have assumed this culturally relevant status; anyone who has seen an episode of *Law & Order* knows that the accused are entitled to a *Miranda* warning upon arrest.[4] Many people who have never set foot inside a courtroom, a police station, or a criminal procedure class can recite a version of the *Miranda* warning.

The right to free movement differs because it seems so obvious that few would expect it ever to be challenged.[5] When most people get in a car or go for a walk, they are unconcerned that the state could or would restrict this behavior. Yet, one may value a right to free movement more highly when he or she is confronted with its denial. A teenager may feel more strongly about the recognition of this right if she were barred from "volunteering at a homeless shelter, attending concerts as a music critic, studying with other students, meeting with friends at their homes or in coffee houses, . . . auditioning for theater parts, attending ice hockey practice, practicing astronomy, and dancing at an under-21 dance club" after 10 PM.[6] Teachers'

[1] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[2] *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[3] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[4] Miranda v. Arizona, 384 U.S. 436, 478-79 (1965) (holding that an individual taken into custody or deprived of his freedom in a significant way and subjected to questioning is entitled to warnings of his "right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning").

[5] Throughout this Note, the right to "intrastate travel" and "free movement" will be used interchangeably. While there may be some small semantic differences in their usage, both terms essentially refer to one's right to travel without restriction within the boundaries of a particular state. Not all courts and scholars follow this formulation. For example, one court wrote:

> While the terms are often used interchangeably, we do not use the right to travel locally through public spaces and roadways synonymously with a right to freedom of movement. To be sure, a right to freedom of movement could encompass a right to localized travel, but it could also include interstate and international travel components.

Johnson v. City of Cincinnati, 310 F.3d 484, 495 (6th Cir. 2002). This Note will take up the issue of terminology again below. *See infra* notes 60-62 and accompanying text.

[6] Nunez v. City of San Diego, 114 F.3d 935, 939 (9th Cir. 1997) (providing examples of

interest in intrastate travel rights may heighten if they were unable to work in school district unless they established in-district residency within ninety days of employment.[7] If a man finds himself without a place to live, he may feel the sting of the application of anti-vagrancy and homelessness ordinances restricting where and when he may be in certain public places.[8]

The importance of a fundamental right to free movement becomes clear only when an individual is actually confronted with the potential loss of the right. A fundamental right is inalienable; it is "implicit in the concept of ordered liberty."[9] When a government restricts such a right, courts apply strict scrutiny in reviewing the law potentially at odds with the fundamental right.[10] To survive strict scrutiny, that law must meet a two-part test: first, it must be justified by a compelling and legitimate state interest and, second, it must be narrowly tailored to achieve that interest.[11]

The Supreme Court has never definitively declared that intrastate travel is a right retained by the American people, let alone a right entitled to strict scrutiny and the fundamental rights analysis.[12] However, many courts have attempted to articulate the state of the law with respect to the freedom of movement. Despite – or perhaps because of – the wide array of opinions on the issue, litigants are invoking the fundamental right to intrastate travel to capitalize on the legal uncertainty and advance their cases. Because free movement implicates many facets of day-to-day life, the argument for a right or fundamental right arises in a broad assortment of substantive areas of the law. From family law[13] to the regulation of prostitution,[14] and juvenile

the ways in which a juvenile curfew ordinance restricts the otherwise lawful activities of minors).

[7] *E.g.*, Wardwell v. Bd. of Educ., 529 F.2d 625, 627-28 (6th Cir. 1976) (finding no fundamental right to intrastate travel and subjecting a residency restriction on schoolteacher applicants to rational basis review).

[8] *See, e.g.*, Benefit v. City of Cambridge, 679 N.E.2d 184, 186-87 (Mass. 1997) (evaluating an ordinance banning panhandling and finding that it violated the First Amendment because peaceful begging qualifies as "communicative activity").

[9] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

[10] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1977) ("Unquestionably we have held that a government practice or statute which restricts fundamental rights or which contains suspect classifications is to be subjected to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." (internal quotation marks omitted)).

[11] *E.g.*, *id.*

[12] *See infra* Part II.

[13] *See, e.g.*, Watt v. Watt, 971 P.2d 608, 615-16 (Wyo. 1999) ("The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent.").

[14] *See, e.g.*, City of New York v. Andrews, 719 N.Y.S.2d 442, 454 (Sup. Ct. 2000) (holding that a law excluding certain individuals from Queens Plaza intrudes upon defendants' freedom to travel "far more than is necessary to serve the legitimate

curfews[15] to concealed weapon statutes,[16] litigants increasingly use ambiguous precedents to promulgate the free movement argument.

This Note explores the means by which the Supreme Court may establish or confirm a fundamental right to intrastate travel under the U.S. Constitution. Part I chronicles the history of the right to *interstate* travel in American jurisprudence, describing the governing precedents and the varied potential sources of such a right. Part II identifies the difficulties in establishing a fundamental right to *intrastate* travel. It then details the existing state and federal court cases that have evaluated the fundamentality of the right to free movement, including the Supreme Court's reticence to declare it a fundamental right. Part III identifies the types of cases in which substantive law creates an avenue for a fundamental rights argument. Among the issues discussed are juvenile curfew ordinances, sex offender residency restrictions, drug exclusion zones, municipal employment residency requirements, and residency restrictions germane to custodial battles. These seemingly disparate regulations share a common theme of arguably restricting the individual's ability to move freely within the borders of a state. Finally, Part IV suggests that the Supreme Court will eventually confirm the fundamentality of the right to intrastate travel because of the growing body of conflicting state and federal precedent that impacts such a diverse range of substantive law.

I. THE RIGHT TO *INTERSTATE* TRAVEL

As a preliminary matter, *interstate* travel must be distinguished from *intrastate* travel. In its most basic definition, "interstate travel" refers to "travel from one State to another, and necessarily to use [of] the highways and other instrumentalities of interstate commerce in doing so."[17] By contrast, "intrastate travel" contemplates movement *within* the borders of a single state. Intrastate travel "is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function."[18]

Before making predictions and suggesting changes for future jurisprudence, exploring the major landmark cases that have advanced the law to its present state will provide valuable background. This Part explores the history of the right to travel generally and examines the precedent governing the right to interstate travel.

governmental interest in suppressing the prostitution trade there").

[15] *See, e.g.*, State v. J.P., 907 So. 2d 1101, 1119 (Fla. 2004) (holding that two juvenile curfew ordinances improperly burdened the juveniles' right to travel freely because they were not narrowly tailored and therefore could not survive strict scrutiny).

[16] *See, e.g.*, Pencak v. Concealed Weapon Licensing Bd., 872 F. Supp. 410, 414 (E.D. Mich. 1994) ("Plaintiff has cited no authority for the proposition that denial of a concealed weapon . . . penalizes the right to travel.").

[17] United States v. Guest, 383 U.S. 745, 757 (1966).

[18] Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002).

A. *History & Precedent of the Right to Interstate Travel*

The Supreme Court has consistently applied strict scrutiny to restrictions on the right to interstate travel.[19] The recognition of a right to interstate travel dates back to at least 1849, when Justice Taney wrote in the *Passenger Cases*[20] that "[w]e 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."[21] Over the years, the Court elevated the right to travel to a sacrosanct level in American jurisprudence: a fundamental right. As early as 1920, the Supreme Court held that all citizens are endowed with "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."[22] In this passage, *United States v. Wheeler* announced for the first time a fundamental right to *interstate* travel.[23]

The Supreme Court further developed its travel jurisprudence in 1966 when it held that interstate travel "occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[24] Just three years later, the oft-cited *Shapiro v. Thompson*[25] held that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."[26] In the very same opinion, the Court emphasized that the right to interstate travel is so

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[19] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.").

[20] Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 572-73 (1849) (holding states may not tax a ship on the basis of the number of passengers in a particular designated category on board).

[21] *Id.* at 492 (opinion of Taney, J.).

[22] United States v. Wheeler, 254 U.S. 281, 293 (1920). While *Wheeler* may seem to establish the fundamental right to intrastate travel (through its use of the phrase "to move at will from place to place therein"), the Supreme Court intended only to establish a fundamental right to *interstate* travel, leaving the *intrastate* travel determination for another day. *See id.* at 297-98 (limiting the essential holding to a finding that the Constitution preserved the "right of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States").

[23] *Id.* at 293.

[24] United States v. Guest, 383 U.S. 745, 757 (1966).

[25] 394 U.S. 618 (1969).

[26] *Id.* at 638 (applying strict scrutiny to statutory provisions denying welfare aid based on a durational residency requirement).

important that it is "a virtually unconditional personal right, guaranteed by the Constitution to us all."[27]

More recently, the Supreme Court returned to the right to travel in *Saenz v. Roe*[28] by confirming and elaborating on its fundamental status.[29] In 1992, California passed a statute conditioning full welfare benefit eligibility on a durational residency requirement.[30] Instead of full benefits, families who resided in the state for less than one year could collect only the amount of benefits that had been available to them in the state where they had previously resided.[31] In a lengthy opinion, Justice Stevens listed the three component parts of the right to interstate travel:

> It protects the right of a citizen of one State to enter and 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.[32]

While confirming the right to travel's fundamentality, the Court held that only the third aspect of this right – new citizens' right to "the same privileges and immunities enjoyed by other citizens of the same State" – was at issue in the case.[33]

B. *Constitutional Sources of the Right to Interstate Travel*

While the fundamentality of the right to interstate travel is uncontroverted, the right's constitutional source is anything but clear. The Supreme Court has rooted the interstate travel right in a myriad of constitutional provisions and concepts. The Third Circuit Court of Appeals once stated that, despite the murkiness that has plagued those who seek to identify the constitutional hook for this right:

> Not all right to travel opinions have eschewed the burden of locating the right to travel in some appropriate constitutional text. Various Justices at various times have suggested no fewer than seven different sources: the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges and [sic] Immunities Clause, a conception of national citizenship said to be implicit in the structural logic of the Constitution

[27] *Id.* at 643 (footnote omitted).

[28] 526 U.S. 489 (1999).

[29] *Id.* at 500.

[30] *Id.* at 492.

[31] *Id.* ("[California's] scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence.").

[32] *Id.* at 500.

[33] *Id.* at 502.

itself, the Commerce Clause, the Equal Protection Clause, and each of the Due Process Clauses.[34]

The extent to which courts have differed on the source (or sources) of such a right is partially explained by the right's lack of textual basis in the Constitution, and further explicable by the Supreme Court Justices' divergent views over the years.

In the influential 1941 decision of *Edwards v. California*,[35] the Supreme Court asserted that the right to travel originates in the Commerce Clause.[36] The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[37] The Court stated that the statute at issue, which "prohibit[ed] the transportation of indigent persons across the California border," placed an "intended and immediate" burden on interstate commerce.[38]

The Due Process Clause of the Fifth Amendment also is cited as a constitutional source of the right to travel.[39] In the 1960s, Justice Harlan authored at least two Supreme Court opinions which located the constitutional protection for the right to travel (at least partially) in due process.[40] Because the restriction of a citizen's movement from state to state may infringe upon

[34] Lutz v. City of York, 899 F.2d 255, 260-61 (3d Cir. 1990) (citations and internal quotation marks omitted).

[35] 314 U.S. 160 (1941).

[36] *Id.* at 172 ("Article I, § 8 of the Constitution delegates to the Congress the authority to regulate interstate commerce. And it is settled beyond question that the transportation of persons is 'commerce,' within the meaning of that provision."). While the majority approved interstate travel rights under the Commerce Clause, four Justices argued that, in the alternative, the right is protected under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 178 (Douglas, J., concurring) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and [sic] immunities clause of the Fourteenth Amendment against state interference."); *id.* at 183 (Jackson, J., concurring) ("While instances of valid 'privileges or immunities' must be but few, I am convinced that this is one.").

[37] U.S. CONST. art. I, § 8, cl. 3.

[38] *Edwards*, 314 U.S. at 174.

[39] *See, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) ("We hold . . . that § 6 of the Control Act too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."); Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

[40] *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); United States v. Guest, 383 U.S. 745, 769-70 (1965) (Harlan, J., concurring in part and dissenting in part) (finding that the Due Process Clause is "[o]ne other possible source for the right to travel").

that citizen's liberty, the Supreme Court has held that such restrictions are subject to the protections of the Fifth Amendment's Due Process Clause.[41]

Alternatively, the Supreme Court has pointed to the Articles of Confederation as a potential source for the right to interstate travel. In *Zobel v. Williams*,[42] Justice O'Connor's concurring opinion indicated that the Article IV Privileges and Immunities Clause derives from Article IV of the Articles of Confederation, a document which "expressly recognized" the right to interstate travel.[43] The Articles of Confederation state that "the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[44] Justice O'Connor contended that the Framers intended to incorporate this provision by implication in the Privileges and Immunities Clause when the Constitution replaced the Articles of Confederation.[45] After Justice O'Connor's concurring opinion in *Zobel*, later decisions further relied on the Articles of Confederation as a major source of the fundamental right to interstate travel.[46]

Recently, courts have relied on yet another constitutional provision as a source of the right to interstate travel. The *Saenz* decision explained that the Privileges or Immunities Clause of the Fourteenth Amendment is one source of and protection for the fundamental right to interstate travel.[47] The Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[48] Justice Stevens

[41] *Kent*, 357 U.S. at 125-27 ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

[42] 457 U.S. 55 (1982).

[43] *Id.* at 79 (O'Connor, J., concurring).

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

[45] *See Zobel*, 457 U.S. at 79-80 (O'Connor, J., concurring) (explaining that the drafters of the Constitution's Article IV omitted the Articles of Confederation's express guaranty to interstate travel because the provision was redundant). Of course, an alternate understanding of the Framers' refusal to incorporate that clause into the Constitution is that they no longer wished for such a right to exist. For further discussion of the historical roots of the right to travel in the Articles of Confederation, see Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 821-22 (1992).

[46] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 501 (1999) ("The right of 'free ingress and regress to and from' neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" (footnote omitted) (quoting U.S. v. Guest, 383 U.S. 745, 758 (1966))).

[47] *Saenz*, 526 U.S. at 502-03.

[48] U.S. CONST. amend. XIV, § 1. The Privileges *or* Immunities Clause, located in the Fourteenth Amendment, is not to be confused with the Privileges *and* Immunities Clause, which is located in Article IV, Section 2. The Privileges and Immunities Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in

cited the Privileges or Immunities Clause, explaining that the right of new citizens of a state to enjoy the same benefits as other citizens of that state "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States."[49] In other words, citizenship of the United States protects certain rights against infringement by the states; the *Saenz* Court recognized the right to interstate travel as one of these component privileges or immunities.[50]

II. THE RIGHT TO *INTRASTATE* TRAVEL

One complication in identifying a fundamental right to *intrastate* travel is that no definite or singular source of the broader constitutional right to *interstate* travel has been identified. Although the right to interstate travel has long been an accepted part of American constitutional jurisprudence, courts have not been transparent about its constitutional source. In *Oregon v. Mitchell*,[51] Justice Harlan lamented the majority's failure to "anchor the right of interstate travel to any specific constitutional provision," terming the right a "nebulous judicial construct."[52]

The task is complicated further because it is not clear whether the intrastate right is conceptually, legally, or practically distinct from the right to interstate travel.[53] If, as some courts and commentators have contended, the rights to interstate and intrastate travel are interrelated, [54] then the constitutional source

the several States." U.S. CONST. art. IV, § 2, cl. 1.

[49] *Saenz*, 526 U.S. at 502.

[50] For excellent discussions of the history and usage of both the Privileges or Immunities Clause and the Privileges and Immunities Clause, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295 (2009) (exploring the use of the terms "privileges" and "immunities" throughout American history); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009) (explaining the history and meaning of the Privileges and Immunities Clause and detailing the Constitutional Convention's choice to omit the right to 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 (2001) (describing the *Saenz* decision's effect on the right to travel through its revival of the Privileges or Immunities Clause).

[51] 400 U.S. 112 (1970).

[52] *Id.* at 215-16 (Harlan, J., concurring in part and dissenting in part).

[53] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974) (refusing to draw a constitutional distinction between interstate and intrastate travel because the distinction would be inconsequential to the court's holding). *Compare* King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) (holding the two rights are constitutionally on the same footing), *with* Wardwell v. Bd. of Educ., 529 F.2d 625, 627 (1976) (refusing to apply *Shapiro* to intrastate travel, thus implying the two cannot be treated as constitutionally the same).

[54] *See, e.g.*, *King*, 442 F.2d at 648; Gregory B. Hartch, Comment, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 470

of the right to interstate travel will apply to intrastate travel as well.[55] In fact, for those who suggest that the right to intrastate travel is inseparable from the right to interstate travel, the sources of the rights likely overlap.[56]

However, some courts have rejected the theory that the rights to interstate and intrastate travel are so closely intertwined. For example, in *Eldridge v. Bouchard*,[57] a district court held that "[h]aving a fundamental right of interstate travel does not necessitate recognizing a fundamental right of intrastate travel. In fact, it is entirely consistent to recognize the right of interstate travel without recognizing the right of intrastate travel."[58] The *Eldridge* court explained that the right of interstate travel is rooted in the Privileges and Immunities Clause, a Clause that creates no protections that bind a state against its own citizens.[59] Thus, under the *Eldridge* interpretation, a state would not violate the Privileges and Immunities Clause by restricting its citizens' ability to move freely within its own borders. By interpreting the two rights as conceptually and constitutionally distinct, the *Eldridge* court may have foreclosed one avenue for the establishment of a fundamental right to intrastate travel.

To make matters worse, courts and scholars routinely use inexact vocabulary in referring to intrastate travel rights.[60] While referring largely to

(1995) (explaining that no court has "offered a convincing explanation for why the right to travel should be confined to interstate travel," and suggesting that "common sense" dictates that they should be treated similarly).

[55] One exception is the Commerce Clause, which has been used to support a right to interstate travel. *See supra* notes 35-38 and accompanying text. Article I of the Constitution authorizes only congressional legislative activity. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."). In contrast, the argument for a fundamental right to *intrastate* travel mainly involves state or municipal legislation. Thus, despite the recent burgeoning of jurisprudential use of the Commerce Clause in matters seemingly limited to purely in-state activity, *see, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17 (2005), the Commerce Clause is neither a likely nor viable source for the establishment of a right to free movement.

[56] *See, e.g.*, State v. Burnett, 755 N.E.2d 857, 865 (Ohio 2001) ("[T]he right to travel within a state is no less fundamental than the right to travel between the states.").

[57] 645 F. Supp. 749 (W.D. Va. 1986).

[58] *Id.* at 754.

[59] *Id.* ("Because the Privileges and Immunities Clause protections do not extend to a state's own citizens, then there is no parallel requirement that a court recognize a new fundamental right of intrastate travel.").

[60] Several Notes and Comments attempt to sort out the ambiguous language applied to intrastate travel rights. *See, e.g.*, Benjamin C. Sasse, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 698-710 (2000) (discussing how imprecise phrasing, and not a doctrinal disagreement, caused the circuit court split regarding existence and scope of the fundamental right to travel on public fora); Andrew M. Schnitzel, Comment, *Balancing Police Action Against an Underdeveloped Fundamental Right: Is There a Right to Travel Freely on Public Fora?*, 114 PENN. ST. L. REV. 667, 672-74 (2009) (arguing that while it may seem a circuit split exists regarding the right to intrastate travel, the jurisprudence resulting from the "jumble of case law" is too

the same constitutional protection, judges have written of the freedom of movement, the right to travel freely on public fora, the right to intrastate travel, and the right to travel.[61] Most courts make no effort to define precisely the terms they use to refer to this nebulous right, and it is not uncommon to see the vocabulary used interchangeably. For example, one court rejected a sex offender's challenge to a residency restriction as a condition of his parole, stating that "[t]he Ordinance does not affect the right of free interstate travel, nor does it affect the right of free intrastate travel, because it only restricts offenders' choice of residence, not offenders' free movement."[62] There is nothing inherently wrong with treating the terms as synonyms; in fact, this Note uses several of these terms interchangeably. However, the lack of uniformity among jurisdictions across the United States results in problematic side-by-side readings of judicial opinions. In jurisdictions where courts *do* distinguish among these terms, it is necessarily more difficult to apply precedents created by courts that do not distinguish the terms.

Thus, the varied constitutional sources of interstate travel rights, the potentially intertwined nature of the rights to interstate and intrastate travel, and the inconsistent application of the terms that could refer to intrastate travel make it exceedingly difficult to understand this body of law. Additionally, judges may root intrastate travel rights in one or more constitutional provisions that are not otherwise recognized as sources of interstate travel. The following section introduces several identified sources of the right to free movement.

A. *Constitutional Sources of Intrastate Travel*

1. The Bill of Rights

Like the right to interstate travel, the right to intrastate travel, if it in fact exists, is difficult to pin to a single constitutional source. A few courts have held that the right to free movement is a component right rooted in the First and Fifth Amendments. Under this analysis, intrastate travel is understood as "an essential means of effectuating other rights, such as freedom of association and freedom of speech."[63] In declaring the fundamentality of intrastate travel, one court stated that "[t]his right is rooted in the First Amendment's protection of expression and association, as well as (in this case) the Fifth Amendment's

varied and inconsistent to be considered a single body of law). The efforts undertaken in these works are beyond the scope of this Note.

[61] *See* Schnitzel, *supra* note 60, at 671.

[62] Bulles v. Hershman, No. Civ.A. 07-2889, 2009 WL 435337, at *6 n.8 (E.D. Pa. Feb. 19, 2009).

[63] Formaro v. Polk County, 773 N.W.2d 834, 839 (Iowa 2009) (citing Aptheker v. Sec'y of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) ("Like the right of assembly and the right of association, [freedom of movement] often makes all other rights meaningful – knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer . . . .")).

protection of fundamental liberty interests under the doctrine of substantive due process."[64] Later, the Iowa Supreme Court held that a juvenile curfew ordinance violated the First Amendment.[65] The court explained that when the rights protected by the Amendment "require one to move about, such movement must necessarily be protected under the First Amendment. Restricting movement in those circumstances to the extent that First Amendment rights cannot be exercised without violating the law is equivalent to a denial of those rights."[66] The Iowa Supreme Court established neither the existence nor the scope of an independent constitutional right to intrastate travel.[67] In a challenge to a law banning public begging, the Massachusetts Supreme Judicial Court held that the restriction "violates the First Amendment because it bans constitutionally protected speech in traditional public forums."[68] These cases demonstrate judicial willingness to recognize that free movement is a necessary and fundamental component of the exercise of the rights guaranteed by the First Amendment.

The Fifth Amendment's protection of liberty also serves as a viable source of intrastate travel rights.[69] First, to the extent that *interstate* travel is coextensive with and complementary to *intrastate* travel, right to travel jurisprudence relying on the Fifth Amendment's due process protection is well-developed.[70] Second, significant passages of Supreme Court opinions may be read to endorse the position that the Fifth Amendment necessitates the fundamental right to intrastate travel. In *Kent v. Dulles*, after firmly rooting travel rights in the Due Process Clause, Justice Douglas wrote that:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.[71]

This language seems to implicitly endorse the position that the Fifth Amendment's Due Process Clause protects against infringements upon *both* interstate and intrastate travel rights.

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[64] Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989).

[65] City of Maquoketa v. Russell, 484 N.W.2d 179, 183 (Iowa 1992) ("Whenever the First Amendment rights of freedom of religion, speech, assembly, and association require one to move about, such movement must necessarily be protected under the First Amendment.").

[66] *Id.* Maquoketa enacted an ordinance forbidding minors under the age of eighteen from being present on "streets, sidewalks, or public places . . . between the hours of 11:00 p.m. and 6:00 a.m." *Id.* at 181.

[67] *See id.* at 186.

[68] Benefit v. City of Cambridge, 679 N.E.2d 184, 186 (Mass. 1997).

[69] *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

[70] *See supra* notes 39-41 and accompanying text.

[71] Kent v. Dulles, 357 U.S. 116, 126 (1957).

2. The Privileges *or* Immunities & Privileges *and* Immunities Clauses

Insofar as they are constitutional sources of the fundamental right to interstate travel, Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Privileges or Immunities Clause also are potential starting points for the recognition of a fundamental right to intrastate travel.[72] Nothing inherent in these Clauses suggests that their language cannot or should not protect both intrastate *and* interstate travel rights.

The Privileges or Immunities Clause of the Fourteenth Amendment is a particularly interesting potential source for a fundamental right to intrastate travel. Long considered dead in American jurisprudence, this Clause may have been somewhat revived by the Supreme Court in *Saenz*[73] as a potential constitutional hook for fundamental rights, including the right of free movement.[74] One commentator suggested that the Privileges or Immunities Clause "grants federal protection over [the intrastate travel] right against state abridgement" because federal sovereignty protects certain rights of U.S. citizens, including the right to free movement, from state government interference.[75] The fact that there is far less existing jurisprudence on the Privileges or Immunities Clause may work in challengers' favor when they assert the Clause as a source of less traditional fundamental rights because there are simply fewer precedents to limit the courts' decisions.[76]

3. Other Constitutional Sources

Another derivative source of the fundamental right to free movement may be court decisions based on state constitutions. For example, the Massachusetts Supreme Judicial Court recently established that the state's constitution contains "a fundamental right of free movement."[77] The juveniles contesting a curfew ordinance asserted intrastate travel rights under both the state and federal constitutions.[78] Justice Cordy authored an opinion explaining that other fundamental rights germane to the Commonwealth's constitution, including the rights to vote, assemble peaceably, and free speech "would be severely curtailed if Massachusetts residents possess no attendant, fundamental

[72] *See supra* notes 47-50 and accompanying text.

[73] 526 U.S. 489 (1999).

[74] *See id.* at 502 (explaining that the Fourteenth Amendment's Privileges or Immunities Clause protects new citizens' abilities to travel to and live in other states).

[75] Hyland, *supra* note 50, at 249-53.

[76] Alternatively, the lack of precedent could work in the opposite direction, making courts hesitant to create new rules on the basis of a traditionally obscure and rarely used clause.

[77] Commonwealth v. Weston W., 913 N.E.2d 832, 836 (Mass. 2009). It is important to note that this case was decided under the Massachusetts Declaration of Rights, rather than the U.S. Constitution. *Id.* at 840.

[78] *Id.* at 835.

right to move about in public."[79] The court rooted this right in the Declaration of Rights, Massachusetts's state constitution, but the same rationale can be applied to the U.S. Constitution. Neither the Declaration of Rights nor the U.S. Constitution contains explicit language authorizing the right to intrastate travel, but both documents contain rights that are arguably meaningless without a citizen's ability to move freely. *Commonwealth v. Weston W.* contains the proposition that "[i]nherent in the right to life, liberty, and happiness is the right to move freely and peacefully in public without interference by police."[80] This argument could easily be applied by analogy to federal constitutional protections.

B. *Intrastate Travel Precedents*

It remains unclear whether individuals have a correlative fundamental right to *intrastate* travel. State and lower federal courts have taken various approaches to the question of the existence of a fundamental right to intrastate travel; while some courts have recognized such a right, others have explicitly rejected it. The following section will delineate relevant precedents, which will help untangle the state of the law with respect to free movement.

1. Supreme Court Decisions

The Supreme Court has been somewhat opaque in its handling of the right to intrastate travel. In *Kent*,[81] Justice Douglas explained that the history of free movement is deeply rooted in American and Anglo-Saxon law.[82] He further explained that "[f]reedom of movement is basic in our scheme of values."[83] Albeit in dicta, the Court's language suggests that there is a fundamental right to intrastate travel. Six years later, Justice Douglas wrote again about the right to free movement in a concurring opinion about a federal statute that restricted the rights of alleged communists.[84] "Freedom of movement," he wrote, "is important for job and business opportunities – for cultural, political, and social activities – for all the commingling which gregarious man enjoys."[85]

The Supreme Court's position on the right to free movement was no more explicit in *Papachristou v. City of Jacksonville*,[86] when the Court examined an anti-vagrancy statute and its effects on "[w]alkers and strollers and wanderers"

[79] *Id.* at 841.

[80] *Id.* at 840.

[81] *Kent v. Dulles*, 357 U.S. 116 (1958).

[82] *Id.* at 125-26 (tracing the right to travel's Anglo-Saxon history to the Magna Carta).

[83] *Id.* at 126.

[84] Aptheker v. Sec'y of State, 378 U.S. 500, 519-20 (1964) (Douglas, J., concurring) (explaining that the Constitution affords this right to all citizens, though they may "use it at times for mischievous purposes," because it "is part of the price we pay for this free society").

[85] *Id.*

[86] 405 U.S. 156 (1972).

and "[l]oafers or loiterers."[87] Justice Douglas wrote again, this time for the majority of the Court, stating:

> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[88]

Justice Douglas's declaration indicates an elevated level of importance for the right to move about freely. Several courts and scholars have understood that implicit in this dicta is a fundamental right to intrastate travel.[89]

A short time after *Papachristou*, Justice Marshall authored a dissenting opinion further supporting a fundamental right to free movement.[90] The opinion argued that the "freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'"[91] These precedents thus lend at least some support for the claim that the Supreme Court already has sanctioned the fundamentality of the right to free movement.

Nevertheless, other Supreme Court dicta arguably cut in the opposite direction, countering the fundamentality of the right to intrastate travel. The Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*[92] provides fodder for critics of the fundamental right to intrastate travel. In *Bray*, a group of abortion clinics and abortion rights activists sought a permanent injunction against anti-abortion demonstrators, hoping to prevent them from protesting in the vicinity of clinics providing abortions or abortion-related counseling services.[93] The plaintiffs argued that the defendants'

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[87] *Id.* at 164 (overturning the defendants' convictions and holding a city vagrancy ordinance "void for vagueness").

[88] *Id*.

[89] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 105 (1999) (Thomas, J., dissenting) ("That case . . . contains some dicta that can be read to support the fundamental right [to free movement.]"); Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (citing *Papachristou* in declaring a fundamental right to free movement); Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 983-84 (1996); Jamie Michael Charles, Note, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 332 & n.164 (2009).

[90] Bykofsky v. Borough of Middletown, 429 U.S. 964, 964-65 (1976) (Marshall, J., dissenting) (disagreeing with the majority's refusal to grant certiorari in a challenge to a nonemergency juvenile curfew).

[91] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (stating that a nonemergency juvenile curfew interferes with the freedom to leave one's house and that "a law that significantly intrudes on this freedom" was unlikely to survive constitutional scrutiny).

[92] 506 U.S. 263 (1993).

[93] *Id.* at 266.

demonstrations constituted a conspiracy to violate the interstate travel rights of women seeking abortions.[94] The *Bray* Court ruled that the plaintiffs did not prove the existence of a conspiracy to violate federal rights to interstate travel because the actions of the defendants restrained only *intrastate* travel.[95] In *Johnson v. City of Cincinnati*,[96] a dissenting judge on the Sixth Circuit capitalized on the *Bray* language and asserted that "[t]his language strongly suggests that no fundamental right to intrastate travel exists."[97]

Further, the Supreme Court has refused to take advantage of ripe opportunities to explicitly bestow citizens with a right to free intrastate movement. In *Memorial Hospital v. Maricopa County*,[98] the Court declined to take such a step, explaining that "[e]ven were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the [lower court's] judgment."[99] The Court had a clear avenue for applying fundamental rights methodology to intrastate travel but declined to take it.

However, courts and scholars may encounter criticism for relying on Supreme Court decisions that refer only implicitly to a fundamental right to intrastate travel without explicitly establishing it.[100] Critics might challenge the soundness of reliance on dicta to create and support something as important as a fundamental right without a more solid or explicit foundation. One court explicitly rejected the use of dicta to justify application of strict scrutiny and fundamental rights methodology to a constitutional challenge of a juvenile curfew statute.[101] The *Hutchins v. District of Columbia* court interpreted the *Maricopa County* statement as a conscious decision by the Supreme Court to refuse "to decide whether the right to interstate travel recognized in *Shapiro* has its analogue in intrastate travel."[102] Further, the *Hutchins* court interpreted another part of the *Maricopa County* decision differently, saying the decision "cast[s] strong doubt on the idea that there was a fundamental right to free movement."[103]

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[94] *Id.* at 266-67. The plaintiffs sought injunctive relief under clause 1 of 42 U.S.C. § 1985(3) which prohibits conspiracies to interfere with civil rights. *Id.* at 267.

[95] *Id.* at 277 (explaining that an injunction would only restrict the demonstrators' movement within a single state, i.e., "in the immediate vicinity of the abortion clinics").

[96] 310 F.3d 484 (6th Cir. 2002).

[97] *Id.* at 509 (Gilman, J., dissenting).

[98] 415 U.S. 250 (1974).

[99] *Id.* at 255-56.

[100] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 105 n.5 (Thomas, J., dissenting) (disapproving of the plurality's use of dicta to support a right of free movement).

[101] Hutchins v. District of Columbia, 188 F.3d 531, 537 (D.C. Cir. 1999) (indicating that support for a generalized right to free movement was "only *dicta*" in cases that involved "travel across borders, not mere 'locomotion.'").

[102] *Id.*

[103] *Id.* (citing *Maricopa County*, 415 U.S. at 255 ("[E]ven a bona fide residence

2. Lower Federal Courts Approving the Right to Intrastate Travel

The Supreme Court's ambiguity has resulted in a remarkably wide array of interpretations and, perhaps unsurprisingly, in a whole host of opinions about the existence and fundamentality of the right to intrastate travel. The federal circuits have issued divergent rulings with respect to the fundamental right of intrastate travel. In *King v. New Rochelle Municipal Housing Authority*, the Secod Circuit rejected any attempt to draw a constitutional line approving interstate and rejecting intrastate travel, calling the distinction "meaningless."[104] The Third Circuit relied on *King* when it eventually recognized a right to free movement almost twenty years later.[105] At least one federal court of appeals has been willing to assume, without affirmatively deciding, that a fundamental right to free movement exists.[106]

District courts have also demonstrated significant diversity in their decisions regarding intrastate travel. Some district courts have ruled in support of the right to intrastate travel.[107] For example, the opinion in one successful challenge to a juvenile curfew ordinance explained that "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all – and to do so whenever one pleases – is an integral component of life in a free and ordered society."[108] This court agreed with the Second and Third Circuits in recognizing a fundamental right to intrastate travel.[109]

3. Lower Federal Courts Rejecting the Right to Intrastate Travel

Then again, not all courts have acquiesced to the analyses of the aforementioned cases. The Fifth Circuit refused to apply strict scrutiny to an ordinance requiring city employees to live within the city for the duration of

requirement would burden the right to travel if travel meant *merely* movement." (emphasis added))).

[104] King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

[105] Lutz v. City of York, 899 F.2d 255, 261 (3d Cir. 1990) (indicating the existence of a constitutional right of intrastate travel based in substantive due process).

[106] Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) ("For purposes of our analysis, we assume without deciding that the right to move about freely is a fundamental right."). The court was reluctant to go further because the case concerned the constitutionality of a juvenile curfew ordinance, and the judges were unsure how the interplay of differential treatment of minors and this fundamental right would affect the analysis. *Id.* For further discussion of the complications implicit in deciding juvenile curfew cases, see *infra* Part III.A.

[107] *See, e.g.*, Callaway v. Samson, 193 F. Supp. 2d 783, 784 (D.N.J. 2002) (holding unconstitutional a durational residency requirement because it violated the due process right to intrastate travel and could not survive intermediate scrutiny); Hawk v. Fenner, 396 F. Supp. 1, 4 (D.S.D. 1975) ("The constitutional right to travel includes not only interstate but intrastate travel as well.").

[108] Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989).

[109] *Id.* ("One has the right to move about . . . because the right to move about – if even for no reason – is a cherished end in itself.").

their employment.[110] After holding that a fundamental right to intrastate travel does not exist, the court of appeals applied rational basis scrutiny.[111] Under this analysis, the Fifth Circuit concluded that the district court was correct in dismissing the plaintiffs' case; the court held that the city could require its employees to live within city limits without violating their constitutional rights.[112]

Moreover, in reviewing a constitutional challenge to a juvenile curfew ordinance, the D.C. Circuit explained that "[a] plurality believes that the curfew implicates no fundamental rights of minors or their parents."[113] Likewise, in *Wardwell v. Board of Education*, the Sixth Circuit held that "*Shapiro* and the other right to travel cases are not applicable to intrastate travel."[114] It thus declined to apply strict scrutiny to the right to free movement.[115] However, the Sixth Circuit recently revisited the issue of the right to intrastate travel and undermined *Wardwell*.[116] After a comprehensive precedent review, *Johnson v. Cincinnati* held that "the existence of a right to intrastate travel remains an open question in this circuit."[117] Across the United States, some courts have followed suit by resisting outright acceptance of (if not explicitly denying) the fundamental right to intrastate travel.[118]

4. State Courts

Some states have a long-established tradition of recognizing the right to intrastate travel, applying heightened scrutiny when the right is infringed upon. North Carolina, for example, has protected the fundamental right to intrastate travel under both the state constitution and the Fourteenth Amendment to the U.S. Constitution since the early 1970s.[119] One of the earliest North Carolina

[110] *See* Wright v. City of Jackson, 506 F.2d 900, 903-04 (5th Cir. 1975).

[111] *Id.* at 902-03.

[112] *Id.* at 904 (holding that the municipal employee residence requirement rationally promotes one or more legitimate state purposes).

[113] Hutchins v. District of Columbia, 188 F.3d 531, 534 (D.C. Cir. 1999).

[114] Wardwell v. Bd. of Educ., 529 F.2d 625, 627 (6th Cir. 1976).

[115] *Id.* at 628 (applying rational basis to a *continuing* requirement affecting only intrastate travel).

[116] Johnson v. Cincinnati, 310 F.3d 484, 494 (6th Cir. 2002) (holding that the rational basis test does not govern every impairment of an asserted right to intrastate travel).

[117] *Id.* at 495.

[118] *See, e.g.*, Eddleman v. Center Township, 723 F. Supp. 85, 89 n.8 (S.D. Ind. 1989) ("Because the U.S. Constitution does not deem intrastate travel to be a fundamental right, classifications on this basis can only be subjected to low-level scrutiny under federal equal protection analysis.").

[119] *See* Standley v. Town of Woodfin, 661 S.E.2d 728, 730 (N.C. 2008) ("[T]his Court has recognized a right to *intrastate* travel, stating that 'the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by . . . the Constitution of North Carolina.'" (quoting State v. Dobbins, 178 S.E.2d 449, 456 (N.C. 1971))).

cases held that "the right to travel on the public streets is a fundamental segment of liberty" and as such its absolute prohibition "requires substantially more justification" than would otherwise be required for ordinary state action.[120] Likewise, in *Treacy v. Municipality of Anchorage*, the Alaska Supreme Court affirmed as fairly obvious that the right to intrastate travel is fundamental.[121] The court wrote: "There is no question that the rights at issue in this case – the rights to move about, to privacy, to speak – are fundamental."[122] The *Treacy* opinion briefly summarizes federal case law before concluding that under the U.S. Constitution "the right to intrastate travel is fundamental," although the court did not address its scope.[123]

The Ohio Supreme Court has also examined the existence of the right under federal constitutional history and precedent.[124] The court concluded that "[h]istorically, it is beyond contention that being able to travel innocently throughout the country has been an aspect of our national freedom."[125] Because the right is so rooted in the collective understanding of how the nation operates, the court alleged that "recognizing a right of intrastate travel is hardly groundbreaking."[126]

Several states recently took steps to establish the fundamentality of the right to intrastate travel. Montana affirmatively established free movement rights in 2009.[127] In examining a custodial matter pursuant to a divorce, the court first looked at the federal cases establishing a fundamental right to interstate travel.[128] Montana's high court summed up its opinion by declaring "[i]t is difficult to conceive that the right to travel protected by the United States Constitution does not include a right to freely travel *within* each of the states."[129] The Montana Supreme Court thus relied heavily on the correlation between interstate and intrastate travel in recognizing the existence of a fundamental right to free movement.

Massachusetts is one of the most recent states to weigh in on the recognition of a fundamental right to intrastate travel.[130] In response to a 2009 challenge to a juvenile curfew statute, the Massachusetts Supreme Judicial Court held for the first time that the right to intrastate travel is fundamental under the state's

[120] *Dobbins*, 178 S.E.2d at 457-58.

[121] Treacy v. Municipality of Anchorage, 91 P.3d 252, 264-65 (Alaska 2004).

[122] *Id.* at 264.

[123] *Id.* at 265.

[124] State v. Burnett, 755 N.E.2d 857, 864 (Ohio 2001) ("Precedent of the United States Supreme Court and federal courts of appeals, and our own precedent cause us to conclude that such a constitutional right of travel within a state exists.").

[125] *Id.* at 865.

[126] *Id.*

[127] *In re* Marriage of Guffin, 209 P.3d 225, 228 (Mont. 2009).

[128] *Id.* at 227.

[129] *Id.* at 228 (emphasis added).

[130] *See* Commonwealth v. Weston W., 913 N.E.2d 832, 838-40 (Mass. 2009).

constitution,[131] while declining to address the issue under the U.S. Constitution.[132] Justice Cordy applied strict scrutiny to the statute, ultimately concluding that the criminal sanctions prescribed by the juvenile curfew were not tailored narrowly enough to survive a fundamental rights evaluation.[133]

It is thus apparent from the foregoing sampling of cases that the Supreme Court has yet to provide adequately definitive guidance on the existence of a fundamental right to intrastate travel. Yet despite the Supreme Court's lack of clarity, lower state and federal courts are increasingly willing to tackle the fundamental nature of the right to intrastate travel head on. But without guidance from the highest court, the results are inconsistent. How can some citizens of the United States be guaranteed such a right, while others with equal citizenship and protection under the Constitution are denied this same right?

This is particularly troubling given that many courts have affixed the label of "fundamental" to the right. American jurisprudence gives a great deal of deference to rights deemed fundamental; it is no empty label. With the diversity of positions in both state and federal courts, it seems it is only a matter of time before the Supreme Court will weigh in on the issue.

III. SUBSTANTIVE CHALLENGES FOR THE ESTABLISHMENT OF A FUNDAMENTAL RIGHT

Each of the ordinances, statutes, and regulations in Part III represents a potential restriction on an individual's right to free movement. For example, a municipality's juvenile curfew ordinance might constrain a minor's ability to drive on a public street or to stroll down a public sidewalk after midnight. Similarly, a residency restriction tied to an offer of municipal employment may limit one's ability to reside outside of a city's borders. While each of these statutes restricts intrastate travel differently, they all impede free movement. In all of the following areas of substantive law, litigants argued that an ordinance, statute or policy unconstitutionally restricted the fundamental right to intrastate travel. These cases all represent a potential avenue by which a jurisdiction, perhaps even the Supreme Court, could recognize a fundamental right to intrastate travel.

Recognition of a fundamental right to intrastate travel would not necessarily ban these kinds of statutes and regulations; rather, the laws would trigger a heightened level of judicial scrutiny when challenged. In other words, to

[131] *Id.* at 836 ("We conclude that the Lowell ordinance implicates, and the Declaration of Rights protects, a fundamental right of free movement.").

[132] *Id.* at 836 n.2 ("We therefore do not consider the defendants' claims under the United States Constitution.").

[133] *Id.* at 845-46. Courts in many other states have considered the question of the existence and fundamentality of the right to free movement or intrastate travel. For a table illustrating the geographic and substantive diversity of cases approving a right to intrastate travel, see *infra* Appendix.

justify its law, a state or municipality would have to demonstrate a compelling interest in limiting the individual's right to move freely and show that the law in question is the least restrictive means of achieving the compelling interest. Heightened judicial scrutiny would provide citizens with significant protection from government abridgement of their right to free movement.

While many of the statutes and regulations could withstand heightened scrutiny, some would not survive this level of review. The following non-exhaustive discussion of examples of challenges on the basis of a supposed fundamental right to intrastate travel not only demonstrates the ways in which elevated scrutiny might apply, but also assesses the likelihood that the Supreme Court will establish or confirm such a fundamental right in any of these substantive challenges.

A. *Juvenile Curfew Ordinances*

At the end of the twentieth century, cities and towns across America responded to rapidly increasing crime rates in a variety of ways. Urban reality seemed bleak; one court contemporaneously wrote that "the sale and use of illicit drugs in the District of Columbia has combined in recent years with long-standing problems of economic and social inequity to create an unprecedented explosion of violence," resulting in a "crisis."[134] Some municipalities enacted juvenile curfews in an attempt to curb teen crime and protect minors from violent crime. One survey by the U.S. Conference of Mayors indicated that by 1997, 276 cities had a nighttime curfew imposed on youths.[135] Other data indicates that curfews still exist in many large cities.[136]

Juvenile curfews have many incarnations, as each municipality attempts to craft an ordinance that best fits its needs. The ordinance passed by Dallas, Texas illustrates at least one city's take on limiting the movement of minors. The curfew ordinance applies to anyone under seventeen years of age and makes it an offense for a covered individual to "remain in any public place or on the premises of any establishment within the city during curfew hours."[137]

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[134] Waters v. Barry, 711 F. Supp. 1125, 1127 (D.D.C. 1989).

[135] *A Status Report on Youth Curfews in America's Cities: A 347-City Survey*, THE U.S. CONFERENCE OF MAYORS, http://usmayors.org/publications/curfew.htm (last visited Nov. 15, 2010) (reporting that eighty percent of the cities surveyed imposed a curfew of some kind upon minors). Cities with curfews were present in all but one state. *See id.* The cities include Phoenix, Los Angeles, Las Vegas, Denver, Chicago, Detroit, Minneapolis, Cleveland, and Philadelphia. *Id.* Notably, large New England cities like Boston, Massachusetts, Providence, Rhode Island, and New Haven, Connecticut opted not to enact juvenile curfews in the mid-1990s. *See id.*

[136] As of July 21, 2009, the City Mayors Society indicated that "[a]t least 500 US cities have curfews on teenage youth, including 78 of the 92 cities with a population greater than 180,000." Tony Favro, *Youth Curfews Popular with American Cities but Effectiveness and Legality are Questioned*, CITY MAYORS SOCIETY (July 21, 2009), http://www.citymayors.com/society/usa-youth-curfews.html.

[137] DALLAS, TEX., MUN. CODE ch. 31, art. 1, § 31-33, *available at* http://www.amlegal.

Many affected minors appealed their convictions for violations of the curfews on the basis of constitutional rights – with somewhat limited success.[138] Challengers to juvenile curfew ordinances often assert that the government has infringed upon a fundamental right to free movement as the basis for their appeals.

At least one complication arises when the right to intrastate travel forms the crux of a challenge to juvenile curfew laws: the involvement of minors in the fundamental rights analysis. Assuming a challenger establishes a fundamental right, should it apply in the same way to minors? While minors often face restrictions on their rights, minority status does not strip a child of his or her constitutional rights, nor does it automatically relegate the child to some lesser position with respect to the Constitution.[139] As the Supreme Court once said: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[140] On the other hand, the Supreme Court has made it clear that the government has a substantial interest in the protection of minors, an interest that must weigh against any fundamental right.[141] Minors' constitutional rights must be evaluated "with sensitivity and flexibility" because of their "peculiar vulnerability" and "their inability to make critical decisions in an informed, mature manner," among other reasons.[142] Thus, there is some uncertainty about the extent to which the fundamental rights methodology applies to youths and their rights to intrastate travel in juvenile curfew cases.

In application, individual courts have addressed the question of the appropriate level of scrutiny using a variety of rationales. In *Ramos v. Vernon*,[143] the Second Circuit applied intermediate scrutiny to the challenge of a juvenile curfew.[144] In a jurisdiction that had recognized a fundamental right to intrastate travel, the court assumed that strict scrutiny would have applied to

com/dallas_tx/ (choose "Frames"; then expand menu to select Volume II, Chapter 31, Article 1, Section 31-33). This curfew was enacted in 1991 and challenged in *Qutb v. Strauss*, 11 F.3d 488, 490 (5th Cir. 1993). The Dallas ordinance has been used as a model by some cities wishing to enact curfews because the Fifth Circuit upheld its constitutionality after applying strict scrutiny. *See Qutb*, 11 F.3d at 492-94.

[138] For a discussion of litigation surrounding juvenile curfew ordinances, see Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 149-59 (1997).

[139] *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . .").

[140] *Danforth*, 428 U.S. at 74.

[141] *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[142] *Id.*

[143] 353 F.3d 171 (2d Cir. 2003).

[144] *Id.* at 176.

the ordinance if it restricted adults.[145] However, the Second Circuit explained that "[a]nalysis in this case is more complicated because [this] ordinance targets juveniles and we have not yet determined whether children, like adults, possess the right to intrastate travel or, if they do, how such right is impacted by their age."[146] The court then examined in detail the factors bearing on which level of scrutiny to apply, ultimately concluding that "strict scrutiny would appear to be too restrictive a test to address government actions that implicate children's constitutional rights."[147]

In contrast, the Massachusetts Supreme Judicial Court applied strict scrutiny to a city ordinance restricting minors' intrastate travel.[148] However, the *Weston W.* court did not completely disregard the fact that the challengers were minors; rather, the court included minority status in its evaluation of whether the state had a compelling interest that would satisfy strict scrutiny.[149] Likewise, the Alaska Supreme Court applied strict scrutiny in evaluating the alleged infringement of juveniles' fundamental rights.[150] The court conducted a lengthy discussion of history and precedent, weighing the plaintiffs' call for strict scrutiny against the municipality's contention that "intermediate scrutiny should apply because the rights of children are not coextensive with those of adults and are entitled to less protection."[151]

In the end, the courts in each jurisdiction must make a discretionary decision as to the level of scrutiny that should apply in cases affecting juveniles and implicating the allegedly fundamental right to free movement. One clear implication of the previous cases is that very little clarity and guidance exist to direct courts in their decision-making. The diversity of decisions from these and other courts suggests that the success of juvenile curfew challenges based on the fundamental right to intrastate travel will be more or less dependent on the jurisdiction in which the case is brought.

Despite the added factor of minority status in juvenile curfew claims, these cases actually provide a plausible avenue for the recognition of a fundamental right to intrastate travel. The public's approval of juvenile curfew statutes has waned and their effectiveness has been challenged over the years, making them vulnerable to litigation.[152] One scholar suggested that "[j]uvenile curfews

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[145] *Id.*

[146] *Id.* The *Ramos* court also clarified its position that the right at issue in the case was "narrower than an adult's right to free movement" because the minors challenging the statute asserted a "right to move about freely with parental consent." *Id.* at 176 n.3.

[147] *Id.* at 180.

[148] Commonwealth v. Weston W., 913 N.E.2d 832, 836 (Mass. 2009).

[149] *Id.* at 842.

[150] Treacy v. Anchorage, 91 P.3d 252, 265-66 (Alaska 2004).

[151] *Id.* at 265.

[152] *See* Waters v. Barry, 711 F. Supp. 1125, 1139 (D.D.C. 1989) (overturning a juvenile curfew because it bore "little relation to the nature of the problem" after evidence indicated that the curfews were ineffective measures of crime prevention and "simply not so closely

become a suitable means of crime prevention only if they effectively promote juvenile criminal justice and community welfare. Formal constitutional analysis aside, if a curfew is proven ineffective it should be abolished."[153] The decline in popular approval also makes it less politically dangerous to overturn the statute or subject it to a higher degree of scrutiny. Further, a curfew that restricts a minor's movement after a particular time of day directly and unambiguously interferes with that youth's ability to move freely within the borders of a single state. If the Supreme Court does eventually decide to address the existence of a fundamental right to intrastate travel, juvenile curfews will almost certainly be affected in the aftermath.

Finally, many of the state supreme courts that have recently addressed the existence of a fundamental right to intrastate travel have done so in the context of challenges to juvenile curfew statutes and ordinances.[154] Litigants who challenge the validity of juvenile curfews almost always invite the court to address the intrastate travel issue and there is already substantial diversity of state court opinions interpreting the federal Constitution; this suggests that the Supreme Court will one day have to resolve the broad array of decisions in this area.

B. *Sex Offender Restrictions*

Registered sex offenders in several states have challenged the constitutionality of residency and other movement restrictions imposed upon them. In recent years, there has been a marked upswing in the number of challenges rooted, at least in part, in the sex offenders' supposed right to intrastate travel. The Iowa Supreme Court rejected one such claim in *Formaro v. Polk County*,[155] a challenge to section 692A.2A of the Iowa Code – the so-called "2000-foot rule."[156] When Formaro, a registered sex offender, was released from prison, he moved in with his parents; he later learned that this living arrangement violated the 2000-foot rule and was forced to vacate.[157] Formaro challenged the constitutionality of section 692A.2A, alleging that his right to free movement was effectively constrained by the statute.[158] The court

related to the protection of minors, or to curing the city's problems with drugs and violence, as to justify the infringement of constitutional interests").

[153] Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 455 (1999).

[154] *See, e.g.*, *Weston W.*, 913 N.E.2d at 840; Anonymous v. City of Rochester, 915 N.E.2d 593, 596-98 (N.Y. 2009).

[155] 773 N.W.2d 834 (Iowa 2009).

[156] *Id.* at 837 (explaining that the rule mandates that no sex offender may reside within a 2000-foot radius of an elementary school).

[157] *Id.*

[158] *Id.* at 839.

> [Formaro] claims that the statute effectively prohibits him from traveling to any location where he may fall asleep within the 2000-foot zone, bars him from participating in overnight political assemblies, overnight religious assemblies, or any

declined to settle the question of the *existence* of a fundamental right to intrastate travel because, even if the right were affirmed, it was not violated in this case.[159] The Eighth Circuit reached a similar result in evaluating the Iowa statute, concluding that it is "unnecessary" to consider the existence of a right to intrastate travel because such a right would not be violated by a residency restriction like the one under review.[160]

At least one case has suggested that the right to intrastate travel exists in this context, while ultimately holding the challenged law constitutional with respect to free movement rights. In *Standley v. Town of Woodfin*,[161] the challenger argued that an ordinance that banned sex offender use of public parks violated the fundamental right to intrastate travel rooted in substantive due process.[162] The court noted that "[t]he right to intrastate travel is a 'right of function,'"[163] but a restriction on the use of public parks "does not infringe upon plaintiff's fundamental right to intrastate travel because it does not impair his daily functions."[164] This holding suggests that a fundamental right to intrastate travel does, in fact, exist, but that certain restrictions imposed upon sex offenders are able to withstand the heightened scrutiny that applies in fundamental rights cases.

To some members of the judiciary, it matters whether the sex offender residency restrictions are statutorily imposed or created as a condition of the offender's probation or parole.[165] The distinction turns on due process; conditions tailored to a specific parolee or probationer more readily satisfy the sex offender's right to individualized terms calibrated on the basis of the

> other overnight lawful assembly, including family gatherings, and prevents him from accessing medical care by criminalizing any effort to receive medical services involving the use of anesthetic or overnight stays in area hospitals, all of which fall within 2000 feet of a protected location.

Id.

[159] *Id.* at 840.

[160] Doe v. Miller, 405 F.3d 700, 713 (8th Cir. 2005) ("The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement."). The court analogized this type of residency restriction to employment residency requirements that have been upheld as not violative of intrastate travel rights. *Id.*; *see also infra* Part III.D.

[161] 650 S.E.2d 618 (N.C. Ct. App. 2007).

[162] *Id.* at 620-21 ("[Plaintiff] also argues that the ordinance denies him his constitutional freedom to intrastate travel as recognized in *Williams v. Fears* . . . (finding that 'the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment)." (citation omitted)).

[163] *Id.* at 621 (quoting Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002)).

[164] *Id.*

[165] *See, e.g.*, Bulles v. Hershman, No. Civ.A. 07-2889, 2009 WL 435337, at *2-3 (E.D. Pa. Feb. 19, 2009) (finding that the plaintiff lacked standing to challenge an ordinance restricting the residence of sex offenders because the plaintiff's restriction was imposed as a condition of probation).

offender's actual crime, his or her likelihood of recidivism, and other factors specific to the person.[166] In particular, one court found that the plaintiff challenging a sex offender residency restriction lacked standing because his residency was restricted by the terms of his probation, *not* by the city's ordinance.[167]

When considering residency restrictions and requirements, some courts have charged that "[e]ven a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in *Shapiro*, the Court explained that '[t]he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites' for assistance and only the latter was held to be unconstitutional."[168] In itself, nothing about this reasoning is faulty, or even particularly troubling. In fact, a residency restriction *does* infringe upon free movement, and that infringement matters if citizens, including admittedly unpopular sex offender citizens, are entitled to a fundamental right to move freely.

That does not, however, mean that the residency restriction is invalid. Instead, it only suggests that such a restriction should be subject to strict scrutiny. Such a restriction sets off red flags because it implicates a fundamental right; it causes us to examine the statute with a critical eye. If and when a state can articulate a compelling interest in the restriction and demonstrate that the restriction is narrowly tailored, a court may uphold the legislation and citizens can rest assured that the state is justified in its actions.

C. *Independent Cause of Action*

In at least one case, plaintiffs attempted to use denial of the right to intrastate travel as an independent cause of action. In *Dickerson v. City of Gretna*,[169] the plaintiffs were victims of Hurricane Katrina who sued the defendant city for its refusal to allow them to evacuate New Orleans through Gretna.[170] The defendants disputed the existence of a constitutional right to

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[166] *See, e.g.*, Fullmer v. Mich. Dep't of State Police, 207 F. Supp. 2d 650, 662 (E.D. Mich. 2002) (invalidating Michigan's sex offender registry as violative of the Due Process Clause because it did not provide affected individuals with an "opportunity to be heard on whether, and to what extent, public notification of sex offenders' registry information is necessary to protect the public"); *see also* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (citing FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275-76 (1949))).

[167] *Bulles*, 2009 WL 435337, at *3 (stating that because the restriction on residency was imposed by the Pennsylvania Board of Probation and Parole, the court could not redress the harm alleged by Bulles by invalidating the ordinance).

[168] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974) (second alteration in original) (quoting Shapiro v. Thompson, 394 U.S. 618, 636 (1969)).

[169] No. 05-6667, 2007 WL 1098787 (E.D. La. March 30, 2007).

[170] *Id.* at *1.

intrastate travel.[171] After a lengthy evaluation of existing precedents of the Supreme Court and other federal circuit and district courts, the district court held the Fifth Circuit's decision in *Wright v. City of Jackson* was binding and "decline[d] to find that there is a fundamental right of intrastate travel."[172]

Ultimately, it seems that intrastate travel is least likely to be recognized as a fundamental right by the Supreme Court in the context of an independent cause of action. This type of case would require the Court to make the largest leap because by validating intrastate travel rights in this context, it would create a brand new stand-alone claim, a result courts often try to avoid. The Court would be unable to draw from any significant existing body of law, as precedents in this area are few and far between.

D. *Employment Residency Requirements*

Some citizens have challenged the conditions imposed by states and localities on employment as violating their fundamental right to intrastate travel. In cases of residency restrictions, courts have taken vastly different approaches. In *Krzewinski v. Kugler*,[173] plaintiff police officers and firefighters challenged the constitutionality of a state law obliging police and firemen to live within the municipalities they served.[174] After a careful consideration of the right to travel precedents, the District Court of New Jersey concluded "[t]hat the State of New Jersey, by attempting to enforce the residency requirement, would be penalizing the right to travel to a substantial degree . . . ."[175] The court held that the "compelling state interest" standard of review was appropriate, before ultimately upholding the statute as constitutional.[176]

In a factually similar case, the Fifth Circuit addressed a residency requirement challenge in *Wright*.[177] The City of Jackson, Mississippi passed an ordinance that mandated that all municipal employees must live within the boundaries of the city.[178] Employee firefighters challenged the ordinance, arguing that the right to travel guaranteed them protection against this kind of restriction and that strict scrutiny should be applied under the Fourteenth Amendment.[179] The court rejected any such "fundamental constitutional 'right

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[171] *Id.* at *2 ("Defendants acknowledge that a constitutional right of *interstate* travel exists, but argue that there is no constitutional right of *intrastate* travel.").

[172] *Id.* at *3 (citing Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

[173] 338 F. Supp. 492 (D.N.J. 1972).

[174] *Id.* at 495.

[175] *Id.* at 498.

[176] *Id.* at 498-504 (finding that the statute advanced compelling state interests such as promoting identity with the community among police and firemen and deterring crime through the presence of off-duty police in the municipality).

[177] *Wright*, 506 F.2d at 901.

[178] *Id.*

[179] *Id.* at 901-02.

to commute,'"[180] indicating that "[s]ince we can find no fundamental constitutional right to intrastate travel infringed by this ordinance, the City was not required to justify the ordinance under the compelling interest standard which must be met upon interference with a right to travel interstate."[181] The court thus applied a rational basis standard of review, which the ordinance easily satisfied.[182]

Just one year later, in *Wardwell*, a teacher was hired by a Cincinnati public school upon the condition that he establish in-district residency within ninety days, pursuant to a rule established by the Board of Education.[183] The teacher lived in Ohio, but instead of establishing residency within the district, he challenged the constitutionality of the rule on equal protection grounds, alleging that it violated his right to intrastate travel under *Shapiro*.[184] The Sixth Circuit opted not to apply fundamental rights methodology, holding instead that "where . . . a *continuing* employee residency requirement affecting at most the right of intrastate travel is involved, the 'rational basis' test is the touchstone to determine its validity."[185]

At present, many major urban and suburban cities have residency requirements of varying degrees of strictness as preconditions for employment.[186] The development of case law in this area suggests that, at present, it is unlikely that courts will recognize a fundamental right to intrastate travel in a case challenging an employment residency requirement. The peak of these challenges relying on intrastate travel rights appears to have been in the 1970s.[187] While states, municipalities, and employees still litigate the issue of the constitutionality and legality of residency requirements, current challenges tend not to be based on travel rights.[188]

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[180] *Id.* at 902 (quoting Ector v. City of Torrance, 514 P.2d 433, 436 (Cal. 1973)).

[181] *Id.* at 901-02.

[182] *Id.* at 903-04.

[183] Wardwell v. Bd. Of Educ., 529 F.2d 625, 626 (6th Cir. 1976).

[184] *Id.* at 626-27.

[185] *Id.* at 628.

[186] *See, e.g.*, *Employment Standards*, CITY OF BOSTON, http://www.cityofboston.gov/brjp/emplo_stand.asp (last visited Apr. 9, 2010) ("[A]t least fifty (50) percent of the total employee worker hours in each trade shall be by bona-fide Boston Residents."); *Requirements*, PHILADELPHIA POLICE DEPARTMENT, http://www.phillypolice.com/careers/requirements (last visited Sept. 3, 2010) ("Each non-resident hired for the position of Police Officer is required to establish residency within the City of Philadelphia no later than six (6) months after completion of the probationary period."); *Residency Requirement*, CITY OF MADISON, http://www.cityofmadison.com/Employment/residencyRequirement.cfm (last visited Apr. 9, 2010) ("Some City positions require that employees be residents of the City of Madison.").

[187] For example, *Krzewinski*, *Wright*, and *Wardwell* were decided in 1972, 1975, and 1976, respectively.

[188] *See, e.g.*, Lima v. State, 909 N.E.2d 616, 618-21 (Ohio 2009) (rejecting two municipalities' challenges to a state-wide ban on municipal employment residency

E. *Drug Exclusion Zones*

In the face of violent crime, rising homeless populations, and social unrest, cities like Portland, Oregon and Cincinnati, Ohio have endeavored to correct societal ills by implementing a novel solution – drug exclusion zones. Because it has been heavily litigated, Cincinnati's law provides an interesting portrait of the zones' interaction with intrastate travel rights. In 1996, Cincinnati enacted an ordinance that "excludes an individual for up to ninety days from the 'public streets, sidewalks, and other public ways' in all drug-exclusion zones if the individual is arrested or taken into custody within any drug-exclusion zone for one of several enumerated drug offenses."[189] This exclusion zone was overturned as a violation of the fundamental right to intrastate travel *twice*: by the Ohio Supreme Court in *State v. Burnett*[190] and by the Sixth Circuit in *Johnson*.[191] The Sixth Circuit wrote that:

> In addition to its solid historical foundation, the tremendous practical significance of a right to localized travel also strongly suggests that such a right is secured by substantive due process. The right to travel locally through public spaces and roadways – perhaps more than any other right secured by substantive due process – is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function.[192]

Thus, it seems that this kind of restriction is a possible route for the establishment or confirmation of the right to intrastate travel. Further, the Supreme Court denied certiorari to the City of Cincinnati in both cases.[193] While the Supreme Court is not yet ready to confirm the fundamentality of the right to free movement, on both occasions it was also unwilling to disturb the lower courts' precedents in this area.

Just as juvenile curfews are complicated by the involvement of minors, a class of people who are more highly regulated, cases involving people arrested for and convicted of drug-related offenses may contain an additional wrinkle. One scholar points out that even if intrastate travel rights were accepted as fundamental, "criminal behavior frequently results in the curtailment of constitutional rights. Just as presumptively constitutional travel restrictions are routinely imposed as a condition for parole or probation, a city also may be permitted to restrict the movement of individuals as a result of drug arrests."[194] Judge Easterbrook explained the reasoning behind restricting the extent of a

restrictions and holding that the state has the authority to enact such a ban).

[189] Johnson v. City of Cincinnati, 310 F.3d 484, 487-88 (6th Cir. 2002).

[190] 755 N.E.2d 857, 865-68 (Ohio 2001).

[191] *Johnson*, 310 F.3d at 498.

[192] *Id.*

[193] City of Cincinnati v. Johnson, 539 U.S. 915 (2003); Ohio v. Burnett, 535 U.S. 1034 (2002).

[194] Nichole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1076, 1097 (2005).

parolee's right to travel, stating that "[the appellant] committed crimes, and the punishment for these crimes includes stripping him of control over where he shall live . . . . Some choice was restored to [him] when he was paroled, but [he] received no more than statutes and binding regulations gave him."[195] The case holds that a parolee has no right to travel that supersedes the conditions of his parole.[196] There is thus some constitutional uncertainty as to the interaction between a convicted person's potential fundamental right to free movement and the State's interest in controlling his or her whereabouts or residence.[197]

F. *Custodial Battles*

An unexpected area in which the constitutional right to intrastate travel arises is in the context of custody orders in divorce proceedings. Some divorce decrees attempt to limit the extent to which the custodial parent may relocate his or her residence. One Wyoming case provides a fairly representative example. In *Watt v. Watt*,[198] a divorce decree awarded the plaintiff primary custody of the parties' three children but stated that should she move more than fifty miles away, custody would *automatically* shift from the plaintiff to her ex-husband, the defendant.[199] The plaintiff wanted to move to Laramie, Wyoming to pursue a graduate degree in pharmacy, so she sought approval from the court to move more than fifty miles away.[200] Her children's father subsequently filed for a change in custody, which the trial court granted.[201] On appeal, the Supreme Court of Wyoming held that the trial judge's conditioning custody upon the plaintiff's residence infringed upon her right to travel.[202] Wyoming's high court gave a detailed history of intrastate travel rights under the U.S. and Wyoming Constitutions before concluding that a fundamental right to intrastate travel existed.[203] The court wrote:

> The right to travel freely throughout the state is a necessary and fundamental aspect of our emancipated society, and it is retained by the citizens. It indeed would be incongruent to identify a fundamental right to travel protected by the Constitution of the United States with respect to

[195] Alonzo v. Rozanski, 808 F.2d 637, 638 (7th Cir. 1986).

[196] *Id.*

[197] However, there is a meaningful distinction between a person convicted, registered as a sex offender, but released from custody, and a parolee who is still subject to the controls of the state. Further discussion on this point is beyond the scope of this Note.

[198] 971 P.2d 608 (Wyo. 1999).

[199] *Id.* at 610.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 615 ("The constitutional question posed is whether the rights of a parent and the duty of the courts to adjudicate custody serve as a premise for restricting or inhibiting the freedom to travel of a citizen of the State of Wyoming and of the United States of America. We hold this to be impossible.").

[203] *Id.*

> interstate travel, and yet to conclude that the right to travel intrastate is inhibited.[204]

The opinion then explains that a custodial parent's right to free movement *includes* the right to have her children move with her, and that no court may infringe upon that right absent "clear evidence . . . demonstrat[ing] another substantial and material change of circumstance and establish[ing] the detrimental effect of the move upon the children."[205]

The *Watt* decision is also interesting because of the *source* the court identifies as the basis of the fundamental right to free movement. Like many other courts, the Wyoming Supreme Court did not provide one concrete constitutional source.[206] One portion of the decision suggested that the right to free movement is an unenumerated right retained by the citizens under the Constitution of the State of Wyoming.[207] However, the Court also indicated that the right to intrastate travel is a component or tagalong right to the fundamental interstate travel right.[208] Thus, despite settling the question of the *existence* of the right to intrastate travel in Wyoming, the decision does not pinpoint the source or sources of that right.

Other courts have also weighed in on residency restrictions imposed by child custody arrangements, albeit in the tangential context of *interstate* travel. These cases are nonetheless relevant to the intrastate travel debate because they demonstrate the states' treatment of the relationship between fundamental travel rights and the goal of protecting the best interests of the child. For example, Minnesota eschews a balancing test of the *parents'* constitutional rights (such as the right to travel and the right to rear one's child) by making the best interests of the *child* paramount.[209] In contrast, Colorado and New Mexico apply equal weight to all of the rights implicated when balancing the competing interests.[210]

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[204] *Id.*

[205] *Id.* at 615-16.

[206] *See id.* at 615 (discussing potential sources of a right to intrastate travel in the U.S. Constitution, in the Constitution of the State of Wyoming, and as derived from an interstate travel right).

[207] *See id.* ("'The enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people.'" (quoting WYO. CONST. art. III, § 36)). The opinion further explains that the right to intrastate travel "is a necessary and fundamental aspect of our emancipated society, and it is retained by the citizens." *Id.*

[208] *Id.*

[209] LaChapelle v. Mitten, 607 N.W.2d 151, 162-64 (Minn. Ct. App. 2000) ("[T]he trial court did not restrict Mitten's right to remain in Michigan; the court only required [the child] to be returned to Minnesota. Any burden on Mitten's right to travel arises from her desire to remain [the child]'s sole physical custodian.").

[210] *In re* Marriage of Ciesluk, 113 P.3d 135, 146 (Colo. 2005); Jaramillo v. Jaramillo, 823 P.2d 299, 308-09 (N.M. 1991).

Family law may be a good avenue for confirming the existence of a fundamental right to intrastate travel. The fundamental rights methodology gives courts a fairly mechanical yet equitable way to settle disputes in the complicated and often emotion-laden process of determining a custodial parent. It allows courts to resolve custody issues without reevaluating each parent's qualifications because a custodial parent's right to free movement includes a right to bring his or her child along. Instead, the resulting standard of review in a case where the fundamental right is implicated would allow the court simply to examine the effect of the move on the child.[211]

IV. THE FUTURE OF THE RIGHT TO INTRASTATE TRAVEL

In terms of substantive law, it seems likely that the ripest area for a successful constitutional challenge on the basis of a fundamental right to intrastate travel is the restriction imposed by juvenile curfews.[212] In terms of policy, the jurisprudence appears to be on an inevitable course toward recognizing a fundamental constitutional right to intrastate travel. Recent cases lend support for this prediction – several recent state supreme court rulings indicate a shift toward broad-based support for such a right.[213]

Notwithstanding jurisdictions like the Sixth Circuit that have bucked this trend, there exist several sound policy reasons for affirming this fundamental right. First, this Note demonstrates the striking diversity of terminology, jurisdictional approaches, and areas of substantive law in which the right to intrastate travel plays a role. For the sake of clarity and uniformity, the Supreme Court would bestow an enormous benefit upon the courts of the United States by providing unambiguous direction. Clarification also promotes efficiency by removing the burden on courts to individually assess the constitutional argument proffered by litigants alleging a right to free movement.

One of the major purposes of the U.S. Supreme Court is to ensure the uniformity of the rights of citizens. In *Martin v. Hunter's Lessee*,[214] the renowned Justice Story remarked upon "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[215] It is both the right and duty of the Supreme Court to clarify the state of the law. *Martin* stands at the very core of American jurisprudence, and it laments the "deplorable" consequences of a nation that lacks the "revising authority to control these jarring and discordant

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[211] *See, e.g.*, *Watt*, 971 P.2d at 616 (applying a standard which required a "substantial and material change of circumstance" and that the move produce a "detrimental effect" on the child).

[212] *See supra* Part III.A.

[213] *See, e.g.*, Standley v. Town of Woodfin, 661 S.E.2d 728, 730 (N.C. 2008) (finding a fundamental right to intrastate travel in both the U.S. and North Carolina Constitutions).

[214] 14 U.S. 304 (1816).

[215] *Id.* at 347-48.

judgments, and harmonize them into uniformity."[216] The fact that some jurisdictions have decided that the U.S. Constitution endows citizens with the fundamental right to intrastate travel, while other jurisdictions leave their citizens without such protection, is inimical to the Constitution.

Second, challengers of statutes and ordinances are increasingly invoking fundamental rights language.[217] These free movement challenges are gaining momentum, particularly in state supreme courts. In the last few years alone, several states have affirmatively recognized a fundamental right to free movement or intrastate travel in the context of challenges to juvenile curfews, drug exclusion zones, and custodial restrictions.[218] If the number of challenges does indeed increase, state and federal trial and intermediate appellate courts will be faced with increased pressure to decide – one way or the other – about the existence of the fundamental right to intrastate travel. There are only two possible results from such pressure: first, increased diversity in opinions among the jurisdictions, or second, a clear trend in one direction or the other about the existence of the right. For the reasons discussed in the preceding paragraphs, increased diversity should be settled by the only court with the authority to do so. If a clear trend emerges about the state of the law, a Supreme Court decision confirming the trend may be necessary to bring the outliers into conformity. In either case, the highest court in the land is called to action.

Third, several Supreme Court opinions hint at the existence of the fundamental right to intrastate travel, without explicitly confirming such a right.[219] Taken as a whole, the Court has used far more language indicating that it supports a fundamental right to free movement than language to the contrary. This tendency, in conjunction with the recent wave of litigation raising intrastate travel issues, suggests that it is the appropriate time for the Court to settle the issue by granting certiorari in one of the pending challenges rooted in the fundamental right to free movement.

Fourth, it is not clear that recognizing this fundamental right would be especially disruptive to existing bodies of law. Though this change would subject ordinances and statutes restricting free movement to strict scrutiny, many or even most of the laws and regulations would likely survive the heightened level of judicial review. Strict scrutiny merely guarantees that states do not unreasonably or unfairly restrict citizens from exercising their fundamental rights.

Finally, opponents of the fundamental right to intrastate travel have not yet articulated a reasonable distinction between the right to interstate travel, which

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[216] *Id.* at 348.

[217] *See, e.g.*, Treacy v. Municipality of Anchorage, 91 P.3d 252, 264-65 (Alaska 2004) ("There can be no question that the rights at issue in this case – the rights to move about, to privacy, to speak – are fundamental.").

[218] *See supra* Parts III.A, III.E, III.F.

[219] *See supra* Part II.B.1.

is fundamental, and the right to intrastate travel. It remains unclear how one can exercise the right to *interstate* travel without moving freely *within* a state. The Montana Supreme Court articulated this point best when it questioned the rationality of this distinction: "It is difficult to conceive that the right to travel protected by the United States Constitution does not include a right to freely travel within each of the states."[220]

Ultimately, the need for the Supreme Court to rule on the existence of a fundamental right to intrastate travel is less about establishing new protections for citizens than it is about the need for consistency and clarity in this area of the law. The confusion resulting from inconsistent vocabulary impacts too many substantive areas of law and too many state and federal jurisdictions. Absent the establishment of an outer boundary for what is and is not fundamental, United States citizens are subject to differing levels of protection despite being covered by a single Constitution.

[220] *In re* Marriage of Guffin, 209 P.3d 225, 228 (Mont. 2009).

APPENDIX

The following non-exhaustive table demonstrates the geographical and political diversity of states that have confirmed the right to intrastate travel under either the state's constitution or the U.S. Constitution. In addition to the states listed, several states have not yet weighed in on the matter.[221] Other states have entertained arguments about freedom of movement but have neither confirmed nor denied the existence of the right to intrastate travel.[222] This table also illustrates the diversity of substantive contexts in which litigants have persuaded courts that a right to intrastate travel does exist.

State	Case	Substantive Context
AK	Treacy v. Municipality of Anchorage, 91 P.3d 252, 264-65 (Alaska 2004) ("There is no question that the rights at issue in this case – the rights to move about, to privacy, to speak – are fundamental. . . . Accordingly, we assume that the right to intrastate travel is fundamental, but we do not address its scope.").	Juvenile Curfew
CA	*In re* White, 158 Cal. Rptr. 562, 566-67 (Ct. App. 1979) ("We conclude that the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole.").	Probation Conditions
CT	Bruno v. Civil Serv. Comm'n, 472 A.2d 328, 336 (Conn. 1984) (finding that the right to intrastate travel is a fundamental right and that the requirements violate the Equal Protection Clause of the U.S. Constitution).	Employment Durational Residency Requirement
FL	State v. J.P., 907 So.2d 1101, 1113 (Fla. 2004) ("We acknowledge that the United States Supreme Court has never definitively ruled that there is a fundamental right to intrastate	Juvenile Curfew

[221] For example, as of August 1, 2010, Westlaw searches for Alabama and Arizona cases produced no results for the relevant terms.

[222] *See, e.g.*, Delgado v. Souders, 934 P.2d 1132, 1137 (Or. Ct. App. 1997) ("Although Souders cites several state and federal constitutional provisions in support of his contention, we find nothing in them to substantiate the general proposition that there is a constitutional impediment against enjoining a person from frequenting a public place, where the circumstances are appropriate.").

	travel and that the federal circuit courts are divided on the issue. . . . However, the right to intrastate travel in Florida is clear.").	
HI	State v. Shigematsu, 483 P.2d 997, 1000-01 (Haw. 1971) (recognizing a fundamental right to intrastate travel under the Hawaii State Constitution, "includ[ing] the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, [and] to stand under open sky").	Banned Presence in Barricaded Gambling Establishment
MA	Commonwealth v. Weston W., 913 N.E.2d 832, 836 (Mass. 2009) (establishing a *state* fundamental right to free movement).	Juvenile Curfew
MI	State constitution establishes a *state* constitutional right to intrastate travel. *See, e.g.*, Pencak v. Concealed Weapon Licensing Bd., 872 F. Supp. 410, 414 (E.D. Mich. 1994) ("The right to intrastate travel is a basic freedom under the Michigan Constitution, and the analysis of government burdens on intrastate travel under the Michigan Constitution is identical to the analysis applied to government burdens on interstate travel under the United States Constitution.").	Concealed Weapon Restrictions
MN	State v. Cuypers, 559 N.W.2d 435, 437 (Minn. Ct. App. 1997) ("Minnesota also recognizes the right to intrastate travel.").	Mandatory Car Insurance
MT	*In re* Marriage of Guffin, 209 P.3d 225, 227-28 (Mont. 2009) ("It is difficult to conceive that the right to travel protected by the United States Constitution does not include a right to freely travel within each of the states. . . . We hold, therefore, that the right to travel guaranteed by the United States Constitution includes the right to travel within Montana.").	Custodial Dispute
NY	City of New York v. Andrews, 719 N.Y.S.2d 442, 452 (Sup. Ct. 2000) ("There can be no doubt that our State Constitution, no less than the Federal Constitution, supports the right to travel freely within the State.").	Prostitution
NC	Standley v. Town of Woodfin, 661 S.E.2d 728, 730 (N.C. 2008) ("'[T]he right to travel on the public streets is a fundamental segment of liberty' . . . ." (alteration in original) (quoting State v. Dobbins, 178 S.E.2d 449,	Sex Offender Restrictions

	456 (N.C. 1971))).	
ND	State v. Holbach, 763 N.W.2d 761, 765 (N.D. 2009) ("An individual has a constitutional right to intrastate travel, however that right is not absolute and may be restricted."); *see also* City of Bismarck v. Stuart, 546 N.W.2d 366, 367 (N.D. 1996) (per curiam) (rejecting a challenge to a state law requiring a driver's license to operate a motor vehicle on public roads but implying the existence of a fundamental right to intrastate travel).	Stalking Driver's License
OH	State v. Burnett, 755 N.E.2d 857, 865 (Ohio 2001) ("[T]he right to travel within a state is no less fundamental than the right to travel between the states.").	Drug Exclusion Zone
WA	City of Seattle v. McConahy, 937 P.2d 1133, 1141-42 (Wash. Ct. App. 1997) ("The right to travel, including the right to travel within a state, is a fundamental right subject to strict scrutiny under the United States Constitution.").	Anti-Vagrancy
WI	Brandmiller v. Arreola, 544 N.W.2d 894, 899 (Wis. 1996) ("[T]he right to travel intrastate is fundamental among the liberties preserved by the Wisconsin Constitution. This right to travel includes the right to move freely about one's neighborhood . . . .").	Municipal "Cruising"
WY	Watt v. Watt, 971 P.2d 608, 615 (Wyo. 1999) ("The right to travel freely throughout the state is a necessary and fundamental aspect of our emancipated society, and it is retained by the citizens.").	Custodial Dispute