Marquette Law Review

Volume 78
Issue 3 *Spring 1995*

Article 6

Wisconsin, A Constitutional Right to Instrastate Travel, and Anti-Cruising Ordinances

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COMMENTS

WISCONSIN, A CONSTITUTIONAL RIGHT TO INTRASTATE TRAVEL, AND ANTI-CRUISING ORDINANCES

> Too many high school kids, it seems, are piling into their parents' cars (or their own cars, in cases of extraordinary good fortune) and driving up and down Main Street all evening, going nowhere. Some of them, apparently, honk horns, lean out windows and shout things.[1]

I. INTRODUCTION

The troubled constitutional right to intrastate travel received both a blessing and a blow from the Third Circuit Court of Appeals in *Lutz v. City of York, Pa.*[2] Holding that there was a constitutionally protected right to intrastate travel,[3] the court nevertheless found York's anti-cruising ordinance an allowable restriction of that right.[4] The Third Circuit discarded the strict scrutiny test traditionally applied under the travel doctrine and instead applied the newer intermediate scrutiny test.[5] The Wisconsin Court of Appeals took a page from the Third Circuit's book in *Scheunemann v. City of West Bend.*[6] Following the Third Circuit's reasoning, the Wisconsin court upheld West Bend's anti-cruising ordinance as an appropriate time, place, and manner restriction on the right to intrastate travel.[7] But the Third Circuit, and by derivation the Wisconsin Court of Appeals, missed the point of a constitutional right to intrastate travel in upholding the anti-cruising ordinances. This Comment will examine the basis for a constitutionally protected right to intrastate travel and the different treatment that right has received from federal courts of appeals. It will then examine the travel right as addressed by the courts in Wisconsin and the issue of balancing the right to intrastate travel

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1. Peter Egan, *In Defense of Cruising*, ROAD & TRACK, Nov. 1993, at 29.
2. 899 F.2d 255 (3d Cir. 1990).
3. *Id.* at 268.
4. *Id.* at 270.
5. *Id.* at 269.
6. 179 Wis. 2d 469, 507 N.W.2d 163 (Ct. App. 1993).
7. *Id.* at 480-81, 507 N.W.2d at 167.

against the goals municipalities seek to achieve by enacting anti-cruising ordinances.

II. Intrastate Travel As A Constitutionally Protected Right

The freedom to move about the nation has long been a recognized right of every American, but the issue has become clouded when the right to travel intrastate is separated from the right to travel interstate. The right to travel interstate free from interference has long been recognized by the United States Supreme Court.

A. The Travel Doctrine in the Supreme Court

The United States Supreme Court first explicitly recognized the right to travel interstate in *Crandall v. Nevada*.[8] The Court invalidated a Nevada law that levied a tax upon every person who left the state by railroad or stagecoach. The Court held that, in levying the tax, Nevada interfered with the federal government's right to call "any or all of its citizens to aid in its service"[9] and that the right to travel "cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered."[10] But the more important result in *Crandall* was the Court's handling of an *individual* right to travel free of restraint.

> [I]f the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. . . . [A]nd this right is in its nature independent of the will of any State over whose soil he must pass in exercise of it.[11]

Although the right to travel through a state's territory without interference by the state is explicitly recognized, the travel doctrine of 1868 extended only to travel that involved a transaction with the federal government.

The Supreme Court expanded the travel doctrine in 1900 when it upheld a Georgia law that levied a tax upon agents engaged in hiring citizens of the state to be employed beyond the state's boundaries.[12] The

8. 73 U.S. (6 Wall.) 35 (1868).
9. *Id.* at 43.
10. *Id.*
11. *Id.* at 44.
12. Williams v. Fears, 179 U.S. 270 (1900).

Court approved the law because the tax act could "be said to affect the freedom of egress from the State, or the freedom of contract . . . only incidentally or remotely."[13] The Supreme Court also provided the first hint of the constitutional origin of a right to travel when it said:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[14]

The Court makes more than passing reference to the Fourteenth Amendment[15] when citing the source for the right to travel, but the broad reference to other provisions of the Constitution foreshadows ninety years of varying constitutional attribution and resultant confusion in the Supreme Court and among the circuits.[16]

The travel doctrine was revisited in *United States v. Wheeler*,[17] when the Supreme Court reviewed the dismissal of an indictment against 25 defendants accused of abducting 221 citizens of Arizona that they considered undesirable. The victims were forcibly carried over the border into New Mexico and threatened with death should they return to Arizona. The defendants were charged with violating the victim's rights and privileges to peacefully remain in a state, reside therein, and be immune from unlawful deportation as secured by the Constitution of the United States.[18] The Supreme Court affirmed the dismissal, saying that the federal government did not have the power under the Constitution to punish such criminal acts.[19]

> In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fun-

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13. *Id.* at 274.

14. *Id.*

15. The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

16. *See infra* notes 110-25 and accompanying text.

17. 254 U.S. 281 (1920).

18. *Id.* at 292.

19. *Id.* at 293-95. While the Supreme Court does not specifically acknowledge that the federal government lacked a criminal statute that covered the criminal activity, the lack of such statute is the likely reason the government charged the defendants with violating the victims' constitutional rights.

> damental 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, with a consequent authority in the States to forbid and punish violations of this fundamental right.[20]

The responsibility to mete out justice fell to the state of Arizona because the federal government's ability to protect the privileges and immunities of Arizona's citizens had been limited by the *Slaughter-House Cases*.[21] The constitutional sources for the right to travel free from the interference of government, but not from the interference of another person, had by that time been attributed to the privileges and immunities guaranteed citizens of the United States by the Constitution.[22]

The Supreme Court took the travel doctrine three steps forward in *Kent v. Dulles*[23] and *Aptheker v. Secretary of State*.[24] In *Kent* the Court held that the Constitution may prohibit the federal government from restricting an individual's right to travel. At issue was an attempt by the federal government to deny passports to communists and prevent them from traveling outside the United States to conduct their controversial business. The Court held the particular travel restrictions invalid saying that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[25] Six years later in *Aptheker*, the Court struck down a ban by the federal government on the use of passports by communists.[26] The Court found the freedom to travel without hindrance by the government a liberty guaranteed by the Fifth Amendment and "a constitutional liberty closely related to rights of free speech and association."[27] One year later the Court moved the travel doctrine two steps back when it approved a government ban on travel to Cuba.[28] The Supreme Court balanced the interest of the government against the interest of individuals. The government won. This marked the first explicit use of what came to be

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20. *Id.* at 293.

21. *Id.* at 293-94, citing the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The *Slaughter-House Cases* made it clear that the Fourteenth Amendment privileges and immunities clause only protects those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79.

22. U.S. CONST. art. IV, § 2.

23. 357 U.S. 116 (1958), *overruled by* Regan v. Wald, 468 U.S. 222, *reh'g denied*, 469 U.S. 912 (1984).

24. 378 U.S. 500 (1964).

25. Kent v. Dulles, 357 U.S. at 125.

26. *Aptheker*, 378 U.S. at 505.

27. *Id.* at 517.

28. Zemel v. Rusk, 381 U.S. 1, *reh'g denied*, 382 U.S. 873 (1965).

known as the rational relationship test for constitutionality under the travel doctrine.

The Supreme Court returned to the domestic right to travel in 1966 with *United States v. Guest*.[29] *Guest* marked the first modern consideration of whether the Constitution secured the right to travel free from private interference. The case stemmed from the indictment of six whites for using terror and murder to deprive blacks as well as white civil rights workers of their rights.[30] Federal prosecutors charged the defendants with criminal conspiracy to violate the victims' civil rights[31] and sought to include the right to travel among the rights infringed upon. The district court dismissed the indictment on the grounds that it did not charge an offense under the laws of the United States. The Supreme Court agreed with the prosecution and held that "[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[32] The Court continued:

> Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the constitution.[33]

The Court canvassed possible sources for the constitutional right to interstate travel, but did not pin the right on any particular sleeve. "All have agreed that the right exists. Its explicit recognition as one of the

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29. 383 U.S. 745 (1966).

30. *Id.* at 747.

31. The defendants were charged with violating 18 U.S.C. § 241, which provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . . They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 241 (1964), *cited in Guest*, 383 U.S. at 747.

32. *Guest*, 383 U.S. at 757.

33. *Id.* at 758 (footnotes omitted).

federal rights protected by what is now 18 U.S.C. § 241 goes back at least as far as 1904."[34]

In *Shapiro v. Thompson*[35] the Supreme Court invoked the right to travel interstate to invalidate an indirect burden on travel for the first time.[36] Connecticut, Pennsylvania, and the District of Columbia had all enacted statutory provisions which denied welfare assistance to people who had not resided within the jurisdiction for at least one year prior to applying for public assistance. The statutes were held unconstitutional at the district court level and reached the Supreme Court on appeal.[37] The Court said that "in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* government interest, is unconstitutional."[38] With this language the Supreme Court elevated the test for interference with the constitutional right to interstate travel to the level of strict scrutiny.[39] *Shapiro* is notable for its invalidation of an indirect burden on the right to travel interstate and the first mention of the strict scrutiny test for impingements on that right. The following years saw several cases build on the foundation laid in *Shapiro*.

The next case to raise the right to interstate travel was *Dunn v. Blumstein*.[40] The Court struck down Tennessee's one-year residency requirement for voting in state elections.[41] Applying the compelling state interest standard over Tennessee's objection,[42] the Supreme Court said

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34. *Id.* at 759.

35. 394 U.S. 618 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974). The Supreme Court in *Edelman* disapproved of the Eleventh Amendment holdings in *Shapiro*, Sterrett v. Mothers' & Children's Rights Org., 409 U.S. 809 (1972), State Dep't. of Health & Rehabilitative Servs. v. Zarate, 407 U.S. 918 (1972), and Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970)(per curiam). In each of these cases, state directors of public aid had been ordered to make retroactive payments by the district court. The Supreme Court summarily affirmed without consideration of Eleventh Amendment objections by the state officers. *Edelman*, 415 U.S. at 670. The Court changed its mind on the Eleventh Amendment issue and overruled its prior decisions. *Id.* at 671. The Supreme Court, the circuit courts of appeals, and the U.S. district courts continue to cite to *Shapiro* for support of the right to travel interstate.

36. *Shapiro*, 394 U.S. at 631.

37. *Id.* at 621-22.

38. *Id.* at 634.

39. The Supreme Court does not provide a rationale for the imposition of the strict scrutiny standard in *Shapiro*. *See* Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. Rev. 820, 826-27 (1992).

40. 405 U.S. 330 (1972).

41. *Id.* at 333.

42. *Id.* at 339.

that "durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' "[43] The laws "must be 'tailored' to serve their legitimate objectives. And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If a State acts at all, it must choose the 'less drastic means.' "[44] The Supreme Court had now placed the right to interstate travel within the boundaries of the equal protection clause of the Fourteenth Amendment to the Constitution,[45] again changing the attribute of the Constitution that protected the right to travel interstate.

The Supreme Court furthered the analysis of the constitutional right to travel when it decided *Memorial Hospital v. Maricopa County*.[46] The Court considered an Arizona statute that required indigents to reside within a county in Arizona for one year before receiving medical care at that particular county's expense.[47] Overruling the Arizona Supreme Court, the U.S. Supreme Court held that the law intruded on the right to interstate travel because it "created two classes of needy residents 'indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in the jurisdiction.' "[48] "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."[49] The Supreme Court finally mentioned intrastate travel in *Maricopa County*. The Court announced that "[e]ven were we to draw a constitutional distinction between interstate and intrastate travel, [it is] a question we do not now consider."[50] Having so spoken on intrastate travel, the Supreme Court abandoned the issue, never to return.

The Supreme Court recently revisited the travel doctrine in *Attorney Gen. of New York v. Soto-Lopez*.[51] The New York Constitution and

43. *Id.* at 342 (citation omitted).
44. *Id.* at 343 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
45. U.S. CONST. amend. XIV, § 1.
46. 415 U.S. 250 (1974).
47. *Id.* at 251.
48. *Id.* at 254 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974)).
49. *Maricopa*, 415 U.S. at 261.
50. *Id.* at 255-56.
51. 476 U.S. 898 (1986).

Civil Service Law granted a civil service employment preference to New York residents who were honorably discharged veterans of the armed forces and were residents of the state when they entered military service. Soto-Lopez qualified for the preference with one exception: He had not been a resident of the state of New York when he entered military service. Soto-Lopez alleged that the preference violated the equal protection clause of the Fourteenth Amendment and the constitutionally protected right to travel.[52] The Supreme Court, in affirming the Second Circuit Court of Appeals' opinion voiding the preference, said that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.' "[53] The Court noted that " 'freedom to travel throughout the United States has long been recognized as a basic right under the Constitution'[54] . . . [a]nd, it is clear that the freedom to travel includes the 'freedom to enter and abide in any State in the Union.' "[55] The holding in *Soto-Lopez* indicates that the travel doctrine is still governed by the law established in *Shapiro*, *Dunn*, and *Maricopa County*.

The Supreme Court has firmly established interstate travel as a protected right that can be found in numerous constitutional provisions,[56] but the Court has mentioned intrastate travel only in passing. It has held that interference with intrastate travel is prohibited when there is some aspect of interstate commerce, interstate travel, or some power of the federal government involved, but the Court has left the issue of state interference with intrastate travel to the lower federal courts.

B. The Circuit Courts of Appeals Split

Presented with only the guidance from *Memorial Hosp. v. Maricopa County*,[57] the Circuit Courts of Appeal were free to go their divergent ways on the issue of a constitutional right to intrastate travel. The circuits are divided into three camps: those that have not recognized a con-

52. *Id.* at 900-01.

53. *Id.* at 903 (citations omitted) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651, *reh'g denied,* 416 U.S. 1000 (1974)). The use of *Shapiro* by the Supreme Court in this context indicates that the portions of *Shapiro* relating to the right to travel are still valid precedent.

54. *Soto-Lopez*, 476 U.S at 901 (quoting U.S. v. Guest, 383 U.S. 745, 758 (1966)).

55. *Id.* at 902 (quoting Oregon v. Mitchell, 400 U.S. 112, 285 (1970)).

56. *See infra* notes 110-26 and accompanying text.

57. 415 U.S. at 255-56.

stitutional right to intrastate travel, those that have, and those that have not directly addressed the issue.

1. The Circuits That Have Refused to Recognize Constitutional Protection

Three circuit courts of appeals have weighed in against a constitutional right to intrastate travel: the Fifth Circuit in *Wright v. City of Jackson*,[58] the Sixth Circuit in *Wardwell v. Board of Educ.*,[59] and the Fourth Circuit in *Eldridge v. Bouchard*.[60] There is more to this opposition than meets the eye, however. The decisions in both *Wright* and *Wardwell* are based on the outcome of *Detroit Police Officers Ass'n v. City of Detroit*.[61] In *Detroit Police Officers Ass'n*, the Michigan Supreme Court addressed the constitutionality of a Detroit ordinance that required city police officers to live within the city limits. The Detroit Police Officers Association argued that the ordinance violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article 1 of the Michigan Constitution.[62] The court held that the Detroit ordinance was not a violation of either the equal protection clause or the Michigan Constitution.

> These constitutional provisions (the Federal and State equal protection clauses) do not mean that there can be no classification in the application of statutes and ordinances, but only that the classification must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation.[63]

The United States Supreme Court dismissed the Detroit Police Officers Association's appeal for want of a substantial federal question.[64]

The Fifth Circuit Court of Appeals drew on *Detroit Police Officers Ass'n* in *Wright v. City of Jackson*,[65] where it addressed a city ordinance requiring municipal employees to live within the city limits. "Any doubt that the 'right to travel' rationale of *Shapiro* and *Dunn* was meant to apply to intrastate travel and municipal employment residency require-

58. 506 F.2d 900 (5th Cir. 1975).
59. 529 F.2d 625 (6th Cir. 1976).
60. 645 F. Supp. 749 (W.D. Va. 1986), *aff'd without opinion*, 823 F.2d 546 (4th Cir. 1987).
61. 190 N.W.2d 97 (Mich. 1971), *appeal dismissed*, 405 U.S. 950 (1972)(dismissing the appeal for want of substantial federal question).
62. *Id.* at 102.
63. *Id.* at 103 (quoting Cook Coffee Co. v. Village of Flushing, 255 N.W. 177, 178 (Mich. 1934)).
64. Detroit Police Officers Ass'n v. City of Detroit, 405 U.S. 950 (1972).
65. 506 F.2d 900 (5th Cir. 1975).

ments was put to rest by the Supreme Court's treatment of litigation challenging a Detroit ordinance similar to the Jackson residency requirement."[66] The court based its finding on the fact that "dismissal for want of a substantial federal question in a state court appeal is fully equivalent to affirmance on the merits in an appeal from a federal court insofar as the federal questions . . . are concerned."[67]

The Sixth Circuit Court of Appeals followed much the same reasoning in *Wardwell v. Board of Educ.*[68] when it addressed a challenge to a City of Cincinnati Board of Education requirement that teachers live within the city's school district within 90 days of employment.[69] While it did not base its decision primarily on *Detroit Police Officers Ass'n*, the court "recognize[d] that the Supreme Court's dismissal of the appeal 'for want of a substantial federal question' is a decision on the merits of the case appealed."[70] The court did address the issue of a right to intrastate travel.

> We find no support for plaintiff's theory that the right to intrastate travel has been afforded federal constitutional protection. An examination of *Shapiro*, *Dunn*, and the Supreme Court's more recent opinion in *Memorial Hospital v. Maricopa County*, convinces us that the aspect of the right to travel with which the Court was concerned in those cases is not involved here.[71]

The final installment in the list of those refusing to recognize constitutional protection for intrastate travel is the Fourth Circuit. The Fourth Circuit affirmed without opinion a district court decision in *Eldridge v. Bouchard*.[72] The district court quashed an attack on the State of Virginia's practice of paying state police officers higher wages in certain patrol districts. Virginia paid the differentials to offset higher living costs in the patrol districts and thereby retain veteran State Police personnel.[73] The plaintiffs argued that the pay differential violated their right to equal protection of the laws and their right to travel. The district court rejected the equal protection argument and went on to address the right to travel claim. "This type of explicit restriction on travel is the type of situation to which the language in *Soto-Lopez* refers when it states that '[a] state law implicates on the right to travel when it actually deters such

66. *Id.* at 902.
67. *Id.* at 903 (quoting Ahern v. Murphy, 457 F.2d 363, 364 (7th Cir. 1972)).
68. 529 F.2d 625 (6th Cir. 1976).
69. *Id.* at 626.
70. *Id.* at 628 (quoting *Ahern*, 457 F.2d at 364).
71. *Id.* at 627 (citations omitted).
72. 645 F. Supp. 749 (W.D. Va. 1986), *aff'd without opinion*, 823 F.2d 546 (4th Cir. 1987).
73. *Id.* at 750-51.

right.' "[74] The court also addressed the issue of a right to intrastate travel.

> After a careful review of the record, this court is unable to conceive how the differential impinges intrastate travel. It appears that the same facts that failed to support a finding of a violation of the right to interstate travel also fail to support a finding of a violation of the right of intrastate travel. The court, however, need not reach this issue because the plaintiffs do not have a federally recognized fundamental right of intrastate travel. Having 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 to interstate travel without recognizing the right of intrastate travel.[75]

The district court was careful, however, to cover all of its bases. It further elaborated that "even if the plaintiffs had a fundamental right of intrastate travel, the present salary differential would not impinge that right."[76]

The nonexistence of a constitutional right to travel intrastate free from interference is largely based on what the Supreme Court has *not* said, as opposed to any positive statement from the Court on the law and the Constitution. Given this void, several circuits have gone the other way.

2. The Circuits That Recognize Constitutional Protection

The first to jump in the other direction was the Second Circuit Court of Appeals. In *King v. New Rochelle Mun. Hous. Auth.*,[77] the court reviewed a New York Public Housing Law that admitted to securing public housing in the City of New Rochelle only for those who had been residents of the city for five continuous years. The court declared that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[78] Because a fundamental personal right was involved (the right to travel intrastate), the classification created by the New York Public Housing Law "can be up-

74. *Id.* at 752-53 (quoting Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903 (1986)).

75. *Id.* at 753-54.

76. *Id.* at 754.

77. 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971).

78. *Id.* at 648.

held only if it furthers a compelling state interest."[79] The court found that no compelling state interest was involved.

The Third Circuit Court of Appeals entered the fray two years later in *Wellford v. Battaglia*[80] when it approved a district court decision striking down a City of Wilmington, Delaware, statute that required candidates for mayor to have resided in the city for five years.[81] The district court held that the residence requirement penalized the free migration into and out of the city. "The right to travel referred to by the court in the *Dunn* case is a right to intrastate as well as interstate migration."[82] Four years later the right to travel issue was back in *Bykofsky v. Borough of Middletown*, a district court decision which the Third Circuit Court of Appeals approved without opinion.[83] In *Bykofsky* the district court upheld the Borough of Middletown's juvenile curfew ordinance. While admitting that "[o]ne may be on the streets even though he is there merely for exercise, recreation, walking, standing, talking, socializing, or any other purpose that does not interfere with other persons' rights,"[84] the court held that "the governmental interests furthered by the curfew ordinance override[ ] the minor's constitutional right to intrastate travel."[85] This seems to be a departure from the absolute standard announced in *Wellford*, but the difference is attributable to the degree to which the constitutional rights of minors are treated differently than those of adults.[86] Once this difference is considered, the Third Circuit Court of Appeals has treated the constitutional right to intrastate travel consistently. Fourteen years later, the court would have an opportunity to speak on the issue again.

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79. *Id.*

80. 485 F.2d 1151 (3d Cir. 1973) (per curiam).

81. Wellford v. Battaglia, 343 F. Supp. 143, 150 (D. Del. 1972), *aff'd per curiam*, 485 F.2d 1151 (3d Cir. 1973).

82. *Id.* at 147 (citing King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971)).

83. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

84. *Id.* at 1254.

85. *Id.* at 1261.

86. There has been considerable controversy over the nature of a minor's constitutional rights and the degree to which these rights are protected. The right to challenge invalid government intrusion upon constitutionally protected rights is not one which may only be asserted upon the attainment of any particular age. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* The Supreme Court has held, however that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Prince v. Massachusetts, 321 U.S. 158, 170, *reh'g denied*, 321 U.S. 804 (1944).

The City of York, Pennsylvania, had a problem. "[O]n certain days and [at certain] times, a threat to the public health, safety and welfare [arose] from the congestion created by repetitive unnecessary driving of motor vehicles on main thoroughfares within the City of York."[87] York reacted by passing a municipal ordinance that prohibited "cruising" in the affected areas.[88] The affected miscreants sought injunctive and declarative relief, claiming that the ordinance violated their right to travel and was overbroad. The district court applied the rational relationship test[89] and found that the ordinance was reasonably related to the city's legitimate traffic safety objectives.[90] An appeal followed and the Third Circuit Court of Appeals decided the issue in *Lutz v. City of York, Pa.*[91] The court held that there was a constitutionally protected right to intrastate travel and concluded that "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.' "[92] The court then attributed the right to travel to the Fourteenth Amendment's due process clause.[93] The Third Circuit departed from the district court's assessment of constitutional infringement, however, and selected the (relatively) new intermediate scrutiny test,[94] finding that York's anti-cruising ordinance, because it was narrowly tailored to a significant government interest, did not violate the right to intrastate travel.[95] Although it subordinated the right to intrastate travel to a significant government interest, the Third Circuit took the lead in establishing intrastate travel as a protected constitutional right.

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87. YORK, PA., ORDINANCE No. 6, § 2 (1988), *reprinted in* Lutz v. City of York, Pa., 899 F.2d 255, 257 (3d Cir. 1990).

88. "Cruising" or "unnecessary repetitive driving" is defined as:

> [D]riving a motor vehicle on a street past a traffic control point, as designated by the York City Police Department, more than twice in any two (2) hour period, between the hours of 7:00 p.m. and 3:30 a.m. The passing of a designated control point a third time under the aforesaid conditions shall constitute unnecessary repetitive driving and therefore a violation of this Ordinance.

Id.

89. *See infra* notes 127-35 and accompanying text.

90. *Lutz*, 899 F.2d at 258.

91. 899 F.2d 255.

92. *Id.* at 268 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. City of Cleveland, 431 U.S. 494, 503 (1977)).

93. *Id.* at 267.

94. *Id.* at 269.

95. *Id.* at 270.

3. Those Circuits That Are Still in Limbo

The remaining circuit courts of appeals have not come down on one side or the other. It has been suggested that the Seventh Circuit may be leaning against intrastate travel as a protected constitutional right,[96] but a survey of its decisions reveals that the court has not jumped off the fence. The Seventh Circuit Court of Appeals was first presented with the opportunity to address the issue in *Ahern v. Murphy*.[97] *Ahern* dealt with a Chicago ordinance that required city police officers to reside within the corporate boundaries of the city. The district court dismissed an action to overturn the ordinance. Three days before oral arguments on the appeal, the Supreme Court dismissed *Detroit Police Officers Ass'n v. City of Detroit*[98] for want of a substantial federal question.[99] The Seventh Circuit cited *Detroit Police Officers Ass'n* as authority to affirm the district court's dismissal, saying that the "Supreme Court has labeled as unsubstantial the very question which constitutes the plaintiffs' most likely basis for asserting federal question jurisdiction."[100]

The issue of residency requirements came before the Seventh Circuit Court of Appeals again in *Andre v. Board of Trustees*.[101] The plaintiffs challenged a requirement that municipal employees of the Village of Maywood, Illinois, live within the village's corporate boundaries, citing violations of due process, equal protection, and the constitutional right to travel.[102] The court rejected the employees' claims, but in so doing spoke to the issue of intrastate travel. Like the Supreme Court in *Memorial Hosp. v. Maricopa County*,[103] the Seventh Circuit said that "[t]he right to travel interstate, although nowhere expressed in the Constitution, has long been recognized as a basic fundamental right,"[104] but that "in this case, we need not consider whether a right of intrastate travel should be acknowledged."[105] Presented with an opportunity to break

96. For support of the idea that the Seventh Circuit might not favor a constitutional right to intrastate travel, see Eldridge v. Bouchard, 645 F. Supp. 749, 754 (W.D. Va. 1986), *aff'd without opinion*, 823 F.2d 546 (4th Cir. 1987) (citing Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *see also* Porter, *supra* note 39, at 835-36.

97. 457 F.2d 363 (7th Cir. 1972).

98. 405 U.S. 950 (1972).

99. *Id.*

100. *Ahern*, 457 F.2d at 365 (quoting Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 262 (2d Cir. 1967)).

101. 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

102. *Id.* at 49.

103. 415 U.S. 250 (1974).

104. *Andre*, 561 F.2d at 52.

105. *Id.* at 53.

new constitutional ground, the Seventh Circuit chose discretion over valour and left its shovel at home.

The court took a small step toward the recognition of a constitutional right to intrastate travel with *Swank v. Smart*.[106] In *Swank*, a police officer was discharged, in part, for giving a seventeen-year-old female college student a ride on his motorcycle. He brought a civil action against the firing city, police department, and chief of police. The district court dismissed the case and the officer appealed.[107] The Seventh Circuit remanded for procedural violations in the officer's termination hearing, but addressed the issue of the freedom of speech and travel.

> A law that enjoined silence on all persons not participating in the marketplace of ideas, a law that forbade people to go from one place to another within the same state (and so extinguished the "right of locomotion," as distinct from the right to travel interstate), a law that forbade dating or, for that matter, forbade an off-duty policeman to offer a ride on his motorcycle to a coed—all of these hypothetical laws would infringe liberty. If arbitrary, they would be deemed to violate "substantive due process," the term for the protection that the due process clause has been held to extend to substantive rights not listed in the Bill of Rights.[108]

The Seventh Circuit, while not endorsing a right to intrastate travel with *Swank*, has at least indicated that it would favorably receive a request for such an endorsement.

C. *The Constitutional Origin of the Right to Travel*

The Supreme Court has cited numerous provisions of the Constitution and its amendments as possible sources for the right to travel. Those potential sources include the Article IV Privileges and Immunities Clause,[109] the Fourteenth Amendment Privileges and Immunities Clause,[110] rights of national citizenship,[111] the Commerce Clause,[112]

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106. 898 F.2d 1247 (7th Cir. 1990).

107. *Id.* at 1249-50.

108. *Id.* at 1251 (citation omitted).

109. The Privileges and Immunities Clause of Article IV was the first recorded source of the right to travel. *See* Porter, *supra* note 39, at 848-49.

110. The Fourteenth Amendment Privileges and Immunities Clause has supplanted the Article IV Privileges and Immunities Clause. *See* U.S. v. Wheeler, 254 U.S. 281, 294-95 (1920). The viability of this doctrine is also limited by the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). *See supra* note 21.

111. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1868).

112. *See* U.S. v. Guest, 383 U.S. 745, 757 (1966).

Equal Protection,[113] and Substantive Due Process.[114] The modern travel doctrine has placed the right to travel in either the Equal Protection or Due Process clause of the Fourteenth Amendment to the Constitution.[115]

The Third Circuit Court of Appeals provided a detailed analysis of the potential sources for the right to intrastate travel in *Lutz v. City of York*.[116] The court first discarded any argument based on the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. The court concluded that following the limitations imposed by the *Slaughter-House Cases*, the clauses provide no protection from an ordinance enacted by a local government and enforced on local citizens.[117] The Third Circuit then addressed the rights of national citizenship and concluded that "Lutz can proceed unimpeded by law (once he makes his way through the traffic jams on Philadelphia and Market Streets) to any federal installation at which he is called upon to exercise the various rights and duties of citizenship."[118] The Commerce Clause was held inapplicable because "York's ordinance is facially neutral as to interstate commerce, and imposes no threat of burdening the stream of commerce with conflicting regulation."[119] The Third Circuit contended that the use of the equal protection clause in *Shapiro v. Thompson* and its progeny is the result of a group being singled out and punished for exercising their constitutionally protected right to travel, and not as the source of that right.[120]

The other possibilities rejected, the Third Circuit concluded that the source of the right to travel is substantively protected by the Fourteenth Amendment Due Process Clause.[121] The court cited the Supreme Court

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113. *See* Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring), *overruled by* Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 253-56 (1974); Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 903-04 (1986).

114. *See* Williams v. Fears, 179 U.S. 270, 274 (1900) (Fourteenth Amendment Due Process Clause); Kent v. Dulles, 357 U.S. 116, 125 (1958) *overruled by* Regan v. Wald, 468 U.S. 222, *reh'g denied*, 469 U.S. 912 (1984) (Fifth Amendment Due Process Clause); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (Fifth Amendment due process clause).

115. *See supra* notes 113-114.

116. 899 F.2d 255, 262-68 (3d Cir. 1990).

117. *Id.* at 262-64; *see supra* note 21.

118. *Id.* at 265; *see supra* note 111 and accompanying text.

119. *Id.*

120. *Id.*

121. *Id.* at 266.

decisions in *Williams v. Fears*,[122] *Kent v. Dulles*,[123] and *Aptheker v. Secretary of State*[124] in support of its conclusion.

> We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history." Despite our preceding analysis, this bottom-line judgment is unquestionably ad hoc, to some extent. However, unless the Supreme Court either repudiates substantive due process altogether (an unlikely prospect), decides the question left open in *Maricopa County*, or limits substantive due process analysis to more specific fact patterns - in other words, limits substantive due process rights to "a series of isolated points" . . . it is a judgment we are required to make.[125]

Having resolutely placed the constitutional right to intrastate travel within the Fourteenth Amendment Due Process Clause, the court went on to discuss the standard of review that was appropriate for the new right.

D. Selecting a Standard for Review

The Supreme Court applied strict scrutiny to impingements of the right to interstate travel in *Shapiro v. Thompson*,[126] *Dunn v. Blumstein*,[127] *Memorial Hosp. v. Maricopa County*,[128] and *Attorney Gen. of*

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122. 179 U.S. 270 (1900).

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

Id. at 274.

123. 357 U.S. 116 (1958) *overruled by* Regan v. Wald, 468 U.S. 222, *reh'g denied*, 469 U.S. 912 (1984). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.

124. 378 U.S. 500 (1964). The Court found the freedom to travel without hindrance by the government a liberty guaranteed by the Fifth Amendment and "a constitutional liberty closely related to rights of free speech and association." *Id.* at 517.

125. Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990).

126. 394 U.S. 618 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974). "[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634.

127. 405 U.S. 330 (1972). Restrictions "are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' " *Id.* at 342 (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)(first emphasis added)). The restrictions "must be 'tailored' to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose the 'less

New York v. Soto-Lopez.[129] The Third Circuit Court of Appeals examined York's anti-cruising ordinance under the rubric of strict scrutiny and concluded that were it "to employ *least* restrictive analysis, as required by the traditional strict scrutiny test, we agree with the plaintiffs that the ordinance could not survive."[130] The court then moved down the scrutiny ladder to the intermediate scrutiny level.[131] To survive the intermediate scrutiny test, a law must be fashioned or "tailored to serve significant government interests - not necessarily compelling ones - while leaving open ample alterative channels of communication."[132] "Moreover, the tailoring requirement in this context does not require the state to employ the *least* restrictive means of achieving its end, as it would under full-blown strict scrutiny."[133] The Third Circuit continued the comparison to restrictions on public speech.

> [T]he right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases - even on roads specifically designed for public travel. Unlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos. To prevent that, state and local governments must enjoy some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of speech and travel.[134]

Following this reasoning, the Third Circuit upheld York's anti-cruising ordinance as an appropriate time, place, and manner restriction on the right to intrastate travel.[135]

The Third Circuit did not consider the rational relationship test in deciding the appropriate level of scrutiny for the right to travel intrastate. The rational relationship test has not been used since *Zemel v. Rusk*, and has been surpassed by *Shapiro* and its progeny.

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drastic means.' " *Id.* at 343 (quoting *Shapiro*, 394 U.S. at 631, and Shelton v. Tucker, 364 U.S. 479, 488 (1960).

128. 415 U.S. 250 (1974). "Such a classification can only be sustained on a showing of a compelling state interest." *Id.* at 269.

129. 476 U.S. 898 (1986). "All four justifications [for the statute] fail to withstand heightened scrutiny on a common ground . . . ." *Id.* at 909.

130. Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990).

131. The intermediate scrutiny test was developed under the doctrine of Equal Protection and was first applied by the Supreme Court in gender discrimination cases. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-26, at 1561 (2d ed. 1988). The intermediate scrutiny test has also found some use in First Amendment cases. *Lutz*, 899 F.2d at 269.

132. *Lutz*, 899 F.2d at 269. The court is describing the intermediate scrutiny test in the First Amendment context.

133. *Id.*

134. *Id.*

135. *Id.* at 270.

III. The Treatment of the Right to Travel in Wisconsin

While the freedom to travel has long been afforded protection at the federal level, the development of a state level travel doctrine has been a much more recent phenomenon. The Wisconsin Supreme Court has addressed the issue, but not to the depth that the federal courts have. Nevertheless, the right to travel enjoys recognition and protection in the State of Wisconsin.

A. Travel as a Protected Right in Wisconsin

The Wisconsin Supreme Court addressed the freedom of movement issue directly in *Ervin v. State*.[136] The defendant had been arrested on a Milwaukee street in August 1967 for violation of a curfew declared by the mayor of Milwaukee under emergency powers granted by the state. The defendant challenged his arrest on the grounds that the curfew was a violation of his First and Fourteenth Amendment rights. The Wisconsin Supreme Court rejected the challenge, holding that the "municipal curfew as was [sic] imposed in Milwaukee [was] an emergency measure undertaken to restore order in the community" and therefore did not infringe upon the freedom to travel.[137] The court described the nature of the freedom to travel:

> The freedom to move about is a basic right of citizens under our form of government, in fact, under any system of ordered liberty worth the name. It was not added to our United States Constitution by the enactment of the first ten amendments. It is inherent, not only in the Bill of Rights, but in the original document itself. It has properly been termed "engrained in our history" and "a part of our heritage."[138]

The court next examined the issue in *Vanden Broek v. Reitz*.[139] In *Vanden Broek* the court addressed a dispute between the appellants and the municipality that was responsible for their public relief payments. The appellants wished to remain in a second municipality and have the first continue to be responsible for their relief payments. The first municipality wanted the appellants to move back and seek gainful employment.[140] The appellants' demurrer was rejected by the circuit court and they appealed, alleging that the forced move would violate their right to travel. The appellants also argued that the court had implicitly recog-

136. 41 Wis. 2d 194, 163 N.W.2d 207 (1968).
137. *Id.* at 201, 163 N.W.2d at 210-211.
138. *Id.* at 200-01, 163 N.W.2d at 210 (footnote omitted).
139. 53 Wis. 2d 87, 191 N.W.2d 913 (1971), *appeal dismissed*, 406 U.S. 902 (1972).
140. *Id.* at 89-90, 191 N.W.2d at 914-15.

nized the intrastate nature of the right to travel in *Ervin v. State*.[141] The Wisconsin Supreme Court differed and held that the issue in *Ervin* was not at all relevant to the issue in *Vanden Broek*. The court discussed the travel doctrine as established by the United States Supreme Court in *Shapiro v. Thompson* and the recent decision recognizing the right to intrastate travel by the Second Circuit Court of Appeals in *King v. New Rochelle Mun. Hous. Auth.*,[142] but concluded: "Assuming, without deciding, that the right to travel envisions intrastate as well as interstate movement, in this case we find no showing that the defendants' right to travel is impaired."[143]

The Wisconsin Supreme Court most recently spoke to the issue of the right to travel in *Milwaukee v. K.F.*[144] K.F., who was 15 years old at the time, was issued a citation for violating Milwaukee's curfew ordinance as it pertains to minors. The ordinance prohibits minors from being at large in the city without adult supervision between 11 P.M. and 5 A.M.[145] K.F. challenged the ordinance claiming that it violated the fundamental right to freedom of movement and travel, among other constitutional rights.[146] The court reiterated its position on the freedom to travel and then broadened the right to intrastate travel by saying: "This right to be free to move about within one's own state is inherent and distinct from the right to interstate travel protected by the commerce clause."[147] Having broadened the right to travel in Wisconsin, the court rejected K.F.'s claim that the right to travel was restricted by the curfew. The court attributed this contradiction to K.F.'s status as a juvenile, noting that "it has become a well-recognized precept of constitutional law that a statute or ordinance which might be unconstitutional as applied to an adult might be constitutional as applied with respect to juveniles."[148] The inherent right to move about within one's own state was then left to the lower courts to apply.

B. But Travel Is Not a Protected Right in West Bend Wisconsin

The City of West Bend, Wisconsin, it seems, also had a problem. Some young people were apparently cruising on Main Street and local

141. *Id.* at 97, 191 N.W.2d at 919.
142. *Id.* at 96-99, 191 N.W.2d at 918-919.
143. *Id.* at 98, 191 N.W.2d at 919.
144. 145 Wis. 2d 24, 426 N.W.2d 329 (1988).
145. *Id.* at 31, 426 N.W.2d at 332.
146. *Id.* at 41, 426 N.W.2d at 336-37.
147. *Id.* at 42, 426 N.W.2d at 337.
148. *Id.* at 44, 426 N.W.2d at 338; *see supra* note 86.

authorities believed that they were creating a public nuisance and a threat to the public health and safety.[149] The West Bend Common Council acted by passing an ordinance that prohibited repetitive, unnecessary driving, also known as "cruising."[150] The Wisconsin Court of Appeals heard the challenge to the anti-cruising ordinance in *Scheunemann v. City of West Bend*[151] on appeal from the circuit court. The appellants challenged the anti-cruising ordinance on various constitutional grounds. The Court of Appeals condensed the challenges into one based on the right to travel,[152] and debated the appropriate level of scrutiny to apply when analyzing the ordinance. Its choices were strict scrutiny as applied in *Shapiro v. Thompson* and the intermediate scrutiny applied in *Lutz v. City of York*.[153] The court said that it, "like the circuit court, agree[s] with the logic of the *Lutz* court on this question. We therefore will subject West Bend's cruising ordinance to intermediate scrutiny, and we will uphold it if it is narrowly tailored to meet the city's objectives."[154] The *Scheunemann* court explained:

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149. Scheunemann v. City of West Bend, 179 Wis. 2d 469, 473-74, 507 N.W.2d 163, 164-65 (Ct. App. 1993).

150. WEST BEND, WI, ORDINANCES § 7.131 (1992). The ordinance states in pertinent part:

> "Cruising" means driving a motor vehicle in the same direction past a traffic control point on a street in the designated area three (3) or more times within a two (2) hour period between the hours of 8:00 P.M. and 4:00 A.M. in a manner and under circumstances manifesting a "purpose" of unnecessary, repetitive driving in such area. Among the circumstances which may be considered in determining whether such purpose is manifested are that such person or any other person present in the vehicle attempts to gain the attention of other motorists or pedestrians or engages them in conversation, whether by hailing, arm waving, horn blowing, or another action or device; that such person or any other person present in the vehicle enters or exits the vehicle directly from or to another vehicle driven in or parked in close proximity to the designated area; that such person or any other person present in the vehicle violates state or municipal traffic regulations or municipal ordinances; or that such person has declared his or her purpose for driving to be that of cruising. The violator's conduct must be such as to demonstrate a specific intent to cruise. No arrest shall be made for a violation of this section unless the arresting officer first affords an opportunity to explain such conduct; and no person shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose, not unnecessary, repetitive driving. Lawful purposes include traveling to a specific destination by a person whose residence address is in the designated area or by a person whose business or employment requires driving in the designated area, and operating an official emergency or police vehicle in the designated area.

Id., reprinted in Scheunemann, 179 Wis. 2d at 474-75, 507 N.W.2d at 165.

151. 179 Wis. 2d 469, 507 N.W.2d 163 (Ct. App. 1993).

152. *Id.* at 478, 507 N.W.2d at 166.

153. *Id.* at 479, 507 N.W.2d at 167.

154. *Id.* at 480, 507 N.W.2d at 167.

> Under the intermediate scrutiny test, we inquire whether the ordinance imposes "content-neutral time, place and manner restrictions that are narrowly tailored to serve significant government interests - not necessarily compelling ones - while leaving open ample alternative channels [by which the citizen may exercise the right at issue]." Under the intermediate scrutiny approach, the tailoring requirement does not require that the ordinance employ the least restrictive means of achieving its end, as it would under a full-blown strict scrutiny approach.[155]

The Wisconsin Court of Appeals held that West Bend's anti-cruising ordinance was an appropriate time, place, and manner restriction on the right to intrastate travel.[156]

IV. CONCLUSION

The Wisconsin Court of Appeals, in reaching its decision in *Scheunemann*, briefly mentioned *Ervin v. State* while discussing the right to travel.[157] The court did not examine *Milwaukee v. K.F.*[158] That omission was a critical lapse. *K.F.* contains the strongest language from the Wisconsin Supreme Court on the issue of the right to intrastate travel.[159] It is possible that the comments from the Wisconsin Supreme Court would have changed the outcome in *Scheunemann*. Even if the result remained unchanged, a more precise interpretation of the language from *K.F.* would have been valuable. *K.F.* may suggest a move to the strict scrutiny standard of review, which would have rendered West Bend's anti-cruising ordinance void. Until the wording in *K.F.* is clarified, the appropriate test for restrictions of travel in Wisconsin remains in doubt.

The number of municipal restrictions on travel continues to increase as municipalities seek to wrest control of their streets away from the elements they deem undesirable. Determining the appropriate test and level of scrutiny is a critical step in reviewing laws and insuring that they do not unduly infringe on the constitutional rights of Wisconsin's citizens.

GREGORY J. MODE

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155. *Id.* at 479, 507 N.W.2d at 167 (quoting Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990)).

156. *Id.* at 480-81, 507 N.W.2d at 167.

157. *Id.* at 478, 507 N.W.2d at 166.

158. 145 Wis. 2d 24, 426 N.W.2d 329 (1988).

159. *Id.* at 42, 426 N.W.2d at 337. "This right to be free to move about within one's own state is inherent and distinct from the right to interstate travel protected by the commerce clause." *Id.*