Constitutional Law - Cruising for a Bruising - An Attack on the Right to Interstate Travel

Keith E. Smith

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation
CONSTITUTIONAL LAW—Cruising For a Bruising—An Attack on the Right to Interstate Travel

_Lutz v. City of York, Pennsylvania_ (1990)

I. Introduction

The United States Supreme Court has consistently held that there is a constitutionally protected fundamental right to interstate travel, but has never decided whether this right extends to intrastate travel or "localized intrastate movement." The Third Circuit recently addressed this question in _Lutz v. City of York, Pennsylvania_, when residents of the City of York, Pennsylvania challenged a city ordinance which prohibited vehicular "cruising" on particular city streets. The plaintiffs in _Lutz_ argued that such an ordinance violated their constitutionally protected right to travel. The city contended, however, that the right to travel did not extend to purely intrastate travel such as the cruising proscribed by the ordinance.

1. See Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262-69 (1974) (applying strict scrutiny to residency requirement statute which infringed upon fundamental right of interstate travel); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (durational residency requirements as prerequisite to voting eligibility held unconstitutional under equal protection clause as infringement upon voter's right of interstate travel); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (statutes affecting fundamental right to interstate travel reviewed by strict standard); United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union."). For a discussion of the Court's decisions asserting a fundamental right to interstate travel, see infra notes 34-53 and accompanying text.

2. See Gray, Keeping the Home Team at Home, 74 CALIF. L. REV. 1329, 1352 (1986) ("[T]he Supreme Court has never explicitly extended the right to travel to movement entirely within a state."); McAdams, Tying Privacy in Knots: Beeper Monitoring and Collective Fourth Amendment Rights, 71 VA. L. REV. 297, 324 (1985) ("[T]he Supreme Court has never addressed whether this liberty interest [the right to travel] encompasses intrastate travel ... "); Developments, The Constitutional Rights of Public Employees—Overview, 97 HARV. L. REV. 1738, 1751 n.70 (1984) ("Although the right to interstate travel is fundamental, the [Supreme] Court has not settled the question whether the right to intrastate travel is fundamental ... ").


4. Id. at 256. The plaintiff challenged York, Pa., Ordinance No. 6, § 3(a) (Apr. 19, 1988). Id. at 257. For a further discussion of the particular elements of the York anticruising statute and the legislative findings which lead to its enactment, see infra notes 20-26 and accompanying text.

5. _Lutz_, 899 F.2d at 256. _Lutz_ also raised an overbreadth claim. Id. For a discussion of the Third Circuit's treatment of the overbreadth claim, see infra note 30 and accompanying text.

6. _Lutz_, 899 F.2d at 256.
The Third Circuit analyzed the language of the Constitution and concluded that a constitutional right to intrastate travel does indeed exist. The court considered the following seven possible constitutional sources of the asserted right to intrastate travel: the privileges and immunities clause contained in article IV, the privileges or immunities clause contained in the fourteenth amendment, a conception of national citizenship, the commerce clause, the equal protection clause, and the due process clauses of both the fifth and fourteenth amendments. The court found that a right to intrastate travel is both "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history," and thus concluded that a right to intrastate travel is founded upon substantive due process grounds.

7. Id. at 258-68. The source of the right to travel, either intrastate or interstate, has never before been firmly established. See Comment, The Right to Travel: In Search of a Constitutional Source, 55 Neb. L. Rev. 117 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L. Rev. 1129, 1140-45 (1975).

8. U.S. Const. art. IV, § 2, cl. 1. The privileges and immunities clause of article IV states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Id. For a discussion of the article IV privileges and immunities clause as a potential source of the right to travel, see infra notes 60-64 and accompanying text.

9. U.S. Const. amend. XIV, § 1. The privileges or immunities clause contained in the fourteenth amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...." Id. For a discussion of the fourteenth amendment privileges or immunities clause as a potential source of the right to travel, see infra notes 65-69 and accompanying text.

10. For a discussion of the theory of a "national citizenship" as a potential source of the right to travel, see infra notes 70-73 and accompanying text.

11. U.S. Const. art. I, § 8. The commerce clause of article I states, "The Congress shall have Power ... To regulate commerce ... among the several States ...." Id. For a discussion of the commerce clause as a potential source of the right to travel, see infra notes 74-76 and accompanying text.

12. U.S. Const. amend. XIV, § 1. The equal protection clause of the fourteenth amendment states, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Id. For a discussion of the equal protection clause as a potential source of the right to travel, see infra notes 77-79 and accompanying text.

13. U.S. Const. amend. V. The due process clause of the fifth amendment states, "No person shall ... be deprived of life, liberty, or property, without due process of law ...." Id. For a further discussion of the fifth amendment due process clause as a potential source of the right to travel, see infra notes 80-90 and accompanying text.

14. U.S. Const. amend. XIV, § 1. The due process clause of the fourteenth amendment states, "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." Id. For a discussion of the fourteenth amendment's due process clause as a potential source of the right to travel, see infra notes 80-90 and accompanying text.

15. Lutz, 899 F.2d at 267 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

16. Id. at 267 (quoting Moore v. East Cleveland, 431 U.S. 494 (1977)).

17. Id. at 268. The phrases quoted above from Palko and Moore are usually articulated as the test for determining whether a right is to be recognized as
After recognizing a fundamental right to intrastate travel, the court used a first amendment analysis and scrutinized the ordinance as a time, place and manner regulation. The court held that the anticruising ordinance was narrowly tailored to combat the safety and congestion problems asserted by the city and therefore constituted a reasonable time, place and manner restriction on localized intrastate travel.

II. FACTS

In 1988, the City of York, Pennsylvania enacted an “anticruising” ordinance, which prohibited “cruising” or “unnecessary repetitive driving” within certain designated areas of the city. Specifically, the law barred the driving of vehicles past a clearly designated “traffic control point[]” in downtown York more than twice within any two hour period between the hours of 7:00 p.m. and 3:30 a.m. Those convicted of violating the ordinance were fined fifty dollars.

The York city council had enacted the ordinance based upon its determination that, on certain evenings, cruising congested the streets along main thoroughfares in the downtown area, resulting in a serious threat to the public health, safety and welfare. At trial, testimony by

---

18. Id. at 269-70. For a further discussion of the unique standard of review employed by the Third Circuit, see infra notes 91-101 & 126-30 and accompanying text.

19. Lutz, 899 F.2d at 270. For a further discussion of the application by the Third Circuit of the time, place and manner analysis to the York statute see, infra notes 97-101 and accompanying text.

20. Lutz, 899 F.2d at 256-57. The ordinance defined “cruising” 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. at 257 (quoting York, Pa., Ordinance No. 6, § 3(a) (Apr. 19, 1988)).

21. Id. The York City Police designated clearly identifiable points of reference along particular blocks of both Philadelphia and Market streets. Id. These two streets, the main thoroughfares in downtown York, were an integral part of the 22 block loop “frequented by the cruisers.” Id. at 257 n.2.

22. Id. at 257. When a violation occurred, only the vehicle owner, if present, was charged with the cruising violation. Id. If the owner was not present, then the driver of the car at the time of the infraction was assessed the violation. Id. In addition, the ordinance excluded both municipal and commercial vehicles. Id.

23. Id. The City Council of York concluded:

---
several York city officials supported the legislative finding and defended the ordinance. Thomas Gross, a York police officer assigned to traffic safety, testified that traffic congestion within the city was worse during times of cruising than during rush hour periods. Keith Ressler, the night shift supervisor of the York police department, testified that emergency vehicles were unable to respond quickly to calls for assistance during hours when cruising was ongoing. Finally, the testimony of George Kroll, the York fire chief and ambulance administrator, indicated that two of York's fire stations were within the restricted cruising area and the congestion in front of such fire houses during cruising hours would at times hinder or make impossible a necessary quick and orderly exit from the station.

The plaintiff, David Lutz, sought a preliminary injunction to prevent the enforcement of the ordinance by York's police force, claiming that its provisions both abridged his right to travel and were unnecessarily overbroad. After a hearing, the district court noted that the freedom to cruise was an ordinary liberty interest and the anticruising ordinance could therefore be upheld if it was "rationally related to a legitimate governmental objective." Accordingly, the district court denied the plaintiff's request for the preliminary injunction, explaining that Lutz was "unlikely to prevail on the merits of his right to travel claim."

Nance is to reduce the dangerous traffic congestion, as well as the excessive noise and pollution resulting from such unnecessary repetitive driving, and to insure sufficient access for emergency vehicles to and through the designated city thoroughfares now hampered by this repetitive driving of motor vehicles.

Id. (quoting York, Pa., Ordinance No. 6, § 2 (Apr. 19, 1988)).

24. Id. Specifically, Gross recited a study undertaken in November 1983, which measured the number of cars passing a particular point per unit of time. Id. at 257. The study indicated that traffic on a Friday night from 9-11 p.m. was almost as high as during rush hour. Id. Gross also testified, based on his "personal observation" of traffic flow in the area in question, that traffic was worse during cruising hours than during rush hour; during rush hour, "traffic was 'heavy, but flowed smoothly,'" but during cruising hours, traffic was "often at 'virtually a complete standstill' ...." Id. (quoting Brief for Appellee at 37, 39).

25. Id. Ressler's testimony revealed that "it could take as long as 20 minutes to travel two blocks in the affected areas." Id. Ressler noted that traffic during cruising hours will sometimes not move at all because people in one car will stop, even at green lights, to talk to the occupants in another car. Id. (citing Brief for Appellee at 50-52).

26. Id. at 258. Kroll testified that traffic in front of the central firehouse, which was located on Market Street, was often at a "standstill" during cruising hours. Id. He noted that such continual obstacles could make it "impossible for the fire engines to exit the station" and that "seconds, not even minutes' can be critical in controlling fires and saving lives." Id. (quoting Brief for Appellee at 56-58).

27. Id.

28. Id. (quoting Lutz v. City of York, 692 F. Supp. 457, 459-61 (M.D. Pa. 1988)). The district court reasoned that the right to cruise only rose to the level of a liberty interest and was not a fundamental constitutional right. Id.

29. Id. (citing Lutz, 692 F. Supp. at 459-61).
Additionally, the district court rejected the plaintiff's overbreadth contention because the ordinance did not potentially hamper any first amendment rights.\(^\text{30}\)

Lutz then amended his original complaint to include a second plaintiff and again sought a preliminary injunction to enjoin the City of York from enforcing the anticruising ordinance.\(^\text{31}\) The district court applied the same rationale employed in Lutz's first challenge to the ordinance and dismissed the action outright.\(^\text{32}\) Lutz appealed the dismissal to the United States Court of Appeals for the Third Circuit.

### III. DISCUSSION

The Third Circuit began its analysis of Lutz's challenge to the York ordinance by assessing whether the regulation of local travel, such as cruising, implicates a protected right.\(^\text{33}\) First, the Third Circuit traced the jurisprudence of the right to interstate travel as developed by the United States Supreme Court.\(^\text{34}\) Specifically, the court recounted the facts and rationale of the principal Supreme Court decisions addressing interstate travel to provide a framework for its later analysis of the potential sources for the unenumerated right to intrastate travel.\(^\text{35}\)

The Third Circuit began by citing *United States v. Guest*,\(^\text{36}\) in which the Supreme Court recognized that the right to interstate travel is a fundamental right.\(^\text{37}\) The court then noted that three years after *Guest*, the

30. Id. (citing *Lutz*, 692 F. Supp. at 461). The Third Circuit stated that overbreadth claims "[a]re allowed in the First Amendment context only because of 'the transcendental value to all society of constitutionally protected expression,' and [have] never been recognized outside the First Amendment context." *Id.* at 271 (citations omitted). Consequently, the Third Circuit dismissed the overbreadth claim outright because no first amendment issue was raised on appeal. *Id.* at 270-71. Ironically, although the court refused to hear the first amendment challenge on appeal, it applied a standard of review which had previously been limited to only the first amendment context. Because of the outright dismissal of this claim in *Lutz* and the fact that the overbreadth claim has been traditionally limited to the first amendment area by the Supreme Court, this author will not further address the issue.

31. *Id.* at 258. Lutz's rationale for adding the second plaintiff, Weber, was neither explained nor addressed by the Third Circuit. *Id.*

32. *Id.* The district court dismissed the action after a hearing on the preliminary injunction "at which no issues of material fact were contested." *Id.* at 258 n.5. For a discussion of the district court's rationale used in the original denial of plaintiff's claim, see *supra* notes 28-29 and accompanying text.

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

34. *Id.* at 258-62. For a discussion of the Third Circuit's analysis of the jurisprudence of the right to interstate travel, see *infra* notes 36-53 and accompanying text.

35. *Lutz*, 899 F.2d at 258-62. For a discussion of the Third Circuit's search for a constitutional source for the right to travel, see *infra* notes 60-90 and accompanying text.


37. *Lutz*, 899 F.2d at 258 (citing *United States v. Guest*, 383 U.S. 745 (1966)). In *Guest*, the Court stated, "[t]he constitutional right to travel from one
The Court decided Shapiro v. Thompson,\(^{38}\) the leading modern interstate travel case. The Court struck down a durational residency requirement as an invalid statutory prerequisite to obtaining welfare benefits\(^{39}\) reasoning that the states’ residency requirement penalized the exercise of a person’s fundamental right to interstate travel, and was thus unconstitutional in the absence of a compelling state interest.\(^{40}\) Following its consideration of Shapiro, the Third Circuit noted that, since Shapiro, the Court has repeatedly recognized the existence of a fundamental right to interstate travel.\(^{41}\) Moreover, most of the United States Supreme Court cases involving interstate travel since Shapiro have involved similar impermissible residency requirements.

For example, the Court in Dunn v. Blumstein\(^{42}\) relied upon the reasoning of Shapiro to strike down a durational residency requirement which served as a pre-condition of voter eligibility.\(^{43}\) A similar restriction

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.” \(\text{Guest, 583 U.S. at 757}\).

In Guest, appellees were six individuals who had been indicted under the Civil Rights Act of 1964 for depriving African-Americans of their rights, including the right to interstate travel. \(\text{Id. at 746-47 n.1}\). Because the issue in this case fell under a federal statute, the Court did not have to consider a constitutional source for the asserted right to interstate travel. \(\text{Id. at 759}\).

\(^{38}\) Shapiro, 394 U.S. 618 (1969).
\(^{39}\) Lutz, 899 F.2d at 258. In Shapiro, the various statutes in question denied welfare assistance to residents of Pennsylvania, Connecticut and the District of Columbia who had not been residents of “[t]heir jurisdiction[]” for at least one year immediately preceding their applications for assistance.” \(\text{394 U.S. at 622}\). The Court invalidated the statutes under the equal protection clause, concluding that the statutes treated new residents differently from long-time residents based on their having exercised their constitutionally protected right to interstate travel. \(\text{Id. at 638}\).

\(^{40}\) Shapiro, 394 U.S. at 638. The Court stated that, “moving from State to State . . . 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 governmental interest, is unconstitutional.” \(\text{Id. at 634 (citations omitted)}\).

In Shapiro, the main contention of the state governments was that the waiting periods were justified as a way for those states to “preserve the fiscal integrity of state public assistance programs.” \(\text{Id. at 627}\). The Supreme Court held that the waiting periods created a classification of citizens within the state and thus were in violation of the equal protection clause. \(\text{Id. at 638}\).

\(^{41}\) Lutz, 899 F.2d at 259.
\(^{42}\) Dunn, 405 U.S. 330 (1972).
\(^{43}\) Id. at 360. In Dunn, a Tennessee voting registration law allowed individual registration only for those residents who were residents of the state for a year and residents of their respective county for three months prior to the election. \(\text{Id. at 331}\). Because the requirement infringed on a fundamental right to interstate travel, the Court employed strict scrutiny in assessing the constitutionality of the registration law. \(\text{Id. at 338-39}\). The Court held that, “[t]he right to travel is an ‘unconditional personal right,’ a right whose exercise may not be conditioned.” \(\text{Id. at 341 (citing Shapiro, 394 U.S. at 643 (Stewart, J., concurring))}\).

dency requirement limiting an individual's right to receive free non-emergency medical treatment was also struck down in *Memorial Hospital v. Maricopa County*, where the Court again implemented the *Shapiro* rationale. The Third Circuit recognized, however, that the Supreme Court upheld a durational residency requirement in *Sosna v. Iowa*. The Court concluded that the requirement that parties filing for a divorce within the state must be genuinely attached to the state was an interest which reasonably justified a residency requirement.

Finally, the Third Circuit considered two more recent decisions of the Court which struck down similar durational residency requirement statutes, but used somewhat different reasoning. In *Zobel v. Williams*, the Court struck down an Alaska statute which distributed funds to adult residents based upon their length of residence in the state. The Court found that the statute could not even pass a minimum rationality test, and therefore a higher level of judicial scrutiny did not have to be con-senting)). For a discussion of the reasoning of *Shapiro*, see supra notes 39-40 and accompanying text.

45. *Id.* at 261-62, 269. In *Maricopa*, the appellant, who was an indigent, moved from New Mexico to Arizona. *Id.* at 251. Several days later, he suffered a respiratory attack and went to a private hospital, which, after initial treatment, sought to transfer him to a county hospital. *Id.* Under Arizona law, individual county governments were responsible for the care of the indigent sick, but a state law required that the indigent must have been a resident of the county for 12 months prior to receiving non-emergency treatment. *Id.* at 252. The county hospital refused to admit the appellant, because he had not met such a residency requirement. *Id.* The Court determined that because the right to travel is fundamental and that the "invidious discrimination" created by the statute impinges upon that right, strict scrutiny should be applied in assessing the constitutionality of the Arizona law. *Id.* at 261-62. The Court held that the state had not demonstrated a compelling state interest to justify the statute, and therefore the statute was unconstitutional under the equal protection clause. *Id.* at 269.

46. 419 U.S. 393 (1975).
47. *Id.* at 406-10. In *Sosna*, Iowa had imposed a one year residency requirement on couples attempting to obtain a divorce within the state. *Id.* at 395. The Court upheld the statute on the grounds that the state's dual interests in (1) requiring residents to have some attachment to the state and (2) insulating its own divorce decrees from collateral attack, were reasonably justified. *Id.* at 409.

The Third Circuit noted in *Lutz* that, although the *Sosna* Court appeared unwilling to impose strict judicial scrutiny, the proposition that durational residency requirements receive heightened scrutiny remained intact. *Lutz*, 899 F.2d at 259 n.6.

49. *Id.* at 65. Because of the discovery of large oil reserves on parts of state-owned land in Alaska, the state had a substantial budgetary windfall, which it wished to distribute to its residents. *Id.* at 56-57. Under the state enacted distribution plan, each adult citizen of Alaska would receive one "dividend unit" for each year of residency after 1959, the first year of Alaska's statehood. *Id.* at 57. In 1979, the first year of the dividend payment, a "dividend unit" was set by the state at $50. *Id.* Appellants were two year residents who challenged the distribution plan. *Id.*
sidered.\textsuperscript{50} In \textit{Attorney General of N.Y v. Soto-Lopez},\textsuperscript{51} Justice Brennan reasserted the heightened scrutiny test, first articulated in \textit{Shapiro}, to strike down a New York statute which gave preference in obtaining civil service employment to veterans who were residents of the state prior to entering the service.\textsuperscript{52} Justice Brennan’s opinion, however, could only garner a plurality, as two concurring Justices applied a rational basis test—similar to \textit{Zobel}—to strike down the statute.\textsuperscript{53}

Although the Third Circuit recognized the plethora of prior United States Supreme Court cases addressing the putative right to travel, it concluded that, because such prior decisions exclusively involved durational residency requirements which had only discriminated against interstate immigrants, the Court had not directly addressed the question of whether there exists a fundamental right to intrastate travel.\textsuperscript{54} Moreover, the \textit{Lutz} court posited that because these prior cases were all fairly similar in that they all involved a durational residency requirement, the Supreme Court had dispensed with a step-by-step analysis of the constitutional basis of the right to travel.\textsuperscript{55} The Third Circuit, however, concluded that the Supreme Court’s interstate travel jurisprudence offered

\textsuperscript{50} Id. at 60-61. In subjecting the statute to review under the equal protection clause, the Court held that the asserted State interests of (1) establishing a financial incentive for residents to remain in Alaska and (2) assuring “prudent management” of the Fund and of the state’s natural resources, are not rationally related to the classifications created by the statute. Id. at 61.

\textsuperscript{51} 476 U.S. 898 (1986).

\textsuperscript{52} Id. at 911. Preference for civil service employment was given, in the form of additional points for ranking purposes, to applicants who were veterans of the United States Armed Forces, who served during time of war, and who were New York residents prior to entering the Service. Id. at 900. Appellees, veterans who had served during time of war, but who were not residents of New York prior to entering the Service, challenged the statutory preference. Id. at 900-01. The Court analyzed the statute under the equal protection clause as it has typically done where a statute creates different classes of residents. Id. at 904. The state’s asserted interests included encouraging residents to enter the service, rewarding residents for war-time service, encouraging residents to return to the state and taking advantage of the unique skills gained by residents who have served in war. Id. at 909. The Court held that these interests did not rise to the level of compelling as required under an equal protection analysis. Id. at 911.

\textsuperscript{53} Id. at 912-16. In \textit{Soto-Lopez}, Justice Brennan, delivering the opinion of the Court, in which Justices Marshall, Blackmun and Powell joined, applied a strict scrutiny test. Id. at 904. Chief Justice Burger filed an opinion concurring in the judgment, but applied only a rational basis test. Id. at 912-13. Similarly, Justice White concurred in the judgment, agreeing with Chief Justice Burger’s conclusion that the classifications contained in the New York statute at issue in the case were irrational and therefore unconstitutional, but finding that “the right to travel [was] not sufficiently implicated . . . to require heightened scrutiny.” Id. at 916.

\textsuperscript{54} \textit{Lutz}, 899 F.2d at 259-60. For a discussion of the Supreme Court’s failure to address the intrastate travel issue, see articles cited \textit{supra} note 2. For a discussion of Third Circuit decisions which have addressed the issue, see \textit{infra} notes 105-118 and accompanying text.

\textsuperscript{55} \textit{Lutz}, 899 F.2d at 260. The \textit{Lutz} court stated that the Supreme Court
little guidance in assessing the constitutionality of a city ordinance which burdened intrastate travel.

After establishing that the Supreme Court had not squarely addressed the issue, the Third Circuit looked to the decisions of other courts of appeals to determine whether other circuits had considered whether a right to intrastate travel exists. The court concluded that only the Second Circuit had addressed the issue when it held in *King v. New Rochelle Municipal Housing Authority* 56 that the fundamental right to travel did indeed encompass intrastate travel. 57 In *King*, the Second Circuit concluded 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." 58

Although the Third Circuit in *Lutz* agreed with the final result of the *King* decision, it found its reasoning to be inadequate. 59 Finding little guidance from either the other circuits nor the Supreme Court, the Third Circuit finally considered whether the language of the Constitution supported the existence of the asserted fundamental constitutional right to intrastate travel.

The Third Circuit first examined the privileges and immunities clause of article IV. 60 The Third Circuit relied on *Paul v. Virginia*, 61 "has dispensed with analysis of the appropriate textual basis in the Constitution for the unenumerated right to travel." Id.

56. 442 F.2d 646 (2d Cir.), cert. denied, 404 U.S. 863 (1971).

57. *Lutz*, 899 F.2d at 261. The Third Circuit stated, "[King v. New Rochelle Municipal Housing Authority is] the only court of appeals case we know to have decided the question" of whether the right to travel encompasses the right to intrastate travel. Id. (emphasis added). However, the Third Circuit was incorrect in concluding that *King* was the only court of appeals case addressing the issue of intrastate travel. For a discussion of other court of appeals cases addressing the right to intrastate travel, see infra notes 119-25 accompanying text.

58. *King*, 442 F.2d at 648. In *King*, plaintiff challenged the constitutionality of a five year durational residency requirement for admission to public housing which was imposed by the New Rochelle Housing Authority. Id. at 646-47. Plaintiff's claim was based on the equal protection clause of the fourteenth amendment. Id. at 647. The residency requirement treated long-term residents differently than short-term residents. Id. at 648. The court found that long-term residents had no greater need and would not benefit any more from public housing than short-term residents. Id. at 649. In striking down the residency requirement, the Second Circuit held that, because the residency requirement violated plaintiff's fundamental right to travel, including intrastate travel, the resolution could only be upheld "if it furthers a compelling state interest." Id. at 648. The residency requirement did not meet this standard. Id.

59. *Lutz*, 899 F.2d at 261. As part of its reasoning for finding the *King* rationale inadequate, the *Lutz* court stated, "[T]o the extent that the right to travel grows out of constitutional text animated by structural concerns of federalism ... it might be entirely 'meaningful' to suppose that the right is not implicated by reasonable restrictions on localized intrastate movement." Id. at 261-62.

60. Id. at 262. For the text of the privileges and immunities clause of article IV, see supra note 8.

61. 75 U.S. (8 Wall.) 168 (1868).
where the Supreme Court held that the clause was not the source of any unenumerated fundamental right, but was simply a “federalism-based anti-discrimination principle.” Since Paul, courts have uniformly agreed that the privileges and immunities clause of article IV is essentially aimed at “insur[ing] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” Because the cruising statute in Lutz applied evenhandedly to both in-state and out-of-state residents, the Third Circuit found that it did not implicate the article IV clause.

Similarly, the Third Circuit considered the privileges and immunities clause of the fourteenth amendment as a possible source of a right to intrastate travel. The Lutz court noted that the Supreme Court in the Slaughter-House Cases held that only those rights which “owe their existence to the Federal Government, its National character, its Constitution, or its laws,” were protected. Thus, after Slaughter-House stripped the privileges and immunities clause of providing any unenumerated rights, the Court pointed exclusively to the due process clause as a basis for the unenumerated rights contained within the Constitution. In light of Slaughter-House, the Lutz court concluded that the “[p]laintiffs therefore cannot rely on the Fourteenth Amendment Privi-
The Third Circuit next considered a theory of national citizenship as a possible basis for the right to intrastate travel. Specifically, it recognized that in *Crandall v. Nevada*, the Supreme Court held that the right to travel was protected as an incidence of national citizenship "insofar as travel is necessary for the transaction of business between the national government and its citizenry." The Third Circuit reasoned, however, that the cruising ordinance did not infringe or hamper a citizen's access to any federal institution, and thus, the rights recognized in *Crandall* were not affected by the York ordinance. Consequently, a right of intrastate travel could not be derived from the concept of national citizenship.

In analyzing York's ordinance under the commerce clause, the Third Circuit recognized that a statute which infringes upon the importation of goods is per se unconstitutional, but concluded that York's ordinance "imposes no threat of burdening the stream of commerce...." The court further explained that the safety benefits of the statute were significant, while the burden upon interstate commerce was negligible.

---

69. *Id.* The Third Circuit observed that the privileges and immunities clause of the fourteenth amendment has "remained essentially moribund since *Slaughter-House*, as the source of an implied fundamental right of intrastate travel." *Id.*

70. 73 U.S. (6 Wall.) 35 (1867).

71. *Lutz*, 899 F.2d at 264 (citing *Crandall*, 73 U.S. (6 Wall.) at 43-44). The *Crandall* Court stated that a person 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. ... [T]his right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

72. *Lutz*, 899 F.2d at 265. The *Lutz* court explained that people subjected to the York cruising ordinance are still able to "proceed unimpeded by law.... to any federal installation at which he is called upon to exercise the various rights and duties of citizenship." *Id.* According to the *Lutz* court's analysis, this was essentially all that *Crandall* required. *Id.* at 264-65.

73. *Id.*

74. *Id.* at 265. For the pertinent text of the commerce clause, see *supra* note 11.

75. *Lutz*, 899 F.2d at 265. Because a regulation which burdens the importation of goods was recognized by the Supreme Court as virtually per se unconstitutional under current commerce clause doctrine, the Third Circuit simply applied the test articulated by the Supreme Court to the York ordinance. *Id.* The *Lutz* court found that the anticruising ordinance was facially neutral as to interstate commerce and would not burden the stream of commerce by conflicting with federal statutes and/or regulations. *Id.* For a discussion of test employed under a commerce clause analysis, see infra note 76.

76. *Id.* The Third Circuit noted that the test employed under a Commerce Clause argument is "whether the burden that the ordinance imposes on interstate commerce 'is clearly excessive in relation to [its] putative local benefits.'"
The Third Circuit then went on to examine the equal protection clause for the asserted right to intrastate travel. Yet, while noting that the equal protection clause prohibits discrimination based upon suspect or quasi-suspect classifications, the Third Circuit opined that the clause ordinarily creates no substantive individual rights. The Third Circuit then scrutinized the cruising ordinance and determined that the York "ordinance . . . creates no such suspect or quasi-suspect classifications," and thus the equal protection clause provides no source of protection in this case.

After dismissing all of the possible Constitutional sources of a right to intrastate travel noted above, the Third Circuit posited that the only potential remaining sources of a right to intrastate travel were the due process clauses of the fifth and fourteenth amendments. Accordingly, the Third Circuit surveyed the modern substantive due process jurisprudence of the Supreme Court in order to determine whether such an asserted right is indeed grounded in the due process clauses of the Constitution. The Lutz court noted that the general test employed by the United States Supreme Court to determine whether such a right under the due process clause could be considered fundamental was whether such a right was "implicit in the concept of ordered liberty" or

Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). The Third Circuit stated that a Commerce Clause argument in the case at bar would be frivolous. Lutz, 899 F.2d at 265.

77. Id. at 265-66. For the text of the equal protection clause, see supra note 12.

78. Lutz, 899 F.2d at 265.

79. Id. at 265-66.

80. Id. at 267. The Third Circuit noted that, "no constitutional text other than the Due Process Clauses could possibly create a right of localized intrastate movement, and no substantive due process case since the demise of Lochner has considered whether the clause in fact does create such a right." Id. This statement seems to indicate that the court was employing a result-oriented analysis whereby they had decided that the right to intrastate travel did exist, but needed to find a source of that right to support their conclusion. After eliminating all other possible sources, they appear to have settled on substantive due process merely because no other alternative remained. For the text of the due process clauses, see supra notes 13 and 14.

81. Lutz, 899 F.2d at 267-68. Specifically, the Lutz court reviewed the following substantive due process cases: Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (unenumerated rights are those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))); Bowers v. Hardwick, 478 U.S. 186, 191-95 (right of persons of the same sex to engage in sexual relations not fundamental), reh'g denied, 478 U.S. 1039 (1986); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (fundamental rights are those "deeply rooted in this Nation's history and tradition"); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (indicating that fundamental rights are those which are "implicit in the concept of ordered liberty"). For a discussion of Michael H., see infra notes 86-89 and accompanying text.

82. Lutz, 899 F.2d at 267 (quoting Palko, 302 U.S. at 325).
"deeply rooted in this Nation's history and tradition."

Because the Supreme Court had recently cautioned that such articulated phrases cannot be read too broadly, the Third Circuit adopted a narrow view in applying these phrases. In employing this narrow interpretation, the Third Circuit took note of the fact that no sitting Justice had suggested that the modern doctrine of substantive due process be abandoned. Consequently, the Third Circuit adopted the approach advocated by Justice Scalia's plurality opinion in Michael H. v. Gerald D., which delimited a narrow concept of the fundamental rights in a substantive due process claim.

In Michael H., Justice Scalia reiterated the proposition that the due process clause did indeed include certain unenumerated rights, "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Such traditions, however, must be evaluated "at the most specific level of generality possible."

83. Id.
84. Id. (citing Bowers v. Hardwick, 478 U.S. 186 (1986)). In Bowers, the Court noted that there should be judicial resistance to the expansion of the substantive reach of the tests delineated in Palko and Moore, so as to avoid the redefinition of those rights deemed to be fundamental. Bowers, 478 U.S. at 195. Otherwise, the Court explained, the judicial branch would invalidly assume the authority "to govern the country without express Constitutional authority." Id. The Bowers Court also stated that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Id. at 194.

85. Lutz, 899 F.2d at 267. Essentially, the Third Circuit recognized the modern Court's limited use, but not elimination, of substantive due process analysis.

86. 491 U.S. 110 (1989). The Third Circuit viewed the modern Court as following a narrow approach to substantive due process and adopted Justice Scalia's view in Michael H. as the narrowest such approach. Lutz, 899 F.2d at 267-68.

87. Michael H., 491 U.S. at 127-28 n.6. In Michael H., a California statute, which created a presumption that a child born to a married mother while the husband was living with the mother is the child of the husband, was challenged by the putative father of a child born to a married couple. Id. at 113-17. Blood tests showed with 98.07% certainty that appellant was the actual father of the child. Id. at 114. Appellant challenged the statute as, among other things, a violation of his substantive due process right of a constitutionally protected liberty interest in pursuing a relationship with his child. Id. at 121. The Supreme Court held that a fundamental right under a substantive due process analysis must "be an interest traditionally protected by our society." Id. at 122. In holding that the relationship in question was not one which our society has historically protected, the Court stated: "This is not the stuff of which fundamental rights qualifying as liberty interests are made." Id. at 127.

88. Id. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
89. Lutz, 899 F.2d at 268 (citing Michael H., 491 U.S. at 127-28 n.6). The Third Circuit used recent Supreme Court decisions to demonstrate this narrow approach. Id. at 268. The Third Circuit noted that the Court has recognized a fundamental right of marital intimacy. Id. (citing Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965)). This right, however, cannot be expanded to a general
Applying this narrow analysis, the Third Circuit concluded that substantive due process embodies a right to intrastate travel which is indeed, "implicit in the concept of ordered liberty" and "deeply rooted in the Nation’s history," and therefore, the right to intrastate travel is fundamental.\footnote{Lutz, 899 F.2d at 268 (court quoted touchstone concepts defining fundamental rights from Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) respectively). The Third Circuit held in essence that although the right of intrastate travel is not contained in the Constitution and has not been recognized by the Supreme Court, it is, however, part of our national tradition that one should have the right to travel freely about. Lutz, 899 F.2d at 268. Thus, under this approach, the Third Circuit concluded that there is a fundamental constitutional right to intrastate travel. Id.}

Having concluded that a fundamental right to intrastate travel is embodied in substantive due process, the Lutz court then sought to establish a standard by which the judiciary could scrutinize restrictions which burden this newly recognized fundamental right.

In seeking to establish this standard of review, the Third Circuit first noted that the York anticruising ordinance did in fact burden the fundamental right to intrastate travel.\footnote{Id. at 268. The Third Circuit stated, "the right to travel is clearly burdened by the cruising ordinance." Id. The Third Circuit offered no reasoning for this conclusion. Id.}

The court further acknowledged that once a court determines that a government action burdens a fundamental right, a reviewing court typically applies strict scrutiny in determining whether the government action passes constitutional muster.\footnote{Id. at 268-69. In Lutz, the plaintiffs argued that the routine test applied in substantive due process cases is that a statute which burdens a fundamental right will only "survive" if it is "no more restrictive than necessary to achieve compelling state interests." Id. at 268. Indeed, the Lutz court acknowledged that this is the traditional standard of review. Id. For a list of cases applying this strict scrutiny test in the area of substantive due process, see infra note 128.}

Although offering no authority for its approach, the Lutz court noted that not every infringement of a fundamental right, however, must be subject to strict scrutiny.\footnote{Lutz, 899 F.2d at 269. The Third Circuit stated: "We believe that reviewing all infringements on the right to travel under strict scrutiny is just as inappropriate as applying no heightened scrutiny to any infringement on the right to travel not implicating the structural or federalism-based concerns of the more well-established precedents." Id. The Third Circuit offered no authority for its adoption of this approach. Id.}

Concluding that a restriction of the right to intrastate travel need not be subjected to such scrutiny, the court instead adopted a time, place and manner methodology of analysis commonly employed when scrutinizing first amendment free speech claims.\footnote{Id. The Third Circuit found that the concerns of the City of York in adopting the cruising ordinance were analogous to the concerns underlying the time, place and manner doctrine. Id. For a criticism of the Third Circuit’s adop-}
As originally conceived, the time, place and manner doctrine allowed an intermediate level of judicial scrutiny to be applied when analyzing a regulation which imposed certain restrictions upon speech. Under such an approach, to be upheld as constitutional, a governmental restriction on speech must be narrowly tailored to serve a legitimate state interest while offering adequate alternative channels of communication. Thus, the Third Circuit explained that if freedom of speech, a right expressly protected by the first amendment, could be regulated by an intermediate standard of review, then clearly the unenumerated right of intrastate travel could be similarly regulated under such a judicial standard. The Third Circuit, therefore, concluded that the anticruising statute would be valid if "narrowly tailored to meet significant city objectives." 

In scrutinizing the ordinance, the court first found that York's objective of ensuring the health, safety and welfare of its residents by enacting the cruising ordinance was significant. Moreover, the court concluded that the anticruising statute was narrowly tailored to further these interests. Based on this analysis the Third Circuit upheld York's cruising ordinance as a constitutional regulation of intrastate travel.

---


96. Lutz, 899 F.2d at 269. The time, place and manner test does not require the state to use the least restrictive means available, as would be required under a strict scrutiny level of judicial review. Id. See Rotunda, Nowak & Young, Treatise on Constitutional Law Substance and Procedure § 20.47 (1986).

97. Lutz, 899 F.2d at 269. The court stated, "[T]he time, place and manner doctrine allows certain restrictions on speech to survive under less than full strict scrutiny. If the freedom of speech itself can be so qualified, then surely the unenumerated right of localized travel can be as well." Id.

98. Id. at 270.

99. Id. The Lutz court gave no reason for arriving at this conclusion. Id. For a discussion of the health, safety and welfare concerns asserted by the city, see supra notes 28-26 and accompanying text.

100. Lutz, 899 F.2d at 270. The court concluded that the York ordinance only applied to locations within the city that were indisputably hampered by the congestion associated with cruising. Id. In addition, the ordinance "leaves open ample alternative routes to get about town without difficulty." Id. Another factor not stated by the court in this conclusion may have been that the ordinance only applied during certain times of the day. See id. at 257.

101. Id. at 270.
The Third Circuit's opinion in Lutz is noteworthy to practitioners for several reasons. First, no other court has so clearly recognized a fundamental right to intrastate travel.102 Second, by individually considering and analyzing each asserted source, Lutz is the first decision in which a court has attempted to clearly delineate the framework for its analysis of a constitutional source upon which such a right is based.103 Most importantly, the Lutz court, in adopting a time, place and manner standard, applied an intermediate level of scrutiny to the regulation of a fundamental right grounded in substantive due process, despite the Supreme Court's insistence upon the application of strict scrutiny to such fundamental rights.104 Such an approach may have far-reaching implications on other claims which challenge the infringement of substantive due process rights by the government, especially when those rights are unenumerated.

In considering whether a fundamental right to intrastate travel exists, the Lutz court failed to properly consider two previous Third Circuit opinions which expressly analyzed the question of intrastate travel rights.105 Most notably, in Wellford v. Battaglia,106 the Third Circuit affirmed the decision of the United States District Court for the District of Delaware, which had held that, "the [constitutional] right to travel... is a right to intrastate as well as interstate migration."107 The district

102. Id. at 261. The court noted that there has been only one "court of appeals case... decid[ing] the question." Id. The court explained further that although the Second Circuit had addressed the issue of intrastate travel, the Lutz court found "its reasoning somewhat underarticulated." Id. For a further discussion of the Third Circuit's approach to finding the constitutional source for the right to intrastate travel, see supra notes 60-90 and accompanying text. For a discussion of circuit court decisions finding no constitutional right of intrastate travel, see infra notes 120-25 and accompanying text.

103. Lutz, 899 F.2d at 261-62. For a further discussion of the Third Circuit's consideration of the constitutional sources for this right, see supra notes 60-90 and accompanying text.

104. Lutz, 899 F.2d at 268-70. For a further discussion of the adoption by the Third Circuit of the time, place and manner standard of review, see supra notes 91-98 and accompanying text. For a discussion of the Supreme Court's use of strict scrutiny when scrutinizing restrictions on fundamental rights under the substantive due process provisions of the fourteenth amendment, see infra notes 126-30 and accompanying text.


106. 485 F.2d 1151 (3d Cir. 1973).

107. Wellford, 343 F. Supp. at 147 (citing King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2nd Cir. 1971)). In Wellford, the plaintiff desired to become a candidate for the mayor of Wilmington, Delaware. Id. at 144.
The Department of Elections denied his request to be placed on the ballot because at the time of the election, plaintiff would have been a resident of the city of Wilmington for only four years. Id. Thus, under the charter, plaintiff would be incapable of holding the office of mayor. Id. Plaintiff challenged the charter as a violation of the equal protection clause of the fourteenth amendment. Id. at 145.

108. Id. at 146. The City of Wilmington Charter, § 3-300 provided: “The mayor shall have been a resident of the city for at least five years preceding his election . . . .” Id. In striking down this durational residency requirement, the court concluded that the objective asserted by the city, that its mayor be knowledgeable of the city’s problems and resources, was not as sufficiently compelling as required under a strict scrutiny analysis. Id. at 145-49.

109. Wellford, 485 F.2d at 1152.
111. Bykofsky, 535 F.2d at 1245. The curfew ordinance in question prohibited any minor “under the age of eighteen from being on or remaining in or upon the streets” during a specified period of time beginning between 10:00 p.m. and 11:00 p.m. and ending at 6:00 a.m., unless certain exceptions applied. Bykofsky, 401 F. Supp. at 1246.
113. Id. at 1261-62.
114. Id. at 1261 (emphasis added). The interests asserted by the government in enacting the ordinance were: (1) the protection of the minor children; (2) enforcement of the parent’s control and responsibility for their children; (3) public protection for mischief by minors; and (4) a reduction in the criminal activities of juveniles. Id. at 1255. The district court placed emphasis on the fact that only minors were being deprived of their rights. Id. at 1256-57. The court noted that fundamental rights are frequently withheld from minors. Id. In this regard, the district court stated, “The Supreme Court has recognized that the
The district court, in applying only a rational basis test, was relying on its understanding of the United States Supreme Court’s decision in Sosna. However, since that time, a plurality of the Court in Soto-Lopez has reaffirmed the strict scrutiny test originally delineated in Shapiro. The Third Circuit, affirming the district court’s determination that a constitutional right to intrastate travel existed, in essence, recognized the existence of a right to intrastate travel fifteen years prior to the Lutz decision. The Lutz court, however, failed to even address this prior opinion.

Not only did the Third Circuit disregard its prior decisions which addressed the right to intrastate travel, but moreover, the Third Circuit erred in its attempt to find other court of appeals’ decisions which addressed the question of the existence of a right to intrastate travel. In Lutz, the court remarked that the Second Circuit decision in King v. New Rochelle Municipal Housing Authority was the only court of appeals case which had previously decided the question of whether a right to intrastate travel existed. Actually, King was the only other court of appeals decision to expressly recognize a fundamental right to intrastate travel; two courts of appeals, however, have held that such a right does not exist. The Fifth Circuit in Wright v. City of Jackson, Mississippi, explicitly held that no fundamental right to intrastate travel exists and upheld a continual residency requirement which mandated that all municipal employees maintain their domicile within the city limits. Similarly, in activities and conduct of minors upon the street may be regulated and restricted to a greater extent than those of adults.”

115. Id. at 1261 (citing Sosna v. Iowa, 419 U.S. 393 (1975)). The district court in Bykofsky stated: “That a balancing test is the proper mode of analysis in dealing with the right to travel is apparent from the Supreme Court’s recent decision in Sosna v. Iowa . . . .” Id. (citation omitted). For a further discussion of Sosna, see supra notes 46-47 and accompanying text.


117. Soto-Lopez, 476 U.S. at 904. For a discussion of Shapiro, see supra notes 38-41 and accompanying text.


119. Lutz, 899 F.2d at 261. For a further discussion of the Third Circuit’s conclusion regarding other court of appeals’ decisions with respect to the right to intrastate travel, see supra note 57 and accompanying text. Apparently, the Third Circuit’s search for other court of appeals’ decisions deciding the intrastate right to travel did not include the Fifth or Sixth Circuits. For a discussion of how these other circuits have addressed this issue, see infra notes 120-25 and accompanying text.

120. See Wardwell v. Board of Education, 529 F.2d 625, 627 (6th Cir. 1976) (“right to intrastate travel has [not] been afforded federal constitutional protection”); Wright v. City of Jackson, Mississippi, 506 F.2d 900, 901 (5th Cir. 1975) (found no fundamental right to intrastate travel).

121. 506 F.2d 900 (5th Cir. 1975).

122. Id. at 902, 904. In Wright, plaintiffs, all firemen living outside the city limits, challenged an ordinance which required all municipal employees to main-
Wardwell v. Board of Education, the Sixth Circuit concluded that no right to intrastate travel was protected by the Constitution. Accordingly, the court upheld under a rational basis test, a school employment policy which required that all teachers establish residence within the school district within ninety days of employment. Although these decisions were all concerning the right of an individual to reside outside of the particular community where that person was employed, they nonetheless were concerned with an individual's right to travel and to live where she chooses. Although the Third Circuit was not bound by the decisions of these other courts of appeals and may have questioned the applicability of these decisions, the fact that the court overlooked such opinions for guidance and explicitly proclaimed their belief that no other similar decisions existed suggests the use of result-oriented jurisprudence and raises questions as to the considerations prevalent in the minds of the Third Circuit judges.

The final question raised by the Third Circuit's analysis in Lutz was the adoption of the time, place and manner doctrine from first amendment jurisprudence in analyzing a claim of infringement of a fundamental right under substantive due process. The use of this first amendment standard resulted in the court applying an intermediate level of judicial scrutiny to the area of substantive due process. Such
an approach is contrary to the prior decisions of the United States Supreme Court which has consistently applied a heightened level of judicial scrutiny when a governmental action infringes upon a fundamental right.128 This manipulation of a first amendment method of judicial analysis into the area of substantive due process under the fourteenth amendment is inappropriate and in conflict with the Supreme Court’s substantive due process decisions.129 The area of free speech has engendered its own method of analysis which has not been applied to any unenumerated fundamental right.130 Therefore, the Third Circuit’s use of this method of analysis is in direct conflict with the Supreme Court’s use of that test solely in the area of free speech.

V. CONCLUSION

As the United States Supreme Court has not squarely addressed the question of whether a right to intrastate travel is protected by the Constitution, the decision of the Third Circuit in Lutz will stand as the principal case on this issue. The Third Circuit’s decision in Lutz recognizes a constitutional basis for a fundamental right to intrastate travel. Yet, according to Lutz, in order for a state to infringe upon such an unenumerated fundamental right, the state need only show that the statute in question constitutes a reasonable time, place or manner restriction upon the individual’s fundamental right of intrastate travel.

Because the Third Circuit has failed to articulate a persuasive distinction between those “fundamental rights” which require heightened

128. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (employing strict scrutiny in analyzing substantive due process claims involving fundamental right to marry); Carey v. Population Servs. Int’l, 431 U.S. 678 (1977) (striking down statute, applying strict scrutiny, that allowed only pharmacist to distribute contraceptives); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (where burden is placed on fundamental right of extended family to live together, governmental action must be “examined carefully”); Roe v. Wade, 410 U.S. 113, 155-56 (1973) (applying strict scrutiny to statute which impaired women’s decision to have an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating restrictions on distribution of contraception under a strict scrutiny test as invasion of fundamental right to decide matters of procreation); Loving v. Virginia, 388 U.S. 1, 9 (1967) (invalidating miscegenation statute under strict scrutiny); Griswold v. Connecticut, 381 U.S. 479 (1965) (White, J., concurring) (use of contraceptives is fundamental right and regulation restricting use must be analyzed under strict scrutiny test). The Third Circuit in Lutz, though specifically recognizing that the Supreme Court has routinely applied strict scrutiny in the area of substantive due process, disregarded these cases. Lutz, 899 F.2d at 255.

129. Lutz, 899 F.2d at 269. The Third Circuit appears to have concluded that, because Lutz represents the first time that a court has clearly held that an unenumerated right to intrastate travel exists, it could apply a standard of review of its own choosing.

130. See Consolidated Edison v. Public Serv. Comm’n, 447 U.S. 530, 536 (1980) (“essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals”) (emphasis added).
scrutiny when infringed, and those, such as the right to intrastate travel, which require only an intermediate level of judicial scrutiny, the court's unorthodox adoption of an intermediate level of judicial scrutiny for a newly recognized substantive due process right may have serious implications in other areas of substantive due process. If the Third Circuit can successfully apply an intermediate level of scrutiny to the fundamental right of intrastate travel under the fourteenth amendment, it remains to be seen whether it may also apply a similar standard to other unenumerated rights which have not yet been considered by the Supreme Court. Given the rather incoherent logic in its rationale, it is doubtful that many other circuits, much less the United States Supreme Court, will fully adopt the rationale of the Third Circuit in Lutz.

Keith E. Smith