NOTE

Sex Offenders and the City: Ban Orders, Freedom of Movement, and *Doe v. City of Lafayette*

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INTRODUCTION

Doe lives in Lafayette, Indiana. He is a convicted sex offender; however, his last conviction was over ten years ago. Doe served his time and has since undergone counseling and therapy to correct his deviant behavior. Recently, he went to a local public park and watched the children there for half an hour. Doe admitted he did this in response to sexual impulses that he later found upsetting.

Disturbed by the incident, Doe talked to his psychiatrist and counseling group, trying to get help. However, an anonymous tip alerted city officials of the incident. A meeting occurred between park officials, the City's mayor, and the Lafayette attorney general. This meeting resulted in a ban order prohibiting Doe from the City's public parks. Doe subsequently sued the City of Lafayette, arguing that the ban order unconstitutionally violated his fundamental right to freedom of movement.[1] Doe argued that his right to travel in this public space could not be unreasonably limited by the City.[2]

This was the situation before the District Court for the Northern District of Indiana in *Doe v. City of Lafayette*.[3] The City of Lafayette passed a ban order, prohibiting Doe from entering any of the public parks within the city limits.[4] Maintaining that he had a number of legitimate interests for entering these public areas, Doe sued the City, asking the court to lift the ban order.[5] His suit alleged that the City

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[1] This hypothetical is based on the facts of the case at issue in this Note, *Doe v. City of Lafayette*. *See* Doe v. City of Lafayette, 160 F. Supp. 2d 996, 1001 (N.D. Ind. 2001).

[2] *See id.*

[3] *See id.* at 1001-04.

[4] *Id.* at 998.

[5] *Id.*

violated his constitutional right to freedom of movement under the Due Process Clause of the Fourteenth Amendment.[6]

Doe's argument that the ban violated his rights under the Fourteenth Amendment rested on the doctrine of substantive due process. Substantive due process limits the regulations a state can place on human life and liberty.[7] A court performing a substantive due process analysis first identifies whether the state action impacts a fundamental right.[8] Next, it applies the appropriate judicial test to the allegedly offending action to determine whether the state action violates the Due Process Clause.[9] If a fundamental constitutional right is at stake, a court will apply a "strict scrutiny" test to the offending state action.[10] However, if the right at stake is not deemed fundamental, a court applies

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[6] *Id.* at 999. Doe also argued that the ban order violated his First Amendment rights. *Id.* at 1000-01. The court dismissed Doe's First Amendment argument because Doe failed to identify a message he sought to convey. *Id.* at 1000. Doe also failed to show how the ban order violated his First Amendment right to communicate such a message. *Id.* The court also held that although the ban order resulted in an incidental infringement of Doe's thoughts, this was not enough to invalidate an order that seeks to protect a legitimate state interest. *Id.* at 1000-01.

[7] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (stating that substantive due process protects individual rights from state interference); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.1, at 1334-35 (3d ed. 2000) (stating that substantive due process remains chief vehicle through which individual rights are protected from arbitrary state action); Kathryn R. Burke, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will It Take for the Court to Declare It Unconstitutional?*, 19 HAMLINE J. PUB. L. & POL'Y 301, 312 (1997) (discussing that substantive due process is limit on state powers).

[8] *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (discussing that heightened scrutiny is given to fundamental rights); United States v. Virginia, 518 U.S. 515, 533 (1993) (discussing that court uses strict scrutiny for certain classifications); Williams v. Pryor, 41 F. Supp. 2d 1257, 1274 (N.D. Ala. 1999) (stating that standard of scrutiny under substantive due process analysis depends on whether right being burdened is considered fundamental); Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices Be Considered Unconstitutional?*, 9 AM. U. J. GENDER SOC. POL'Y & L. 395, 400 (2001). For a definition of fundamental rights, see Section I.A.1, *infra*.

[9] *See Glucksberg*, 521 U.S. at 720 (stating that heightened judicial scrutiny is given to certain fundamental rights); Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crimes, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 286-87 (1998-1999) (stating that judicial test applied depends on status of right being abridged); Kaminer, *supra* note 8, at 400 (stating that court applies different levels of scrutiny to fundamental and non-fundamental rights).

[10] *See Glucksberg*, 521 U.S. at 720-21 (stating that Due Process Clause analysis requires strict scrutiny of government regulations restricting fundamental rights); Reno v. Flores, 507 U.S. 292, 302 (1993) (stating that strict scrutiny test must be applied to all regulations restricting fundamental rights); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (describing that specially protected individual rights are subject to heightened judicial scrutiny).

a more deferential "rational basis" test to the state action.[11]

In his case, Doe argued that he had a fundamental right to freedom of movement.[12] That is, Doe had a fundamental right to move freely about the public park and therefore the court should strictly scrutinize the ban order.[13] The United States Supreme Court has recognized a liberty interest in free movement.[14] However, the Court has never decided whether this is a fundamental right under the Due Process Clause, thus warranting strict scrutiny.[15] Furthermore, the Court has never ruled on the constitutionality of a state regulation that bans one person from all public parks because of the person's sexually improper thoughts toward children.[16] The Seventh Circuit, which includes the *Doe* court, has not settled these issues either.[17] Thus, the district court in *Doe* was faced with a question of first impression.

Addressing this question of first impression, the *Doe* court held that the right to freedom of movement is not a fundamental right under

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[11] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing that rational basis test is most minimal test applied to regulations restricting individual rights); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (stating that if fundamental right is not at stake, rational basis test should be applied); *see also* United States v. Virginia, 518 U.S. at 567-68 (Scalia, J., dissenting) (describing situations in which heightened judicial scrutiny is applied).

[12] Doe v. City of Lafayette, 160 F. Supp. 2d 996, 999 (N.D. Ind. 2001).

[13] The right to freedom of movement is a broad term that has been defined in a number of different ways. These different definitions include movement in the public fora, the right to intrastate travel, the right to locomotion, and the freedom to loiter. *See* City of Chicago v. Morales, 527 U.S. 41, 42 (1999) (using term "freedom to loiter"); Williams v. Fears, 179 U.S. 270, 274 (1900) (using "right to locomotion"); Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990) (using phrase "right to travel locally through public spaces and roadways"); Benjamin C. Sasse, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 688 (2000) (using term "right to travel on public fora"). For the sake of consistency, this Note will refer to Doe's argument as the right to move about the public area.

[14] *See Morales*, 527 U.S. at 53-54 (plurality opinion) (recognizing that there is liberty interest in loitering in public place); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (holding that statute allowing police officers to stop individuals on public streets and ask for credible and reliable identification implicated constitutional right to freedom of movement); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (stating that right to move about public area is unwritten amenity of life).

[15] *See Morales*, 527 U.S. at 64 n.35 (stating that it is unnecessary to determine if right is fundamental under substantive due process analysis because ordinance was invalid due to vagueness and overbreadth); Sasse, *supra* note 13, at 690 (discussing that there is lack of U.S. Supreme Court precedent regarding right to intrastate travel).

[16] *Cf.* Doe v. City of Lafayette, 160 F. Supp. 2d at 999 (stating that this case is one of first impression).

[17] *See id.*

substantive due process.[18] As such, the City of Lafayette's ban order was only required to satisfy a rational basis test.[19] The court found the ban order was rationally related to a legitimate state interest and granted the City's motion for summary judgment.[20]

This Note argues that the court's dismissal of Doe's case was improper because the right to free movement should be considered a fundamental right under the Due Process Clause. Part I of this Note explains the current state of the law regarding the constitutional right to freedom of movement under the Due Process Clause. Part II discusses the facts, holding, and rationale in *Doe v. City of Lafayette*. Part III argues that, by defining Doe's substantive due process claim too narrowly, the court ensured that the ban order would only need to satisfy rational basis scrutiny. Furthermore, because the court failed to recognize Doe's fundamental right to freedom of movement, the court incorrectly applied rational basis scrutiny rather than strict scrutiny to evaluate Doe's claim.

I. BACKGROUND

Substantive due process jurisprudence stems from the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[21] The clause mandates that no state can deprive a citizen of life, liberty, or property without due process of the law.[22] The Due Process Clause provides individuals with two forms of protection: procedural due process and substantive due process.[23] Procedural due process requires states to meet procedural requirements before taking any action that may impact individuals' constitutional rights.[24] Substantive due process

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[18] *Id.* at 1001-04.

[19] *Id.* at 1004.

[20] *Id.*

[21] *See* U.S. CONST. amend. XIV, § 1; Kaminer, *supra* note 8, at 399 (discussing that substantive due process analysis stems from Fourteenth Amendment to United States Constitution).

[22] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[23] *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (stating that Due Process Clause contains two separate causes of action, procedural due process and substantive due process); Daniels v. Williams, 474 U.S. 327, 331 (1986) (discussing that procedural due process and substantive due process both stem from Due Process Clause of Fourteenth Amendment).

[24] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419-70 (1997) (describing that Due Process Clause requires state to follow doctrine of procedural due process); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 432-49, 615-27 (13th ed. 1997) (discussing that procedural due process stems from Due Process Clause).

protects certain substantive liberty interests.[25]

A. Substantive Due Process Analysis

The doctrine of substantive due process restricts state regulations that abridge individual rights.[26] States have police powers that allow them to pass laws regulating individual rights.[27] A state's police power is not a specialized governmental power, but the broad inherent right of a state to enact legislation protecting the welfare of its citizens.[28] However, state police power is not unlimited. A state must have a legitimate purpose for limiting individual liberties.[29] Thus, state restrictions upon individual liberties or rights that exceed the scope of its police powers violate the Due Process Clause.[30]

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[25] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (stating Due Process Clause includes substantive aspect protecting individual rights from government interference); Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (discussing that Due Process Clause embodies substantive aspect); Reno v. Flores, 507 U.S. 292, 301-02 (1993) (recognizing that substantive due process stems from Due Process Clause); *Collins*, 503 U.S. at 125 (stating that Due Process Clause protects individual's liberty from certain government actions regardless of process used to implement those actions).

[26] *See* Burke, *supra* note 7, at 312 (discussing that Due Process Clause has limiting power on government).

[27] *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (holding that states have wide discretion in using police powers); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (stating that states have wide latitude in exercising police powers); Star Scientific Inc. v. Beales, 278 F.3d 339, 349 (4th Cir. 2001) (stating that there is wide latitude for states to exercise their police powers).

[28] Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 591 (1906); Barbier v. Connolly, 113 U.S. 27, 31 (1884); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 402 (6th ed. 2000) (stating that courts defer to rational decisionmaking with respect to economic legislation).

[29] *See* Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935) (stating that police powers cannot be used arbitrarily or unreasonably); Buchanan v. Warley, 245 U.S. 60, 74 (1917) (describing that state police power, although broad, cannot justify laws contrary to federal Constitution); Bruck v. State *ex rel.* Money, 91 N.E.2d 349, 353 (Ind. 1950) (stating that state use of police powers must have reasonable relation to end in view). Because substantive due process limits state-imposed regulations, a substantive due process analysis requires a showing of state action. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (finding that state action refers to exertions of state power in all forms); CHEMERINSKY, *supra* note 24, at 5 (describing that state action doctrine means Constitution limits only governmental actions, not actions of individuals).

[30] *See* Rochin v. California, 342 U.S. 165, 171-72 (1952) (stating that due process is constitutional guarantee of governmental respect of fundamental or implicit rights); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (explaining that Fourteenth Amendment protects those rights explicit in constitutional guarantees and "implicit in the concept of ordered liberty"); NOWAK & ROTUNDA, *supra* note 28, at 402-03.

To examine whether a state has a legitimate purpose for restricting individual rights, a court engages in a three-step substantive due process analysis.[31] The court's first step is to define the individual liberty right at stake in the case.[32] The U.S. Supreme Court has held that in defining the right at issue, courts must carefully describe the right.[33] However, there is some debate over the specificity a court must use in carefully describing this right. Courts are reluctant to recognize new fundamental rights under a substantive due process analysis.[34] Justice Antonin Scalia argues that the "carefully described" test does not limit the scope of substantive due process enough because courts can still define the right too generally.[35] Therefore, Justice Scalia advocates that rights should be described at the greatest level of specificity possible.[36]

This disagreement over how to define the right at stake was a point of contention between the majority and dissenting Supreme Court opinions in *Michael H. v. Gerald D.*[37] This case involved a man who wished to receive visitation rights with his biological daughter.[38] The dissenting opinion broadly defined the right at stake as the right of parenthood.[39] Under this formulation the dissent found that the claimants asserted a valid liberty interest.[40] However, the plurality defined the right with more specificity, calling it the right of a natural father to have a

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[31] *See* Washington v. Glucksberg, 520-21 U.S. 702, 720 (1997) (discussing steps in substantive due process analysis).

[32] Reno v. Flores, 507 U.S. 292, 302 (1993). *See generally* Paul Moore, *Physician-Assisted Suicide: Does "The End" Justify the Means?*, 40 ARIZ. L. REV. 1471, 1476-77 & n.43 (1998) (discussing that substantive due process analysis is multi-step process).

[33] *See Glucksberg*, 521 U.S. at 721 (stating that constitutional right that party is claiming must be "carefully described"); *Flores*, 507 U.S. at 302 (stating that substantive due process requires careful description of constitutional right at stake).

[34] *See Glucksberg*, 521 U.S. at 720 (stating that Court is reluctant to expand scope of heightened scrutiny under substantive due process analysis); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (stating that Court is reluctant to expand field of fundamental rights, and therefore exercises care when recognizing new fundamental rights); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (stating that Court is at risk of illegitimacy when recognizing rights not found in constitutional text); Moore v. E. Cleveland, 431 U.S. 494, 502 (1977) (stating that Court limits fundamental rights to guard against enacting own policy considerations).

[35] *See* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., concurring) (stating that rights recognized under substantive due process need to be limited by Court).

[36] *See id.* at 127 n.6 (Scalia, J., concurring) (arguing that test for defining fundamental rights in substantive due process analysis needs to be further limited and arguing that constitutional right at stake should be defined with greatest level of specificity possible).

[37] *Id.* at 139 (Brennan, J., dissenting).

[38] *Id.* at 113-116 (plurality opinion).

[39] *Id.* at 139 (Brennan, J., dissenting).

[40] *Id.* at 147 (Brennan, J., dissenting).

relationship with a child whose mother is married to another man.[41] The plurality then found that the claimants did not have a valid liberty interest.[42]

Thus, the first, and perhaps most critical, step in a substantive due process analysis is defining the right at issue. *Michael H.* demonstrates that how a court defines the right at issue determines how that court will view the right at stake, and how it will analyze the state regulation. After defining the right, the court must then, as its second step, decide if that right is fundamental.[43] The Supreme Court has identified two ways to determine whether a right is fundamental. The right can either be stated explicitly in the Constitution, or inherent in the concept of ordered liberty.[44] After determining whether the right at stake is fundamental, a court undergoes the last step in a substantive due process analysis. This third step is applying the correct level of scrutiny to analyze whether the offending state action unconstitutionally violates the individual's rights.[45]

A court's decision about whether the right is fundamental dictates the level of scrutiny the court applies.[46] If the state regulation impacts a fundamental right, the court will apply strict scrutiny to determine whether the state regulation is permissible.[47] Strict scrutiny requires that

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[41] *Id.* at 124 (plurality opinion).

[42] *Id.* at 125-27 (plurality opinion).

[43] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Hemmens & Bennett, *supra* note 9, at 286-87 (stating that judicial test applied depends on status of right being abridged); Kaminer, *supra* note 8, at 400 (stating that court applies different levels of scrutiny to fundamental and non-fundamental rights).

[44] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (stating that fundamental rights can be explicit or implicit in Constitution); *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (stating that fundamental rights are those implicit in concept of ordered liberty); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (describing that fundamental rights are those deeply rooted in traditions and conscience of American people).

[45] *See supra* note 8. The Court set forth this two-tiered scrutiny in Justice Stone's famous *Carolene Products* opinion. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (describing that there are two levels of analysis for substantive due process cases).

[46] *See* William L. Campbell, Jr., Commentary, *Moving Against the Tide: An Analysis of Home School Regulation in Alabama*, 52 ALA. L. REV. 649, 654-55 (2001) (stating that Supreme Court utilizes two-tier analysis for substantive due process rights); Kristiana L. Farris, Seeley v. State*: The Need for Definitional Balancing In Washington Substantive Due Process Law*, 73 WASH. L. REV. 669, 673 (1998) (stating that fundamental rights receive highest level of scrutiny in substantive due process analysis); Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 353 (2001) (stating that whether right is fundamental determines what level of scrutiny courts will apply to regulation challenged under substantive due process).

[47] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (explaining that strict scrutiny test is

the challenged law is necessary for the state to achieve a compelling government interest.[48] A government interest is compelling if the state provides evidence that there is a strong police power interest justifying the state action.[49] A regulation is necessary if it has been narrowly tailored — that is, if the state used the least drastic means to accomplish its purpose.[50] Essentially, the means the state employs must be necessary to accomplish the government's ends.[51]

If the state abridges a non-fundamental right, a court applies a rational basis test to the contested state action.[52] This test requires that the offending action be rationally related to a legitimate state interest.[53] A rational relationship is one in which the legislature could logically

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applied when fundamental right is at stake); GUNTHER & SULLIVAN, *supra* note 24, at 469 (stating that heightened judicial scrutiny is appropriate only when "particularly cherished constitutional rights are threatened"); Kaminer, *supra* note 8, at 400 (stating that courts apply strict scrutiny to fundamental rights).

[48] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993) (stating that government is forbidden from infringing fundamental liberty unless it is tailored to serve compelling state interest); *Roe v. Wade*, 410 U.S. at 155 (stating that regulation limiting fundamental rights may be justified only by compelling state interest).

[49] *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) (stating that compelling state interest is one of highest order); Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring) (maintaining that compelling state interest is one of highest interest to state); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (describing that state's most important interests are considered "compelling").

[50] *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (stating that under strict scrutiny analysis, courts must use least drastic means).

[51] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (describing that close fit is required when conducting strict scrutiny analysis); Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (stating that under strict scrutiny state must choose least drastic means of accomplishing purpose); *Shelton*, 364 U.S. at 488 (stating that under strict scrutiny test state must use close fit between purpose and means used to achieve that purpose).

[52] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319-20 (1993) (holding that rational basis scrutiny is proper test for regulation that does not infringe on fundamental constitutional rights); City of Dallas v. Stranglin, 490 U.S. 19, 26 (1989) (holding that rational basis scrutiny is correct test to use when analyzing non-fundamental rights); Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) (stating that rational basis test must be used when analyzing non-fundamental constitutional rights).

[53] *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (inferring that rational basis test requires state action be rationally related to legitimate state interest); Turner v. Glickman, 207 F.3d 419, 424 (7th Cir. 2000) (holding that rational basis test requires rational relationship between regulation used and legitimate state interest). There is also a third type of test, an intermediate test that falls somewhere in between the strict scrutiny and rational basis tests. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing that intermediate scrutiny test requires state regulation be substantially related to an important governmental interest); Watkins v. United States Army, 875 F.2d 699, 712 (9th Cir. 1989) (Norris, J., concurring) (stating that equal protection analysis involves three-stage test). However, this intermediate test is generally used for an analysis under the Equal Protection Clause of the Fourteenth Amendment. *See id.*

believe the regulation is related to accomplishing a legitimate state interest.[54] An interest is generally considered legitimate if it advances one of the state's traditional police powers.[55] An example of these powers is a regulation designed to protect the health of a city's residents.[56]

The type of scrutiny a court applies to a regulation generally determines whether the state action is constitutional.[57] A rational basis test is the most lenient type of test used by the courts.[58] This minimal test is deferential to states and allows almost all types of reasonable state regulation to stand.[59] On the other hand, a strict scrutiny test is the most stringent test used by the courts.[60] This type of judicial scrutiny is

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[54] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (stating rational means whether legislator could logically believe regulation serves legitimate public interest that transcends harm done to those being regulated); *see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (stating that courts give deference to legislature in rational basis test to determine if legislation is related to state interest); Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating that courts will overturn legislation only when it is irrational).

[55] *See* CHEMERINSKY, *supra* note 24, at 536-39 (1997). Such traditional values may include protecting the public's safety, health, or even public morals. *Id.* at 536; *see* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (describing that wide discretion is given to states under rational basis test).

[56] *See* Barbier v. Connolly, 113 U.S. 27, 31 (1885) (holding that city regulation prohibiting public laundries from operating between 10 p.m. and 6 a.m. was state police power and not unconstitutional as ordinance was designed to protect public health and well-being).

[57] *See* SAMUEL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 58 (2d ed. 2001) (commenting that strict scrutiny is "strict in theory but fatal in fact," whereas virtually all legislation passes rational basis test). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (describing that Court is backing away from idea that strict scrutiny is "strict in theory but fatal in fact").

[58] *See* CHEMERINSKY, *supra* note 24, at 415, 490. Under this test, courts generally presume that laws are constitutional. *Id.*

[59] *See* Fed. Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (stating that regulations are upheld under rational basis test if there is any reasonable state of facts that would reasonably uphold regulation, and that such test is "paradigm of judicial restraint"); United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (holding that where plausible reasons underlay state action, judicial inquiry is at end); *Vance*, 440 U.S. at 97 (stating that courts will only overturn regulations under rational basis scrutiny if classifications are so unrelated to any legitimate purpose so as to be irrational).

[60] *See* Joan Callahan, *Contraception or Incarceration: What's Wrong With This Picture?*, 7 STAN. L. & POL'Y REV. 67, 72 n.36 (1995-96) (stating that strict scrutiny is highest level of scrutiny in substantive due process analysis); John P. Cronan, *Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs*, 17 YALE L. & POL'Y REV. 949, 957 (1999) (stating that strict scrutiny erects highest scrutiny for substantive due process challenges).

invasive, and rarely will a regulation pass such a test.[61]

B. Liberty Interest in Freedom of Movement

1. Fundamental Rights in a Substantive Due Process Analysis

There are two ways to determine whether a liberty right is fundamental.[62] First, certain rights are fundamental because they are enumerated in the Constitution.[63] An example of an enumerated fundamental right is the right of free speech found in the First Amendment.[64] Second, a right may be considered fundamental if it is inherent in the Constitution.[65] An example of an inherent right is the right to procreate.[66]

The U.S. Supreme Court has articulated a test for determining whether a right is a fundamental right inherent in the Constitution.[67] A court examines whether the liberty interest is so firmly entrenched in society's traditions and conscience so as to be fundamental.[68] One such liberty

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[61] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (stating that statutes subject to strict scrutiny are usually struck down). In contrast, the rational basis test is a very minimal test: nearly every state action will pass a rational basis test. *See* GUNTHER & SULLIVAN, *supra* note 24, at 467 (stating that due process is fatal to legislation only when fundamental right is reviewed under heightened judicial scrutiny).

[62] *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (explaining that liberty rights include both enumerated and inherent constitutional rights); NOWAK & ROTUNDA, *supra* note 28, at 415 (stating that fundamental rights can be either explicit or inherent in Constitution). A non-exclusive list of fundamental liberty rights includes the right to marry, to have children, to marital privacy, to use contraception, and to abortion. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[63] *See Roth*, 408 U.S. at 572 (explaining that liberty rights include enumerated constitutional rights); NOWAK & ROTUNDA, *supra* note 28, at 415.

[64] *See* Brandenburg v. Hous. Auth. of Irvine, 253 F.3d 891, 899-900 (6th Cir. 2001); Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1562 (11th Cir. 1995).

[65] *See* Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (holding that fundamental rights are those "implicit in the concept of ordered liberty"); Burns v. Brinkley, 933 F. Supp. 528, 531 (E.D.N.C. 1996) (citing Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986)) (stating that inherent fundamental rights are those founded upon deeply rooted notions of personal interests derived from Constitution).

[66] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that procreation is fundamental individual right implicit in Constitution).

[67] *See Glucksberg*, 521 U.S. at 720-21; Michael H. v. Gerald D., 491 U.S. 110, 122-23 (1989).

[68] *See Michael H.*, 491 U.S. at 122-23 (stating that test for finding inherent fundamental right is that it be traditionally protected by American society); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (holding that fundamental rights are those "implicit in the concept of ordered liberty"); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (stating that fundamental rights are those "principle[s] of justice so rooted in the traditions and

interest is the right to freedom of movement, or more specifically, the right to travel.[69] While the Supreme Court has recognized interstate travel as a fundamental right, it has not decided whether the right to intrastate travel is also fundamental.

2. United States Supreme Court Decisions Regarding Freedom of Movement

The Supreme Court addressed the fundamental right to interstate travel in *United States v. Guest*.[70] *Guest* involved the criminal prosecution of a conspiracy to deprive African-American citizens of their right to interstate travel.[71] In examining the plaintiff's right to travel, the Court held that the right was indeed fundamental.[72] The Court reasoned that the right to interstate travel was essential to the concept of the federal union.[73] An individual's right to pass through every state as freely as their own was a right implicitly guaranteed to all citizens of the United States.[74] The Court reasoned that although there was no textual reference to interstate travel in the Constitution, this right is a necessary component to the federal union.[75]

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conscience of our people as to be ranked as fundamental").

[69] *See* Williams v. Fears, 179 U.S. 270, 274 (1900) (stating that right of locomotion is attribute of personal liberty); *see also Michael H.*, 491 U.S. at 121 (stating that liberty protected by substantive due process goes beyond freedom from physical restraint); Hutchins v. District of Columbia, 188 F.3d 531, 536 (D.C. Cir. 1999) (stating that right to free movement is synonymous with right to liberty).

[70] United States v. Guest, 383 U.S. 745, 757-60 (1966).

[71] *Id.* at 757-58 (holding that state law was unconstitutional because it interfered with African-American citizens' rights to travel freely interstate).

[72] *Id.* The Court noted that this right, though not explicit in the Constitution, was explicit in the Articles of Confederation. *Id.* at 758 n.14 ("The people of each State shall have free ingress and regress to and from any other State").

[73] *Id.* at 757.

[74] *Id.* at 757-58 (citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1867)).

[75] *See id.* (recognizing that Court has used different clauses for textual source of right to travel). In his dissent in *Shapiro v. Thompson*, Justice Harlan stated that the Court's interstate travel opinions have used four different constitutional provisions as the source of this right. Shapiro v. Thompson, 394 U.S. 618, 666 (1969) (Harlan, J., dissenting). The Court has held the right to travel is found in the Commerce Clause, Privileges and Immunities Clauses of Article Four and the Fourteenth Amendment, and the Fifth Amendment Due Process Clause. *Id.*; *see also* Jonathan Hangartner, Comment, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203, 217 n.15 (stating that Court has articulated different sources for right to interstate travel, including Privileges and Immunities Clauses of Article Four and Fourteenth Amendment, Commerce Clause, and Due Process Clauses of the Fifth and Fourteenth Amendments).

The Court has found specific textual support for two aspects of the right to travel. *See* Saenz v. Roe, 526 U.S. 489, 500 (1999). The right to travel to another state is found in the

The Supreme Court recently declined to address the issue of whether the right to intrastate travel is fundamental in *City of Chicago v. Morales*.[76] *Morales* involved a Chicago anti-loitering law, the purpose of which was to stop gang-related criminal activity.[77] Chicago's Gang Congregation Ordinance prohibited criminal street gang members from loitering in public places.[78] A number of people arrested for violating the ordinance appealed their convictions.[79] The Illinois Appellate Court reversed the appellants' convictions.[80] The court found that the ordinance impaired the freedom of association rights of non-gang members under both the Federal and Illinois Constitutions.[81] The court further held that the ordinance was unconstitutionally vague, that it criminalized status rather than conduct, and that it jeopardized the appellants' Fourth Amendment protection from unreasonable search and seizure.[82] The Illinois Supreme Court affirmed, holding the ordinance was impermissibly vague.[83] The U.S. Supreme Court affirmed the Illinois Supreme Court, holding that the ordinance was both vague and overbroad.[84]

While the Supreme Court's holding rested on vagueness and overbreadth, a plurality of the Court recognized that the ordinance also impacted the plaintiffs' liberty rights to move from one place to another under the Fourteenth Amendment.[85] The plurality stated that "the freedom to loiter for innocent purposes is part of the 'liberty' protected

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Privileges and Immunities Clause of Article Four. *Id.* at 501. The right of a newly arrived resident to have the same status as every other citizen of a state is protected by the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 503. However, the court has not yet identified the textual source for the right to locomotion. *Id.* at 500-01 (stating that it is unnecessary to find source for right to locomotion).

[76] City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999).

[77] *Id.* at 45-46.

[78] *Id.* at 46.

[79] *Id.* at 50.

[80] *Id.*

[81] *Id.*

[82] *Id.* The Fourth Amendment protects individuals from unreasonable searches and seizures, and mandates probable cause as necessary for the issuance of warrants. U.S. CONST. amend. IV.

[83] *Id.* Criminal statutes require clear notice so that ordinary individuals will understand what conduct the law forbids. *Id.* at 56. A law is unconstitutionally vague when it lacks this clear notice. *Id.*

[84] *Id.* at 51, 52, 63.

[85] *Id.* at 53-54. The Amicus Curiae brief for the United States agreed with this proposition. *See id.* at 54 n.19 (citing Brief for United States as Amicus Curiae 23) (finding that individuals have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others).

by the Due Process Clause of the Fourteenth Amendment."[86] However, the Court did not conduct a substantive due process analysis because it invalidated the ordinance as being unconstitutionally vague.[87] As a result, the Court failed to address whether the liberty right in free movement was a fundamental right under the Due Process Clause.[88] Thus, the issue is an open question for the circuit courts.[89] The circuit courts are split on this issue.[90]

3. Circuit Court Decisions Regarding Freedom of Movement

While the Supreme Court has held that the right to interstate travel is fundamental, the circuit courts are split as to whether the right to intrastate travel is also fundamental. The Fourth, Sixth, Seventh, and District of Columbia Circuits have declined to recognize intrastate travel as a fundamental right.[91] The decisions of these circuits generally do not recognize this right because the Supreme Court has not held that the right to intrastate travel is fundamental.[92] These courts refuse to extend the Supreme Court's interstate travel jurisprudence to encompass an analogous fundamental right to intrastate travel.[93]

In contrast, the First, Second, Third, Fifth, and Ninth Circuits all recognize a fundamental right to intrastate travel.[94] The Second Circuit

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[86] *Id.* at 53-54.

[87] *Id.* at 64 n.35.

[88] *See id.* at 53-54.

[89] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974) (deciding that it would not hold whether there is fundamental right to intrastate travel because finding such fundamental right would not help claimant).

[90] *See* Hutchins v. District of Columbia, 188 F.3d 531, 537 (D.C. Cir. 1999).

[91] *See* Chavez v. Ill. State Police, 251 F.3d 612, 648-49 (7th Cir. 2001) (holding that lower court incorrectly found that state action did not violate interstate travel); *Hutchins*, 188 F.3d at 536, 541 (holding that curfew law did not implicate any fundamental rights and upholding regulation under intermediate scrutiny); Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (holding that child curfew ordinance was constitutional after intermediate scrutiny); Wardwell v. Bd. of Educ., 529 F.2d 625, 627 (6th Cir. 1976) (holding that there is no federal constitutional right to intrastate travel).

[92] *See Hutchins*, 188 F.3d at 536-38 (stating that right to intrastate travel is not fundamental because interstate travel cases do not support intrastate travel); *Wardwell*, 529 F.2d at 627 (holding that fundamental right to intrastate travel does not exist because it has not been recognized by Supreme Court).

[93] *Hutchins*, 188 F.3d at 536-38; *Wardwell*, 529 F.2d at 627.

[94] *See* Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997) (holding that there is fundamental right to free movement and intrastate travel); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (assuming that claimants have fundamental right to move freely within state without actually deciding); Lutz v. City of York, 899 F.2d 255, 261 (3d Cir. 1990) (finding that right to intrastate travel is fundamental); King v. New Rochelle Mun. Hous.

recognized this right in *King v. New Rochelle Municipal Housing Authority*.[95] In *King*, the Municipal Housing Authority built, maintained, and administered public housing facilities in New Rochelle, New York using city and state funding.[96] In conjunction with administrating the public housing, the Housing Authority imposed a five-year minimum residency requirement for admission to the housing.[97] Therefore, housing was only available to people who had resided in New Rochelle for at least five continuous years prior to applying for public housing.[98]

The claimants, residents of New Rochelle, were denied public housing because they had not been residents of the city for five years.[99] The claimants argued that the durational housing requirement violated their fundamental right to travel.[100] The district court found for the claimants, and held that the regulation unconstitutionally infringed on their right to travel.[101]

The Second Circuit affirmed the lower court's decision.[102] The *King* court first examined whether the claimants were asserting a fundamental right.[103] The court noted that the U.S. Supreme Court had previously recognized only the right to interstate travel as fundamental.[104] However, the court reasoned that it would be meaningless to recognize a fundamental right to interstate travel without recognizing a correlative

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Auth., 442 F.2d 646, 648 (2d Cir. 1971) (holding that right to intrastate travel is fundamental); Cole v. Hous. Auth. of Newport, 435 F.2d 807, 811 (1st Cir. 1970) (holding that there is fundamental right to travel and applying strict scrutiny to regulation that impeded both interstate and intrastate travel).

[95] *King*, 442 F.2d at 647-48.

[96] *Id.* at 647. However, no funds were received from the federal government. *Id.*

[97] *Id.* New York state law allowed each locality to set its own residency requirements. *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 648.

[101] *Id.* at 647-48. The lower court relied specifically on the United States Supreme Court's decision in *Shapiro v. Thompson*. *Id.* at 648 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)). The *Shapiro* Court held a similar durational housing requirement unconstitutional. *Id.* However, the requirement in the Shapiro case only implicated the right to interstate travel. *See id.* at 648-49.

[102] *Id.* at 647-48. The Second Circuit relied on United States Supreme Court precedent and adopted the persuasive reasoning of the First Circuit. *See id.* at 648 (citing Shapiro v. Thompson, 394 U.S. 618 (1969); Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. (1970)).

[103] *Id.* at 647-48. The Second Circuit relied on United States Supreme Court precedent and adopted the persuasive reasoning of the First Circuit. *See id.* at 648 (citing Shapiro v. Thompson, 394 U.S. 618 (1969); Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. (1970)).

[104] *Id.*

fundamental right to intrastate travel.[105] Thus, the court concluded that intrastate travel is a fundamental right and applied strict scrutiny to the Housing Authority's residency requirement.[106] Under this standard, the court determined that the ordinance was unconstitutional because the state had not presented evidence of a compelling interest.[107] As such, the state unconstitutionally infringed on the claimants' fundamental rights to interstate and intrastate travel.[108]

Following the Second Circuit's lead, the Third Circuit in *Lutz v. City of York* held that intrastate travel was a fundamental right.[109] In *Lutz*, the City of York, Pennsylvania, passed an ordinance prohibiting drivers from cruising in designated parts of the city.[110] The City's purported interests were in clearing congested roadways, allowing access for emergency vehicles, and cutting down excessive noise and pollution.[111]

Lutz challenged the ordinance in court, claiming that it violated his right to travel.[112] The district court held that Lutz's asserted right to travel was not a fundamental right under the Fourteenth Amendment.[113] The court therefore applied a rational basis test to uphold the ordinance.[114]

The Third Circuit began its analysis of Lutz's claim with a survey of U.S. Supreme Court precedent.[115] The court noted that, although a fundamental right of interstate travel had been firmly established, the Supreme Court had not yet determined whether intrastate was also fundamental.[116] Therefore, a clear precedent as to the status of intrastate travel was lacking.[117] The court postulated that the lack of precedent arose, in part, from the Supreme Court's unwillingness to identify the

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[105] *Id.*

[106] *Id.* at 649.

[107] *Id.* The only interest the court found that the state had demonstrated was to allow each community to care for its own before allowing benefits to go to members of other communities. *Id.*

[108] *Id.*

[109] 899 F.2d 255, 261 (3d Cir. 1990).

[110] *Id.* at 257. The ordinance defined "cruising" as unnecessary repetitive driving, which is driving a motor vehicle on a street past a traffic control point set up by the York City Police Department more than twice in any two-hour period. *Id.* The ordinance prohibited cruising between 7:00 p.m. and 3:30 a.m. *Id.*

[111] *Id.*

[112] *Id.* at 258.

[113] *Id.*

[114] *Id.*

[115] *See id.* at 258-61.

[116] *Id.* at 258-59.

[117] *Id.* at 258-61.

textual source that supports the right to interstate travel.[118] The court pointed out that while seven different textual sources have been identified, the Supreme Court has never decided which is the source of the right to travel.[119]

Finding no clear precedent for the textual source of the fundamental right to interstate travel, the *Lutz* court undertook an independent search for a constitutional source.[120] The court found persuasive Supreme Court decisions holding the textual source for the right to interstate travel was the Due Process Clause of the Fourteenth Amendment.[121] The court determined that this was the source of the right to travel.[122] The court settled on the Due Process Clause after finding the right to intrastate travel fit within the test for finding a fundamental right in a substantive due process analysis.[123] The court held that the right to intrastate travel was implicit in the concept of ordered liberty.[124]

Having determined the right to travel was rooted in the Due Process Clause, the *Lutz* court engaged in a substantive due process analysis.[125] The court narrowly defined the right at issue as the right to travel locally through public spaces and roadways.[126] The court next determined that this right was fundamental.[127] The court applied the narrowest test advanced by a minority of the Supreme Court for finding an inherent fundamental right.[128] This test is that the right be "so rooted in the traditions and conscience of our people" that it is fundamental.[129] The

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[118] *Id.* at 260 & n.9 (citing United States v. Guest, 383 U.S. 747, 760 (1966)) (stating that there was no need to identify source of right to travel because parties agreed that right to interstate travel was fundamental).

[119] *Id.* at 260-61.

[120] *Id.* at 262-67. The *Lutz* court found that the Supreme Court had identified the Privileges and Immunities Clauses of Article Four and the Fourteenth Amendment, the rights of national citizenship, the Commerce Clause, the Equal Protection Clause, and substantive due process as textual sources for the right of interstate travel. *Id.*

[121] *See id.* at 266 (citing Williams v. Fears, 179 U.S. 270, 274 (1900)) (finding right of locomotion is attribute of liberty secured by Fourteenth Amendment); Kent v. Dulles, 357 U.S. 116, 125 (1958) (stating that right to travel is liberty right that state cannot deprive individual of without due process)).

[122] *Id.* at 266-68. The court held that this source supported both interstate and intrastate travel. *Id.*

[123] *Id.* at 267; *see* Section I(A)(1), *supra*.

[124] *Id.* at 268.

[125] *Id.* at 267-70.

[126] *Id.* at 268.

[127] *See id.* (describing right as "deeply rooted in the Nation's history").

[128] *Id.* at 268-69.

[129] *See id.* (Scalia, J., plurality opinion) (quoting Michael H. v. Gerald D., 491 U.S. 110 (1989)).

court also adopted a further limiting phrase, that the tradition be evaluated at the greatest level of specificity possible.[130]

Under this strict formulation, the *Lutz* court found that the right to intrastate travel is indeed deeply rooted in the country's history.[131] The court stated that its holding was necessary; it would be meaningless to recognize a fundamental right to interstate travel without recognizing the correlated fundamental right to travel within a state.[132] As such, the court recognized the right to intrastate travel as fundamental under a substantive due process analysis.[133]

Both *Lutz* and *King* represent the view that the Due Process Clause protects a fundamental right to intrastate travel.[134] These courts perceived intrastate travel as a right to general mobility.[135] Importantly, these cases provide persuasive authority for other circuits to recognize the right of free movement about the public space as a fundamental right. Nevertheless, several circuits have explicitly rejected these courts' rationale.[136]

The District Court for the Northern District of Indiana faced the question of whether intrastate travel is a fundamental right in *Doe v. City of Lafayette*.[137] Because the Seventh Circuit has not decided if the right to intrastate travel is fundamental, the *Doe* court looked to other circuits for persuasive authority to determine this issue.[138] The court ultimately decided that the right to intrastate travel is not fundamental.[139]

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[130] *Id.* at 268.

[131] *Id.*

[132] *Id.* at 261 (quoting King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971)).

[133] *Id.* at 268. Although finding a fundamental right, the *Lutz* court applied intermediate rather than strict scrutiny. *Id.* at 269. The court relied on an analogy to First Amendment cases in this holding. *Id.* The court felt this was appropriate as courts apply intermediate scrutiny to time, place, and manner restrictions to the traditional public fora known as free speech. *See id.* (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293-94 (1984)).

[134] *See* Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993); Cole v. Hous. Auth.of Newport, 435 F.2d 807, 811 (1st Cir. (1970)).

[135] *See* Andrew Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 836 (1992).

[136] The Fourth, Sixth, Seventh, and District of Columbia circuits have not recognized the right to intrastate travel as a fundamental right. *See* discussion and cases cited *supra* note 91.

[137] 160 F. Supp. 2d 996, 1003 (N.D. Ind. 2001).

[138] *Id.*

[139] *Id.*

II. *DOE V. CITY OF LAFAYETTE*

Doe, a resident of Lafayette, Indiana, was a convicted sex offender.[140] His convictions ranged from voyeurism and exhibitionism to child molestation.[141] Doe's last conviction was in 1991, for child molestation.[142] As punishment for this crime, the court ordered Doe to four years of house arrest and four years of probation in Lafayette.[143] He received counseling from an addictions counselor, and attended a sex-offenders therapy group.[144] He also took medication to alleviate his sexual urges.[145] Doe had no convictions for ten years prior to the litigation, and had lived in Lafayette during that time.[146]

In January 2000, Doe walked to a Lafayette public park.[147] There he watched a number of young teenagers for about half an hour.[148] He had recently begun having sexual thoughts about children again and had gone to the park for the purpose of watching teenagers.[149]

Realizing the impropriety of these thoughts, Doe left the park on his own accord.[150] He contacted both his addictions counselor and his sexual offenders group about the incident.[151] An anonymous tip alerted Doe's former probation officer of the incident.[152] The probation officer then told the Lafayette Police Department about Doe's actions.[153] A meeting occurred between the police chief, city superintendent, and city attorney.[154] As a result of this meeting, the Parks Department issued a ban order prohibiting Doe from any of the city's public parks.[155] The

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[140] *Id.* at 997.

[141] *Id.*

[142] *Id.*

[143] *Id.* The City did not prohibit Doe from entering public parks during the years of his house arrest or probation. *Id.*

[144] *Id.*

[145] *Id.* Dr. Moisan-Thomas believed that Doe was in control of his urges even without this medication. *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* While at the park, Doe had sexual fantasies, such as exposing himself to one of the children or making contact with one of them. *Id.* at 998.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* The court noted that it was concerned with the procedure used to institute the ban order. However, the court did not further explore the issue because Doe failed to raise a procedural due process claim. *See id.* at 999 n.2.

[155] *Id.* at 998. The court cited the text of the city's ban order:

order made it a criminal trespass offense for Doe to enter park property.[156]

A typical ban order prohibits teenagers or young adults who have vandalized park property or disturbed park patrons from entering the public property.[157] The ban informs individuals that they will be arrested for trespass if they are found in the park during the time the order is in effect.[158] While a typical ban order lasts for a week or a few months, the order the City placed on Doe was a permanent ban from all park property.[159]

Doe filed suit against the City, alleging that the ban violated his rights under the First and Fourteenth Amendments.[160] The court faced a question of first impression: whether a ban order prohibiting a convicted sex offender, who was no longer serving a criminal sentence, from all city parks was constitutional.[161] Doe argued that the ban order violated his First Amendment rights because he was being punished for mere thoughts.[162] He also argued the ban violated his substantive due process rights because it infringed upon his fundamental right to freely enter public areas.[163] Doe asked the court to strike down the ban order so that he could play softball, attend concerts and events, and enjoy the park with adult friends.[164] The City argued that the ban order did not violate Doe's rights because it was enacted to accomplish a legitimate state interest: protecting the community's youth.[165]

> Due to reports of your improper behavior toward juveniles using city park property, you are hereby notified that you are not allowed to enter any city park property, including Columbian Park at any time for any purpose. If you are observed on park property, you will be arrested for trespass.

Id.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See id.* at 999 (stating that Doe contended that ban order violated First Amendment and substantive due process rights).

[161] *Id.* (stating that issue was whether convicted sex offender who already served his sentence had right to sit in park, watching and having inappropriate sexual thoughts regarding children).

[162] *Id.* at 1000.

[163] *Id.* at 1001.

[164] *Id.* at 998.

[165] *Id.* at 999, 1004.

On cross motions for summary judgment, the district court granted the City's motion.[166] The court held there were no issues of material fact, and that the ban order did not violate Doe's constitutional rights.[167] The court first analyzed Doe's argument that the ban violated his First Amendment rights.[168] The court dismissed this argument, finding Doe did not identify a message that the ban order stopped him from conveying.[169] Generally, mere thoughts cannot be regulated.[170] However, because communicating ideas was not involved, the fact that the ban incidentally affected Doe's thoughts did not make the ban order invalid.[171]

Turning to Doe's Fourteenth Amendment claim, the court disagreed with his contention that he had a fundamental liberty right to enjoy and wander through a public park.[172] In support of its holding, the court distinguished the U. S. Supreme Court's decision in *City of Chicago v. Morales* from Doe's case.[173] *Morales* recognized a liberty right to loiter for innocent purposes.[174] According to the *Doe* court, however, *Morales* did not establish a fundamental liberty interest in free movement.[175] While Doe presented evidence that he had innocent purposes for using the park, including participating in a softball league and attending concerts,[176] the court agreed with the City that there was no evidence Doe had any innocent purpose for being in the park on the day the incident occurred.[177] Therefore, the court concluded that *Morales* did not apply because Doe's purposes did not satisfy *Morales'* "innocent purposes" test.[178] Further, the court concluded that it was not bound by *Morales*

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[166] *Id.* at 1004.

[167] *Id.* at 997, 999, 1004.

[168] *Id.* at 1000-01.

[169] *Id.* at 1000.

[170] *See id.* at 1001 (stating that City is not attempting to control mind or thoughts of Doe at city parks, or in privacy of his own home).

[171] *Id.* at 1000-01 (quoting Paris Adult Theatre I v. Slayton, 413 U.S. 49, 67 (1973)).

[172] *Id.* at 1002.

[173] *Id.* at 1002-03.

[174] *Id.* at 1002 (citing City of Chicago v. Morales, 527 U.S. 41 (1999)).

[175] *Id.*

[176] *Id.* at 998.

[177] *Id.* at 1002. The court also found that Doe submitted some innocent activities at the city parks that he wanted to participate in. *Id.* However, because he had not recently participated in such activities Doe's evidence cut against the court finding that the city unconstitutionally violated Doe's liberty interest. *Id.* This was because the only reason he had recently used the parks was to watch children in response to sexual urges. *Id.* However, the parties presented conflicting evidence about whether Doe had participated in a softball league before the city instituted the ban order. *Id.* at 998, 1002.

[178] *Id.* at 1002.

because that decision was based on grounds of overbreadth and vagueness.[179] The *Doe* court determined that the ban at issue was sufficiently narrowly drawn to the facts and the individual in question, and thus *Morales* was inapposite.[180]

Finding *Morales* was not determinative, the court then conducted a substantive due process analysis.[181] First, the court defined Doe's asserted interest narrowly: the right to enjoy and wander about the city's public parks.[182] Next, the court addressed the issue of whether there was a fundamental interest in freedom of movement.[183] The court noted that the test for determining a fundamental right is to look at this country's history, legal traditions, and practices.[184] However, the court did not conduct an independent analysis of whether freedom of movement is rooted in this nation's traditions.[185] Instead, the court looked to the Supreme Court and other circuits for guidance.[186] Specifically, the court looked for cases involving intrastate travel.[187] The court found that neither the Supreme Court nor the Seventh Circuit had addressed the question of whether there is a fundamental right to free movement within a state.[188]

Turning to cases from other jurisdictions, the court distinguished two decisions that Doe used for legal support.[189] The court found that these cases did not mandate holding that there is a fundamental interest in freedom of movement.[190] The first case, *Johnson v. City of Cincinnati*,[191] involved a city-wide ban order prohibiting anyone convicted of a drug-related crime from entering an established drug-free zone.[192] The *Johnson* court recognized that there was a fundamental right to intrastate

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[179] *Id.*

[180] *Id.*

[181] *Id.* at 1003-04.

[182] *Id.* at 1002.

[183] *Id.* at 1003.

[184] *Id.* at 1002 (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Collins v. City of Harker Heights, 503 U.S. 115, 125-26 (1992)).

[185] *See id.* at 1002-04.

[186] *See id.*

[187] *Id.* at 1003.

[188] *Id.*

[189] *Id.* at 1003-04.

[190] *Id.*

[191] *Id.* at 1003 (citing Johnson v. City of Cincinnati, 119 F. Supp. 2d 735 (S.D. Ohio 2000)).

[192] *Johnson*, 119 F. Supp. 2d at 736.

travel.[193] However, the *Doe* court distinguished this case because the *Johnson* court found an additional fundamental right at issue beyond freedom of movement, the right of freedom of association.[194] The order in *Johnson* implicated the freedom of association because it interfered with the claimants' rights to form and preserve highly personal relationships.[195] The court emphasized that the existence of multiple interests was crucial in *Johnson*.[196] Therefore, the court distinguished *Johnson* because Doe did not argue that the ban order also abridged a separate, established fundamental right.[197]

Furthermore, the *Doe* court concluded that *Johnson* was most likely overruled by the Sixth Circuit's subsequent decision in *Thompson v. Ashe*.[198] In *Thompson*, the Sixth Circuit held that a policy prohibiting the plaintiff from accessing public housing did not violate the plaintiff's Fourteenth Amendment right to free movement because the policy only affected intrastate travel.[199] Therefore, the court concluded that Doe's reliance on *Johnson* was unpersuasive.[200]

The second case the *Doe* court distinguished was *City of New York v. Andrews*.[201] The issue in *Andrews* was the constitutionality of an injunction prohibiting pimps and prostitutes from entering a section of New York City.[202] While *Andrews* recognized there were constitutional concerns at issue in the case, it determined that it was improper to impose an injunction restricting the right to travel.[203] Noting that the ban order at issue in *Doe* was not established by a court injunction, the *Doe* court distinguished *Andrews* on this basis.[204]

Rather than rely on *Johnson* or *Andrews*, the *Doe* court found persuasive reasoning in *Thompson v. Ashe*. In *Thompson*, the Sixth Circuit found that

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[193] *Id.* at 745 (holding that limited fundamental right to intrastate travel exists in form of right to freedom of movement).

[194] *Doe v. City of Lafayette*, 160 F. Supp. 2d at 1003. The *Johnson* court found the fundamental right of familial association was also infringed by the city's ban order. *Johnson*, 119 F. Supp. 2d at 745.

[195] *Johnson*, 119 F. Supp. 2d at 741.

[196] *Doe v. City of Lafayette*, 160 F. Supp. 2d at 1003 (stating that order in *Johnson* impinged upon fundamental rights of familial association and movement).

[197] *See id.* (citing *Johnson*, 119 F. Supp. 2d at 744).

[198] *See id.* (citing Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001)).

[199] *Id.* (citing *Thompson*, 250 F.3d at 406).

[200] *Id.*

[201] *Id.* (citing City of New York v. Andrews, 719 N.Y.S.2d 442 (N.Y. Sup. Ct. 2000)).

[202] *Id.* (citing *Andrews*, 719 N.Y.S.2d at 442).

[203] *See id.* (citing *Andrews*, 719 N.Y.S.2d at 454).

[204] *Id.* at 1003.

a no trespass policy was not unconstitutional because it only infringed on the non-fundamental right of intrastate travel.[205] Accordingly, the court found that Doe did not have a fundamental right to move about the public area.[206] Having decided that freedom of movement is not a fundamental right, the court applied a rational basis test to evaluate the constitutionality of the ban at issue.[207] Under this test, the ban order had to be rationally related to a legitimate state interest.[208]

The *Doe* court concluded that the City had a legitimate interest in protecting the welfare of its citizens.[209] According to the court, there existed a special and strong interest in protecting the welfare of the City's youth, who may have been lacking the capacity to exercise their rights fully and wisely.[210] The court also concluded that the ban order was sufficiently narrow in its scope to achieve this legitimate state interest.[211] Therefore, the court held the ban did not violate Doe's substantive due process rights because it was rationally related to a legitimate state interest.[212] The court's ruling allowed the City to continue banning Doe from Lafayette's public parks.[213]

III. ANALYSIS

The *Doe* court incorrectly granted summary judgment for the City of Lafayette. First, the court incorrectly defined the substantive right at issue. By defining this right too specifically, the court in effect resolved the issue before engaging in substantive due process analysis. Second, freedom of movement is a fundamental right, and the City's ban order improperly regulated Doe's right to move about the public area. Third, because the court incorrectly determined freedom of movement to be a non-fundamental right, it applied the wrong test. The court should have applied a strict scrutiny test to the ban order rather than a rational basis test. Finally, the court's decision was dangerous public policy because it substantially undermined the City's asserted interests.

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[205] *See id.* (citing Thompson v. Ashe, 250 F.3d 399, 406 (6th Cir. 2001)).

[206] *Id.* at 1003, 1004.

[207] *Id.* at 1004.

[208] *Id.*

[209] *Id.*

[210] *Id.* (citing Hodgson v. Minnesota, 497 U.S. 417, 444 (1990)).

[211] *Id.*

[212] *Id.*

[213] *See id.* (granting City of Lafayette's motion for summary judgment).

A. The Court Defined the Right at Stake Too Narrowly, Dictating the Outcome of the Case

The *Doe* court defined Doe's right too narrowly. The first step in a substantive due process analysis is to define the right at issue.[214] The way the right is defined is important because it dictates how the court will analyze the case.[215] However, it is not settled law as to how the court should define any given right.[216] The Supreme Court simply states that the test is to "carefully describe" the right.[217] However, some justices of the Court, such as Justice Scalia, believe the definition should be further limited by defining the right with the greatest amount of specificity possible.[218]

The *Doe* court purported to carefully describe the right.[219] However, the court defined Doe's right in two very specific ways. First, the court termed the issue as "whether a convicted sex offender who is no longer serving a sentence or probation can be permanently banned from a city park after entering the park, watching young persons in the park and having inappropriate thoughts about those young persons."[220] The court later described Doe's right as that to "enjoy and wander through the various city parks in Lafayette."[221]

The *Doe* court described the right at stake with the greatest level of specificity possible. The court should not have used this level of specificity, as this is not the test currently promulgated by the majority of the Supreme Court.[222] Instead, the court should have "carefully described" the right at stake.[223] This allows a greater level of generality in defining the right, while still limiting the rights recognized under a

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[214] *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Reno v. Flores, 507 U.S. 292, 302 (1993).

[215] *See Glucksberg*, 521 U.S. at 720. Courts determine whether to apply a strict scrutiny or rational basis test by deciding whether the right at stake is fundamental. *Id.*

[216] *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., concurring) (noting dissent's criticism of using historical traditions to determine rights).

[217] *Glucksberg*, 521 U.S. at 721; *Flores*, 507 U.S. at 302.

[218] *See Michael H.*, 491 U.S. at 127 n.6 (Scalia, J., concurring).

[219] *See* Doe v. City of Lafayette, 160 F. Supp. 2d 996, 1001 (N.D. Ind. 2001) ("Specifically, Doe claims that the ban order violates his alleged fundamental right to enjoy and wander through a public park.").

[220] *Id.* at 999.

[221] *Id.* at 1002.

[222] *See Michael H.*, 491 U.S. at 127 n.6 (Scalia, J., concurring); *see also id.* at 132 (O'Connor, J., concurring) (disagreeing that Court must always define right at stake with greatest level of specificity possible).

[223] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

substantive due process analysis. Instead of defining Doe's right so narrowly, as the right to enjoy and wander through the various parks, the court should have defined the right as the right to move about the public area. This would enable the court to determine independently whether intrastate travel is a fundamental right, rather than simply concluding that such a right does not exist.[224]

The *Doe* court itself seemed to recognize that its definition was too specific. A majority of the cases the court used to examine whether the right was fundamental involved intrastate travel.[225] The court did not identify any cases recognizing a right to watch children and have inappropriate sexual thoughts about those children.[226] Nor did the court analyze cases involving a right to simply enjoy the park.[227] Defining Doe's right so narrowly allowed the court to dismiss his case without truly analyzing whether the right at stake was fundamental.[228]

B. The Court Should Have Held There Is Fundamental Right to Freedom of Movement

1. The Supreme Court Has Implicitly Recognized a Fundamental Right to Intrastate Travel, and Circuit Courts Have Explicitly Recognized This Right

The *Doe* court should have held that there is a fundamental right to free movement about the public area. The U.S. Supreme Court's plurality decision in *City of Chicago v. Morales* explicitly recognizes a liberty interest in the freedom to loiter in a public area.[229] *Morales* relied on language from previous Supreme Court cases, stating the right to move from one place to another is a personal liberty protected by the Constitution.[230] Furthermore, *Morales* acknowledged that the right to remain in a public place is as much a liberty right as the freedom to

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[224] *Doe v. City of Lafayette*, 160 F. Supp. 2d at 1003 (citing Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001)) (stating that reasoning of Thompson court was persuasive, but not conducting independent analysis of whether right to intrastate travel is fundamental).

[225] *Id.* at 1002-04.

[226] *See id.*

[227] *See id.*

[228] *See id.* Although the court found that Doe's right was not fundamental, it did not conduct an independent analysis of whether this right fit within the traditions of the country. *Id.*

[229] City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999).

[230] *Id.* at 53.

move inside the boundaries of the country.[231]

In so holding, *Morales* extended the language recognizing interstate travel as a fundamental right to recognize a liberty interest in staying in a public place.[232] *Morales* thus implicitly recognized a liberty interest in moving within a state. The Court did so by using language supporting a right to move from one place to another according to one's inclination.[233] Although *Morales* initially used this language to support the right of interstate travel, it also used this same language in a broader sense to recognize the fundamental right of intrastate movement.[234]

Those desiring to limit the fundamental rights recognized by the Supreme Court may argue that intrastate travel is not a fundamental right. They might treat the language in *Morales* as only dicta, and not as the Court's holding.[235] Thus, they would conclude that the Court has not recognized intrastate travel as a fundamental liberty right.[236] Similarly, those courts that have refused to recognize this right contend that the Court's language in interstate travel cases should not be extended to support a fundamental right in intrastate travel.[237] Those courts have held that intrastate travel does not implicate any of the components of the right to travel that the Court recognized.[238]

While it is true that the Supreme Court has not expressly recognized a fundamental right to intrastate travel, the Court has certainly indicated its willingness to recognize such a right.[239] Indeed, individual justices have argued that the right to intrastate travel is fundamental.[240] For instance, in a concurring opinion, Justice Douglas once expressed that the right to intrastate travel is as basic as the right to interstate travel.[241] In another opinion, Justice Marshall stated that the right to leave one's

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[231] *Id.* at 54.

[232] *See id.* at 53-54 (citing Kent v. Dulles, 357 U.S. 116, 126 (1958); Williams v. Fears, 179 U.S. 270, 274 (1900)).

[233] *Id.* at 53 (citing *Williams*, 179 U.S. at 274).

[234] *See id.*

[235] *Id.* (plurality opinion).

[236] *See* Hutchins v. District of Columbia, 188 F.3d 531, 536-38 (D.C. Cir. 1999); Wardwell v. Bd. of Educ., 529 F.2d 625, 627 (6th Cir. 1976).

[237] *See Hutchins*, 188 F.3d at 536; *Wardwell*, 529 F.2d at 627.

[238] *See* Thompson v. Ashe, 250 F.3d 399, 406 (6th Cir. 2001) (citing Saenz v. Roe, 526 U.S. 489, 500 (1999)).

[239] *See* Bykofsky v. Borough of Middletown, 429 U.S. 964, 964 (1976) (Marshall, J., dissenting) (arguing that intrastate travel is fundamental right).

[240] *See id.*; Bell v. Maryland, 378 U.S. 226, 255 (1964) (Douglas, J., concurring) ("The right of any person to travel interstate . . . is protected by the Constitution . . . . Certainly his right to travel intrastate is as basic.").

[241] *Bell*, 378 U.S. at 255.

house and move about is essential to the idea of ordered liberty.[242]

The Supreme Court has also used broad language that supports finding a fundamental right to intrastate travel.[243] For example, in *United States v. Guest*, the Court noted that it had long recognized that the right to travel throughout the United States was a fundamental right.[244] The Court cited Chief Justice Taney, who stated that the right to move throughout the entire country without interruption was as necessary as the right to travel within one's own state.[245] This broad language suggests the Court would support a fundamental right to intrastate travel.

Furthermore, while the Supreme Court has not explicitly recognized a fundamental right to intrastate travel, several circuits have.[246] These holdings extend the language of the Court in recognizing a fundamental right to travel interstate to also recognize a fundamental right to intrastate travel.[247] In *Lutz*, the Third Circuit used the Court's language stating that the right to travel could not be denied without due process of the law to find a fundamental right to intrastate travel.[248] Similarly, in *King*, the Second Circuit found a fundamental right in intrastate travel in the context of durational housing requirements. It also extended the Court's holding that such requirements were unconstitutional because they infringed on a fundamental right to interstate travel.[249] Both *Lutz* and *King* agreed that it is illogical to recognize interstate, but not intrastate, travel as a fundamental right.[250]

2. The Right to Intrastate Travel Satisfies the Supreme Court Test for Finding Fundamental Rights

Courts recognize a right as fundamental if it fits within our country's traditions.[251] The right to interstate travel has long been a part of this

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[242] *Bykofsky*, 429 U.S. at 964.

[243] *See* Williams v. Fears, 179 U.S. 270, 274 (1900).

[244] United States v. Guest, 383 U.S. 745, 757-58 (1966).

[245] *Id.* (citing Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).

[246] *See supra* Part I.B.2.

[247] *See Lutz*, 899 F.2d at 264; King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648-49 (2d Cir. 1971).

[248] *Lutz*, 899 F.2d at 266 (citing Williams v. Fears, 179 U.S. 270, 274 (1900)).

[249] *King*, 442 F.2d at 648 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)).

[250] *See Lutz*, 899 F.2d at 264-65.

[251] Indeed, some consider intrastate travel an easier case than other fundamental rights because it is "morally neutral" — it is not laden with moral judgments. Hangartner, *supra* note 75, at 223.

country's traditions.[252] The Supreme Court recognized that the right to travel was an essential attribute of national citizenship as early as 1867.[253] Furthermore, this right was explicitly mentioned in the Articles of Confederation, which predated the U.S. Constitution.[254] In recognizing this, the *Guest* Court found that the right was not explicitly mentioned in the Constitution because it was elementary to the concept of a federal union.[255] That the Court has recognized the right to travel since the beginning of the federal union demonstrates that this right fits within the traditions of this country.

The right to intrastate travel is inherent in the right to interstate travel, and also fits within the traditions of our country.[256] Both interstate and intrastate travel encompass the meaning of the word "liberty" in the Fourteenth Amendment.[257] It is difficult to exercise one's fundamental right to interstate travel without first traveling intrastate.

The right to intrastate travel is also inherent in the right to interstate travel. Holding that intrastate travel is not a fundamental right would mean that one's liberty interest in moving about the country is protected at a high level only after one crosses state borders. This distinction is plainly arbitrary. Furthermore, the Court has stated that traveling about the public area is a part of the amenities of life taken for granted by citizens of this country.[258] The Court implies that the right to intrastate travel is so essential to everyday life that it is fundamental.[259] The right to intrastate travel therefore satisfies the fundamental right test.

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[252] The Articles of Confederation expressly mention interstate travel. United States v. Guest, 383 U.S. 745, 758 (1966); *see* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (stating that intrastate travel is difficult to comprehend because moving about public area is "historically part of the amenities of life as we have known them.").

[253] Lutz v. City of York, 899 F.2d 255, 264 (3d Cir. 1990) (citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)); *see* Saenz v. Roe, 526 U.S. 489, 502 (1999) (stating that part of right to travel comes from status as citizen of United States); *Guest*, 383 U.S. at 758 (1966) (recognizing that right to travel is important part of citizenship); Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) (stating that right stems from status as citizen).

[254] *Guest*, 383 U.S. at 758 & n.14.

[255] *Id.* at 758.

[256] *See Lutz*, 899 F.2d at 268 (holding that right to intrastate travel satisfies test for finding fundamental right because it fits within traditions of country).

[257] *Cf.* Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("liberty is something more than an exemption from physical restraint. . . .").

[258] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

[259] *See Lutz*, 899 F.2d at 268 (citing *Papachristou*, 405 U.S. at 164) (stating that Supreme Court implicitly recognized right to move about public area).

C. The Court Should Have Applied Strict Scrutiny to Doe's Claim

The *Doe* court should have found the right to free movement in the public area is a fundamental right, warranting strict scrutiny.[260] Strict scrutiny would have required that the ban order be necessary for the state to achieve a compelling government interest.[261] Proponents of the ban order might argue that this issue is irrelevant because the order would have survived strict scrutiny. They would insist that the *Doe* court found that the ban order was narrowly drawn so as to address Doe's actions.[262] Further, they would suggest that the City has a strong interest in protecting its youth, who did not have the capacity to protect themselves.[263] Thus, the ban order was substantially related to the City's interest as it stopped Doe from easily accessing children and teenagers.

However, contrary to the contentions outlined above, the ban order would not pass strict scrutiny. While the state does have a compelling interest in protecting its youth, the ban order is not narrowly tailored to accomplish this goal. First, the ban order is overbroad because it prevented more than it was justified to prevent. The ban order prohibited Doe from entering the park for all purposes.[264] The City's goal was to protect its youth by disallowing Doe access to children and teenagers in the park.[265] However, this goal was not met by keeping Doe out of the public park for valid purposes. Thus, the ban order exceeded the scope of the state's police powers.

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[260] Although some circuit courts have held the right to intrastate travel a fundamental right, they do not agree about whether a court should apply strict or intermediate scrutiny. *Compare Lutz*, 899 F.2d at 269-70 (holding that intermediate scrutiny should be applied to evaluate regulations impinging fundamental right to intrastate travel), *with* King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) (holding that strict scrutiny is proper test to analyze claim regarding fundamental right to intrastate travel). *But see* Porter, supra note 135, at 854-55 (stating that *Lutz* court's use of intermediate scrutiny was incorrect for three reasons). Porter criticized the *Lutz* court's use of intermediate scrutiny because the court's use of First Amendment analogy was incorrect. *Id.* He also argued that intermediate scrutiny is inconsistent with other right to travel jurisprudence, and gives intrastate travel status of quasi-fundamental right. *Id.*

[261] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (noting that infringements on fundamental rights must be narrowly tailored to serve compelling state interest); Reno v. Flores, 507 U.S. 292, 302 (1993); Roe v. Wade, 410 U.S. 113, 155 (1973) (requiring that regulation limiting fundamental rights be justified by compelling state interest).

[262] Doe v. City of Lafayette, 160 F. Supp. 2d 996, 1002, 1004 (N.D. Ind. 2001).

[263] *Id.* at 1004 (citing Hodgson v. Minnesota, 497 U.S. 417, 444 (1990)).

[264] *Id.* at 998.

[265] *Id.* at 998-99.

Second, the ban order is underinclusive: it does not stop Doe from having inappropriate sexual thoughts about children.[266] Nor would it prevent Doe from committing child molestation or other sexual crimes.[267] The order does not protect children who are at risk of Doe's attentions in places other than public parks.[268] The ban order does not prohibit Doe from going on other public property, such as elementary schools.[269] Nor does it restrict him from approaching children in the neighborhood where he lives.[270] The ban order merely limits Doe's movements; it does not eliminate his access to children. Furthermore, the order does not deter other convicted sex offenders from being in the park.[271] Therefore, although the state interest in protecting its youth is certainly compelling, the ban order is drawn much too narrowly. As such it fails to satisfy the strict scrutiny test.

D. The Ban Order Fails to Achieve the Public Policy Interest Asserted by the City of Lafayette

The ban order is a problematic public policy decision for three reasons. First, it sets a dangerous precedent for how the City of Lafayette will deal with convicted criminals who have served their time. Second, it undermines the judicial system by punishing members of society that have not committed a crime. Lastly, the order discourages other sex offenders from obtaining help to try and remedy their inappropriate sexual urges.

The ban order sets a precedent for how the City will deal with convicted criminals. The City assumed that because Doe was a convicted criminal, he was at risk of committing more crimes. The order suggests that the City will take action against other convicted criminals who have served their time. Presumably, if a convicted murderer is found in a public area where he may be tempted to commit another murder, the City will ban this person from ever entering this public area. The City has effectively set a standard by which it will have to treat all

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[266] Doe did not commit any criminal actions while in the park. *Id.* at 998. His only action was watching children and having improper thoughts. *Id.* As having bad thoughts was Doe's only inappropriate action, this must be the behavior the ban order is attempting to prevent.

[267] *Id.* Although the ban order makes it a crime for Doe to enter the City's public parks, it does not add any additional prohibitory measures for committing other crimes. *See id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

other convicted criminals the same.

The order also has the effect of undermining the criminal law system. Doe was convicted of a crime and sentenced to a punishment.[272] He served his punishment in its entirety.[273] He also received psychiatric help, underwent different forms of therapy, and took drugs to correct his behavior.[274] The ban order not only undermines the fact the Doe is taking steps toward rehabilitation; it also diminishes the punishment Doe has already served.[275]

Finally, this policy discourages sex offenders from using counseling as rehabilitation. Doe took the appropriate action: he approached his therapist and sex offenders therapy group.[276] He admitted he had a problem, and was trying to remedy it.[277] But the City punished Doe, nevertheless.[278] This sends a message to other sex offenders that they should stay silent and not admit any recurring problems they may have. This actually undermines the City's policy goals, because it makes it more likely that sex offenders will be tempted to recommit, and will not seek the help they need when overcome with dangerous urges. Because of this, the *Doe* court's decision was detrimental to the City's public policy concerns.

CONCLUSION

The *Doe* court's grant of summary judgment to the City of Lafayette was ill advised. The court described Doe's alleged right with too much specificity, thus narrowing his right and limiting the scope of precedent examined. The court also should have recognized that individuals have a fundamental right to freedom of movement in the public under the Due Process Clause. This fundamental right would require courts to use a strict scrutiny analysis, under which the court in *Doe* should have invalidated the ban order. Furthermore, the ban order is difficult to justify on public policy grounds because it fails to achieve the policy aims asserted by the City. For these reasons, the court erroneously held

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[272] *Id.* at 997 (stating that Doe's last conviction was in 1991).

[273] *Id.* His punishment was four years of house arrest plus four years of probation. *Id.*

[274] *Id.*

[275] *Cf.* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 803-04 (2000) (arguing that banning convicted felons from voting denies offenders chance of rehabilitation).

[276] *Doe v. City of Lafayette*, 160 F. Supp. 2d at 998.

[277] *Id.*

[278] *Id.*

that the ban order did not violate Doe's liberty rights under the Fourteenth Amendment.

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