

A CONSTITUTIONAL RIGHT TO LOCALIZED INTRASTATE TRAVEL

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Baseball might be the American pastime, but by time spent, there is no activity that Americans spend more time doing than driving.¹ Americans love their vehicles, and long-distance driving through suburban and exurban sprawl is a marker of the American lifestyle.² From the early days of the Ford Model T, through the driving heyday of the 1950s and 1960s, to the electric and self-driving cars of today, the automobile has had a defining influence on American culture.³ While Americans may value the freedom of the open road, they nonetheless accept basic traffic regulations to ensure safety. Such laws usually dictate *how* one drives—how fast, how orderly, or how one must prove their abilities before receiving a driver’s license. Most people likely believe that those laws may not dictate *where* or *how much* one drives on public roads.⁴ Despite this perception, legislators have implemented statutes and ordinances with the purpose of restricting where and when drivers may proceed on public roads.⁵ Despite the potential for legislative overreach, the outcry in response to these rules has been tepid, with questions as to their constitutionality rarely raised before courts.⁶

In 2017, the town of Leonia, New Jersey, instituted a municipal ordinance which barred drivers who neither live nor work in Leonia from driving on its public roads during rush hour, ostensibly to limit gridlock to the George Washington Bridge.⁷ This law follows a long

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¹ Steven N. Gofman, *Car Cruising: One Generation’s Innocent Fun Becomes Another Generation’s Crime*, 41 BRANDEIS L.J. 1, 30 (2002).

² *Id.* at 31.

³ *Id.*

⁴ *Id.* at 3-4.

⁵ *Id.*

⁶ *Id.*

⁷ Steve Janoski, *Leonia’s Ban on Commuter Traffic Along Local Roads: Is It*

tradition of statutes enacted to limit undesirable drivers on public streets at undesirable times.⁸ The Third Circuit has held that when reviewing statutes limiting intrastate travel, as opposed to the more frequently discussed interstate travel, courts must apply intermediate scrutiny.⁹ Intermediate scrutiny requires that an important government interest be addressed through means, such as a statute, that are substantially related to that interest.¹⁰ This note will argue that while the history of so-called “cruising” jurisprudence or caselaw concerned with the rights of drivers to drive aimlessly on public roads—does grant municipalities some degree of discretion to limit intrastate travel, this statute likely fails intermediate scrutiny.¹¹

The concept of “cruising” has a long history in American culture, and imagination.¹² Depicted in many famous films like *American Graffiti*, groups of young Americans have, for years, gathered in their vehicles, driving aimlessly through town together.¹³ “Cruising” has been defined as:

A social phenomenon primarily involving 20th Century American youth owning or having access to automobiles, and essentially consists of the practice of driving slowly around a set ‘loop’ of streets in an urban area, especially during evenings, weekends, or other free time, and frequently entails talking between automobiles at stoplights, stopping randomly to greet acquaintances on the street, or engaging in like activities causing congestion and delay for those with legitimate business in the area.¹⁴

In practice, the act of cruising has led to both ample celebration and detraction.¹⁵ Supporters assert that cruising is “a rite of passage celebrating freedom, adulthood, and the authority to drive a car.”¹⁶ Detractors allege it leads to increases in crime, drug dealing,

Legal?, NORTHJERSEY.COM (Jan. 25, 2018, 6:18AM), <https://www.northjersey.com/story/news/bergen/leonia/2018/01/25/leonia-ban-commuter-traffic-local-roads-legal/1059993001/>.

⁸ Gofman, *supra* note 1, at 16.

⁹ Gofman, *supra* note 1, at 16.

¹⁰ Gofman, *supra* note 1, at 16.

¹¹ Gofman, *supra* note 1, at 16.

¹² Gofman, *supra* note 1, at 6.

¹³ Gofman, *supra* note 1, at 16.

¹⁴ Russell G. Donaldson, *Validity, Construction, and Effect of Statutes or Ordinances Forbidding Automotive “Cruising”—Practice of Driving Repeatedly Through Loop of Public Roads Through a City*, 87 A.L.R. 4th 1110 (1991).

¹⁵ Gofman, *supra* note 1, at 4.

¹⁶ Gofman, *supra* note 1, at 4 (citing Nesreen Khashan, *State Street Cruiser a Loser; Court Rejects His Constitutional Appeal of Traffic Ticket*, SALT LAKE TRIBUNE, Sept. 29, 2000, at B3).

prostitution, gang activity, and traffic infractions, as well as more mundane effects, such as congestion and traffic gridlock.¹⁷

I. BACKGROUND AND CASE LAW

The town of Los Gatos, California was among the first municipalities in the nation to enact a cruising ban in 1980.¹⁸ In doing so, the town defined cruising as:

Driving a motor vehicle on a highway (1) for the sake of driving, without immediate destination, (2) at random, but on the lookout for possible developments, or (3) for the purposes of (a) sightseeing repeatedly in the same area, and (b) while driving with the purpose of socializing with other motorists or pedestrians.¹⁹

The ordinance prohibited this activity in the central business district of the town.²⁰ The law was struck down several years later, largely on procedural grounds, as a result of substantive California state law governing municipal lawmaking.²¹ The constitutionality of the ban was not addressed.²² Nonetheless, this early attempt to define and prohibit aimless driving set the tone for future municipal ordinances—especially those distinguishing “social” and “repetitive” forms of driving from ordinary driving.²³

The hallmark case addressing the constitutionality of limiting drivers on public roads is *Lutz v. York*,²⁴ a case decided by the Third Circuit in 1990, just a decade after the Los Gatos ordinance was struck down. The Supreme Court has not yet addressed this issue substantively.²⁵ In this case, the Third Circuit reviewed a statute passed by the city of York, Pennsylvania prohibiting aimless driving in a certain part of the city at night.²⁶ Somewhat differently from the Los Gatos statute, this statute defines “unnecessary repetitive driving”—as:

Driving 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-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

¹⁷ Gofman, *supra* note 1, at 4.

¹⁸ Gofman, *supra* note 1, at 9.

¹⁹ Gofman, *supra* note 1, at 9.

²⁰ Gofman, *supra* note 1, at 9.

²¹ Gofman, *supra* note 1, at 10.

²² Gofman, *supra* note 1, at 10.

²³ Gofman, *supra* note 1, at 10-11.

²⁴ 899 F.2d 255 (3d Cir. 1990).

²⁵ *Id.*

²⁶ *Id.* at 257.

driving and therefore a violation of this Ordinance.²⁷

The ordinance passed the city council at the behest of the local police department, fire department, and other municipal emergency service personnel.²⁸ Legislative findings concluded the ordinance should be passed so as to:

[R]educe 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.²⁹

The York Police Department asserted that traffic caused by cruising creates traffic at levels worse than during rush hour.³⁰ The York Fire Department argued that this traffic “standstill” creates a danger to town safety, with emergency vehicles unable to proceed through town easily during nighttime hours.³¹ The fire chief testified that “seconds, not even minutes,” are critical to town safety, creating a strong government interest in regulating traffic.³²

The plaintiffs in *Lutz* challenged the ordinance on the grounds that such a statute violates their constitutional right to travel and that the ordinance is overbroad.³³ The lower court did not conclude the ordinance violated a right to travel, because it found that precedent only created a “liberty interest” in intrastate travel, and not a “fundamental right.”³⁴ Therefore, rational basis scrutiny was applied, and the interests provided by York was found constitutionally sufficient.³⁵

In reviewing the lower court’s decision, the Third Circuit sought to examine all possible constitutional grounds upon which a fundamental right to localized intrastate travel could be based.³⁶ The Circuit Court determined that Supreme Court precedent firmly guarantees a fundamental right to interstate travel.³⁷ In *Shapiro v. Thompson*,³⁸ the Supreme Court struck down durational residency requirements as a prerequisite to obtaining welfare benefits on Equal Protection grounds,

²⁷ *Id.*

²⁸ *Id.* at 257-58.

²⁹ *Id.* at 257.

³⁰ *Lutz*, 899 F.2d at 257.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 258.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Lutz*, 899 F.2d at 262.

³⁷ *Id.* at 258.

³⁸ 394 U.S. 618 (1969).

because the law distinguished long-time local residents from local residents who had moved between states. This holding meant that residents have the right to travel between states and relocate temporarily or permanently to other states without being treated differently by local, state, or federal law.³⁹ After the holding in *Shapiro*, the Supreme Court broadened its scope, holding, among other things, that minimum durational residency requirements may not be used to establish eligibility to vote or to receive free non-emergency medical care.⁴⁰ Although these cases illustrate a strong regard for freedom of movement, the Third Circuit found that they do not address the Constitution's requirements for intrastate travel.⁴¹

The Third Circuit did, however, find that the Supreme Court previously referenced a constitutional right to freedom of movement.⁴² In *Kolender v. Lawson*,⁴³ the Supreme Court examined an anti-loitering statute. The *Kolender* Court struck the statute down as vague, focusing mainly on the lack of adequate notice provided in the text.⁴⁴ However, the Third Circuit noted that the dicta suggested "'a constitutional right to freedom of movement' potentially implicated by the statute."⁴⁵ Likewise, in *Papachristou v. City of Jacksonville*,⁴⁶ which also addressed an individual's challenge to a municipal anti-loitering statute, the Third Circuit found that the Supreme Court's inclusion of a number of poems and works of literature mentioning wandering and walking as "part of the amenities of life," indicate an acknowledgment of freedom of movement. Nevertheless, the Supreme Court held that the statute discriminated against the poor and declined to address the issue of freedom of intrastate travel.⁴⁷ The Third Circuit concluded that it could not find direct justification for a right to localized intrastate travel in Supreme Court jurisprudence; therefore, it considered other constitutional grounds.⁴⁸

First, the Third Circuit examined the Article IV Privileges and Immunities Clause to see if it could justify a fundamental right to localized intrastate travel.⁴⁹ The Court examined a very early case,

³⁹ *Lutz*, 899 F.2d at 258 (citing *Shapiro*, 394 U.S. 618).

⁴⁰ *Id.* at 259.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352 (1983)).

⁴⁴ *Id.* at 260 n.8.

⁴⁵ *Lutz*, 899 F.2d at 260 n.8 (quoting *Kolender*, 461 U.S. at 358).

⁴⁶ *Id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972)).

⁴⁷ *See Papachristou*, 405 U.S. at 171 (1972).

⁴⁸ *Lutz*, 899 F.2d at 262.

⁴⁹ *Id.*

Corfield v. Coryell,⁵⁰ which recognized the right to travel and work out-of-state under the Privileges and Immunities Clause. In that case, the dicta noted that:

The right of a citizen of one state to pass through, or to reside in, any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . may be mentioned as [one] of the particular privileges and immunities of citizens, which [is] clearly embraced by the general description of privileges deemed to be fundamental⁵¹

This dicta implied the creation of a right to travel both through and within a state; however, subsequent precedent held that the Article IV Privileges and Immunities Clause does not, itself, create rights.⁵² Likewise, the Third Circuit found that the Fourteenth Amendment's Privileges and Immunities Clause is also inapplicable because it does not independently create rights.⁵³ Similarly, the Third Circuit found that the Supreme Court had already refused to recognize a right to travel as a right of citizenship in *United States v. Wheeler*,⁵⁴ holding it only applicable when a law impedes a citizen's ability to travel to exercise the rights and duties of citizenship. Additionally, the Third Circuit found that the Commerce Clause does not establish the right to freedom of localized intrastate travel, as the ordinance in *Lutz* did not facially or in effect burden the interstate flow of commerce.⁵⁵ Finally, the Third Circuit found that the Equal Protection Clause did not establish such a right because the statute did not define groups or distinguish between groups; rather, the ordinance barred certain actions on public roads.⁵⁶

Ultimately, the Third Circuit determined that the Due Process Clause established a fundamental, substantive right to localized intrastate travel.⁵⁷ The Court located dicta in early due process cases implying a right of intrastate travel.⁵⁸ For example, in *Williams v. Fears*,⁵⁹ a case decided in 1900, the Supreme Court found that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . secured by the Fourteenth Amendment" Likewise, a separate line of cases from

⁵⁰ *Id.* (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825)).

⁵¹ *Corfield*, 6 F. Cas. at 552.

⁵² *Lutz*, 899 F.2d at 262 (citing *Paul v. Virginia*, 75 U.S. 168 (1869)).

⁵³ *Id.* at 264.

⁵⁴ *Id.* at 264-65 (citing *United States v. Wheeler*, 254 U.S. 281 (1920)).

⁵⁵ *Id.* at 265.

⁵⁶ *Id.* at 265-66.

⁵⁷ *Id.* at 266.

⁵⁸ *Lutz*, 899 F.2d at 266.

⁵⁹ 179 U.S. 270, 274 (1900).

the 1950s and 1960s concerning the question of whether the federal government may constitutionally deny passports to Communists also implied a broad due process right to travel.⁶⁰ In *Kent v. Dulles*,⁶¹ the Supreme Court held that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.” Although this statement implies that the Supreme Court interpreted a right to travel as an important—and perhaps fundamental—right, the Third Circuit nevertheless found that the Supreme Court focused its holding directly on the issues of freedom of association.⁶² Subsequent case law muddies this understanding, with some cases—such as *Haig v. Agee*⁶³—upholding restrictions on international travel while distinguishing those restrictions from a general constitutional right to interstate travel within the United States. Because interstate travel is specified in *Haig*, the Third Circuit concluded that drawing a constitutional right to localized intrastate travel from this line of cases would be difficult.⁶⁴ The court subsequently concluded 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.”⁶⁵

Therefore, the court applied the test “usually articulated for determining fundamentality under the Due Process Clause,” which asks whether the right must be “implicit in the concept of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.”⁶⁶ The court also weighed, and ultimately adopted, Justice Scalia’s understanding of the Due Process Clause, holding that it protects “unenumerated rights ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁶⁷ Using this standard, the court concluded that the right to free intrastate movement—by vehicle or on foot—is “implicit in the concept of ordered liberty” and “deeply rooted in the Nation’s history.”⁶⁸ Therefore, the Court recognized that a fundamental right to

⁶⁰ *Lutz*, 899 F.2d at 266.

⁶¹ 357 U.S. 116, 125 (1958).

⁶² *Lutz*, 899 F.2d at 266.

⁶³ *Id.* at 266-67 (citing *Haig v. Agee*, 453 U.S. 280 (1981)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 267.

⁶⁶ *Lutz*, 899 F.2d at 267 (quoting *Palko v. Conn.*, 302 U.S. 319 (1937); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)).

⁶⁷ *Id.* at 268 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

⁶⁸ *Id.*

localized intrastate movement exists.⁶⁹

However, the Third Circuit was uncomfortable reviewing this fundamental right under strict scrutiny, which is customary for putative violations of due process rights.⁷⁰ Additionally, the court recognized that if strict scrutiny applies to the York statute, it would plainly fail, as the ordinance does not constitute the least restrictive means of preventing traffic problems.⁷¹ Instead, the court analogized the fundamental right to localized intrastate movement to the First Amendment right to freedom of speech.⁷² Just like freedom of speech jurisprudence permits reasonable, content-neutral and limited time, place, and manner restrictions on speech, the court held that time, place, and manner restrictions are necessary and reasonable for regulated intrastate movement as well.⁷³ Therefore, the Third Circuit held that this fundamental right should be reviewed under intermediate scrutiny, with an eye toward ensuring that ordinances are “narrowly tailored to meet significant city objectives.”⁷⁴ Under this reading, the court found that York’s ordinance constituted an appropriate use of the city’s police power, and that the ordinance was narrowly tailored enough to pass constitutional muster.⁷⁵

In the aftermath of the *Lutz* decision, challenges to statutes regulating cruising or other aimless driving met with mixed results, both within and outside of the Third Circuit.⁷⁶ The only major success came outside of the Third Circuit in the Minnesota state Court of Appeals.⁷⁷ In a Minneapolis suburb, an ordinance was passed prohibiting “driving three or more times in a designated no-cruising zone between 9:00 p.m. and 2:00 a.m.”⁷⁸ Citing *Lutz* extensively and reviewing under intermediate scrutiny, the court found that the ordinance was not narrowly tailored to pass constitutional muster, and that it constituted an unconstitutional violation of the fundamental right to intrastate movement.⁷⁹ The court specifically looked to the legislative findings

⁶⁹ *Id.*

⁷⁰ *Id.* at 269.

⁷¹ *Id.*

⁷² *Lutz*, 899 F.2d at 269.

⁷³ *Id.*

⁷⁴ *Id.* at 270.

⁷⁵ *Id.*

⁷⁶ Gofman, *supra* note 1, at 22.

⁷⁷ Gofman, *supra* note 1, at 22 (citing *State v. Stallman*, 519 N.W.2d 903, 906-10 (Minn. Ct. App. 1994)).

⁷⁸ Gofman, *supra* note 1, at 22 (quoting *State v. Stallman*, 519 N.W.2d 903, 906-10 (Minn. Ct. App. 1994)).

⁷⁹ Gofman, *supra* note 1, at 22 (citing *Stallman*, 519 N.W.2d at 906-10).

behind the ordinance's passage—claims regarding increased fighting, traffic violations, drug dealing, and other criminal activity—and found that all of them were already flatly prohibited by state and local law.⁸⁰ Therefore, the new anti-cruising ordinance is not narrowly tailored to address the alleged problems. The court found that “there [was] no hole in the Minnesota Criminal Code for this cruising ordinance to plug.”⁸¹ This conclusion implies that narrowly tailoring an ordinance to solve an important government interest necessitates some prior loophole or clear shortcoming of existing legislation.⁸² Layering new statutes on top of existing statutes does not meet the standard necessary to pass constitutional muster.⁸³

Following the ruling in *Lutz*, courts within the Third Circuit put the holding framework into action in subsequent cases, determining what government interest is important enough to pass the bar under intermediate scrutiny. In *Snowden v. State*,⁸⁴ the Supreme Court of Delaware applied the test set out in *Lutz* to a criminal case. Here, the defendant Snowden was convicted of stalking for repeatedly following and calling a coworker and was sentenced to two years probation.⁸⁵ Two years later—after the no-contact order expired—the defendant again began following the victim.⁸⁶ The defendant conducted his stalking by assessing the location of the victim and then following her driving at a short distance along public roads.⁸⁷ After several occurrences, the defendant was again arrested and convicted.⁸⁸ Among several other arguments on appeal, the defendant contended that the anti-stalking statute under which he was convicted violated his constitutional right to localized intrastate travel—a fundamental right per *Lutz*.⁸⁹ Snowden claimed that the anti-stalking statute unconstitutionally prohibited free travel on public roads and that his arrest and conviction was for his exercise of this constitutionally protected right to drive where he pleased on public roads—regardless of whether that was where the victim was also driving at the same time.⁹⁰

⁸⁰ Gofman, *supra* note 1, at 22 (citing *Stallman*, 519 N.W.2d at 906-10).

⁸¹ Gofman, *supra* note 1, at 22 (quoting *Stallman*, 519 N.W.2d at 906-10).

⁸² Gofman, *supra* note 1, at 23 (citing *Stallman*, 519 N.W.2d at 906-10).

⁸³ Gofman, *supra* note 1, at 23 (citing *Stallman*, 519 N.W.2d at 906-10).

⁸⁴ 677 A.2d 33 (Del. 1996).

⁸⁵ *Id.* at 35.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 35-36.

⁸⁹ *Id.* at 36.

⁹⁰ *Snowden*, 677 A.2d at 37.

The court rejected Snowden's argument.⁹¹ Although the court conceded that under the *Lutz* precedent localized intrastate travel along public roads is indeed a constitutionally protected right, it found that the governmental objective of protecting individuals from stalking and other harassing behavior was sufficient to pass intermediate scrutiny as an important state interest.⁹² The court held that the interest of "preventing the emotional harm to individuals caused through fear and loss of privacy, as well as the more general societal interest in fostering a sense of security" constituted an important government interest, and statutes to this effect will be held constitutional.⁹³ Likewise, the court found that the regulated behavior in this statute does not bear a strong burden on any exercise of the right to localized intrastate travel because its limitations on travel do not extend to "unintentional [travel] or . . . travel serv[ing] a legitimate purpose."⁹⁴

Looking outside the Third Circuit, the United States District Court for the Eastern District of Missouri has also examined the issue of localized intrastate movement.⁹⁵ In *Townes v. City of St. Louis*, the court examined a city ordinance that temporarily closed a public street for a period of six months.⁹⁶ The ordinance passed as an emergency measure at the request of local residents, who claimed that excess traffic through the street brought negative effects on quality of life, including increased criminal activity.⁹⁷ The residents and the city aldermen supporting the ordinance believed a temporary end to traffic would help "stabilize" the street and surrounding neighborhood, and thus reduce crime.⁹⁸ The ordinance was enforced by the deployment of several large flower pots along the road's entrance from the nearest avenue.⁹⁹

The plaintiff—a resident of the street—challenged the constitutionality of the ordinance, alleging, among other things, that it violated her substantive due process right to localized intrastate travel along a public street to access her residence.¹⁰⁰ On the other hand, the city contended that no such right existed, as this jurisdiction is outside the Third Circuit, and the ruling in *Lutz* did not apply.¹⁰¹ The court

⁹¹ *Id.* at 38.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Townes v. City of St. Louis*, 949 F. Supp. 731, 732 (E.D. Mo. 1996).

⁹⁶ *Id.* at 733.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 734.

¹⁰¹ *Townes*, 949 F. Supp. at 734.

examined the holding in *Lutz*, as well as Eighth Circuit precedent regarding substantive due process, and concluded that the Eighth Circuit would most likely not establish the same holding as the Third Circuit.¹⁰²

Nonetheless, the court decided to review the St. Louis ordinance under intermediate scrutiny to determine whether it passes muster.¹⁰³ In the city's favor, the court considered how minimal the effects of the ordinance are on area residents.¹⁰⁴ The flower pots did not shut off all routes to the street, and slightly longer alternative routes still existed.¹⁰⁵ Likewise, the ordinance left access to other government services—such as fire protection, police, and emergency services—unchanged.¹⁰⁶ In sum, the court found that the plaintiff was at best “marginally inconvenienced” by the ordinance.¹⁰⁷ On the other hand, the court examined the proffered government interest underlying the ordinance—the apparent proliferation of crime along the effected street.¹⁰⁸ The plaintiff contended that the appropriate response to the government interest in stopping criminal activity is calling for a police response or increased police activity—not inconveniencing area residents.¹⁰⁹

Under intermediate scrutiny, the court found that “the existence of this alternative method of dealing with the criminal activity in the 6100 block (e.g., increased police patrolling) may be relevant as a limitation on the authority of the city to act, if the court was required to subject the ordinance to strict constitutional scrutiny.”¹¹⁰ Therefore, were this case governed by Third Circuit precedent, intermediate scrutiny would not have been met, and the ordinance would likely be found unconstitutional.¹¹¹ However, the court rejected its earlier argument supporting intermediate scrutiny, determining that in the Eighth Circuit this level of scrutiny is not yet necessary.¹¹² As such, the court then applied the rational basis test of constitutional scrutiny.¹¹³ Under this test, a statute must only be rationally related to a government interest to pass constitutional muster.¹¹⁴ This is a low bar, and courts generally

¹⁰² *Id.* at 735.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 736.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Townes*, 949 F. Supp. at 736.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Townes*, 949 F. Supp. at 736.

¹¹⁴ *Id.*

only strike statutes if they are so irrational as to “shock the conscience.”¹¹⁵ Under the rational basis standard of review, the ordinance easily passes, as reducing crime is a government interest and reducing traffic is rationally related to achieving that goal.¹¹⁶ The court specifically states the reported result of the ordinance’s implementation, finding that a showing of reduced crime furthers the notion that the ordinance was rationally related to the stated outcome.¹¹⁷ Therefore, the plaintiff’s claim of unconstitutionality under substantive due process grounds fails.¹¹⁸

The United States District Court for the Middle District of North Carolina—outside of the Third Circuit—has also examined a statute under the test presented in *Lutz*.¹¹⁹ In *Shanks v. Forsyth County Park Authority*, a county parks authority enacted a resolution banning entry of motorcycles into a public park.¹²⁰ The plaintiff was an avid motorcyclist who attempted to enter the park on his motorcycle to participate in a charity ride event.¹²¹ In addition to other constitutional claims, the plaintiff alleged that an ordinance banning motorcycle entry violated his substantive due process right to localized intrastate travel.¹²² Although not required to follow the precedent set in *Lutz*, the court nevertheless quoted the holding and test positively and examined the circumstances of the case as if bound by *Lutz*.¹²³ Recognizing a fundamental right to localized intrastate movement, the court found that the resolution banning motorcycle entry passed constitutional muster not because it passed intermediate scrutiny, but rather because it did not implicate any right of movement at all.¹²⁴ The issue is avoided for two main reasons.¹²⁵ First, the court distinguished a right to travel to the park versus a right to travel around the park.¹²⁶ This regulation only implicates the right to travel around a set area, not the right to travel to a place.¹²⁷ Second, the court distinguished a ban on entry generally from

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Shanks v. Forsyth Cnty. Park Auth.*, 869 F. Supp. 1231 (M.D.N.C. 1994).

¹²⁰ *Id.* at 1233.

¹²¹ *Id.*

¹²² *Id.* at 1237.

¹²³ *Id.*

¹²⁴ *Id.* at 1238.

¹²⁵ *Shanks*, 869 F. Supp. at 1238.

¹²⁶ *Id.*

¹²⁷ *Id.*

a ban on entry via the means of a motorcycle.¹²⁸ If a fundamental right to localized intrastate movement along publicly accessible property exists, then that right is satisfied by entry or transit through a means of movement—not necessarily through every means.¹²⁹ As such, a government entity may determine which means are appropriate for movement in a particular area.¹³⁰ Here, the court found that the plaintiff could easily get off his motorcycle and enter the park on foot, by bicycle, or through other permitted means, satisfying his right to movement and entry.¹³¹ Taking these two factors together, the court found that the resolution did not implicate the constitutional right to localized intrastate travel.¹³²

Returning to Third Circuit jurisdictions, the issue of localized intrastate travel was most recently examined in two New Jersey cases. The first of which, *Lanin v. Borough of Tenafly*,¹³³ was decided by the United States District Court for the District of New Jersey. In that case, the plaintiffs reside on a street shared by a school.¹³⁴ The Borough of Tenafly promulgated ordinances making the street one-way during school hours, eliminating on-street parking, and constructing a student drop-off zone along the street.¹³⁵ The plaintiffs alleged, in part, that their substantive due process rights to localized intrastate travel had been violated by the ordinances because the newly increased and irregular traffic patterns force them to change and delay their regular travel routes.¹³⁶ The court dismissed these claims, finding that “[t]raffic, even if it can be attributed to poor public planning, is not a deprivation of a fundamental right.”¹³⁷ Likewise, the court found that “tak[ing] a route that turns out to be more circuitous when viewed from the perspective of a particular property owner’s driveway” does not constitute a deprivation of a fundamental right.¹³⁸ According to the court, to violate the constitutional right to localized intrastate travel, a burden must actually prevent travel—not simply render it more difficult

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Shanks*, 869 F. Supp. at 1238.

¹³² *Id.*

¹³³ *Lanin v. Borough of Tenafly*, No. 2:12-02725 (KM)(MCA), 2014 U.S. Dist. LEXIS 256 (D.N.J. Jan. 2, 2014).

¹³⁴ *Id.* at *2.

¹³⁵ *Id.*

¹³⁶ *Id.* at *25.

¹³⁷ *Id.* at *26.

¹³⁸ *Id.*

or inconvenient.¹³⁹ This lack of a describable burden is especially important relative to the compelling government interest in maintaining a school premises.¹⁴⁰

The issue came up again in *Galicki v. New Jersey*,¹⁴¹ which was also decided by the United States District Court for the District of New Jersey. The events in *Galicki* concern a high-profile political scandal in which state officials allegedly ordered some points of access to the George Washington Bridge closed to punish disloyal local political figures.¹⁴² Among numerous other claims, the plaintiffs in this case—made up of local residents and commuters angered by the delays caused by the closures—asserted a violation to their fundamental substantive due process rights to localized intrastate travel.¹⁴³ Decided after *Lanin*, both plaintiffs and defendants tailored their response to conform to the recent holding holding.¹⁴⁴ Plaintiffs argued that, short of simply inconveniencing their commute, the closures amounted to a total denial of access to many routes—trapping some at home.¹⁴⁵ On the other hand, the defendants likened plaintiffs’ grievances to those of the plaintiffs in *Lanin*—anger about a slight inconvenience or somewhat longer commute but not sufficient enough to amount to a significant burden.¹⁴⁶ The court distinguished this case from *Lanin* because of the defendants’ intent in each case.¹⁴⁷ In *Lanin*, the defendant borough sought to ease traffic congestion to a school—a laudable government interest.¹⁴⁸ In this case, the defendants allegedly exacted the closure out of spite.¹⁴⁹ Because the intent behind the alleged planned closure was vindictive in nature and designed to delay or divert commuters, the court found that no government interest existed to justify the closure.¹⁵⁰ As such, the closure amounted to an unconstitutional violation of commuters’ rights to localized intrastate (and interstate) movement.¹⁵¹

¹³⁹ *Lanin*, No. 2:12-02725 (KM)(MCA), 2014 U.S. Dist. LEXIS at *26.

¹⁴⁰ *Id.*

¹⁴¹ No. 14-169 (JLL), 2016 U.S. Dist. LEXIS 126076 (D.N.J. Sep. 15, 2016).

¹⁴² *Id.*

¹⁴³ *Id.* at *42.

¹⁴⁴ *Id.* at *46.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Galicki*, No. 14-169 (JLL), 2016 U.S. Dist. LEXIS at *46.

¹⁴⁸ *Lanin v. Borough of Tenafly*, No. 2:12-02725 (KM)(MCA), 2014 U.S. Dist. LEXIS 256 at *26 (D.N.J. Jan. 2, 2014).

¹⁴⁹ *Galicki*, No. 14-169 (JLL), 2016 U.S. Dist. LEXIS at *46.

¹⁵⁰ *Id.* at *49.

¹⁵¹ *Id.*

II. ANALYSIS

The ordinance passed by the municipality of Leonia sought to bar drivers who are not residents of Leonia or employed at a location in Leonia from driving through the municipality during rush hour.¹⁵² Local residents and employees would be marked so as to allow them to pass without being stopped.¹⁵³ Applying the above cases to the Leonia ordinance does not provide a clean-cut answer to the question of whether this ordinance passes constitutional muster. Nevertheless, a court would likely hold the ordinance unconstitutional. As Third Circuit precedent governs in New Jersey, it is worth examining the ordinance under *Lutz* first, as this test is the one a court must apply. Under the intermediate scrutiny standard, Leonia would have to demonstrate that keeping vehicles out serves an important government interest and that the ordinance is narrowly tailored to achieve that stated objective.¹⁵⁴ Managing traffic flow during rush hour would most likely constitute an important government objective, just as general traffic flow management was recognized as an important objective in *Lutz*.¹⁵⁵ Likewise, Leonia can demonstrate that traffic leading to the George Washington Bridge renders rush hour traffic particularly disruptive and in need of government intervention.¹⁵⁶ However, the Leonia ordinance is likely not the most narrowly tailored option to achieve the goal of limiting congestion. First, keeping all outside drivers off the road—regardless of their origin, destination, or the duration of their drive within Leonia—represents a major inconvenience to drivers from neighboring towns, and a clear windfall to Leonia residents. In *Lanin*, the holding states that taking a more circuitous route is not a deprivation of a fundamental right; however, *Galicki* modified that holding to include more deference to intent and effect.¹⁵⁷ Here, it appears Leonia's intent in promulgating the ordinance was neutral—a simple desire to help its own residents. However, if a plaintiff can demonstrate that Leonia sought to help its own residents to the exclusion and detriment of the residents of neighboring towns, then the ordinance would fail constitutional scrutiny as not sufficiently narrowly tailored.

The regulation in *Shanks* is distinguishable from the Leonia

¹⁵² Janoski, *supra* note 7.

¹⁵³ Janoski, *supra* note 7.

¹⁵⁴ *Lutz v. York*, 899 F.2d 255, 270 (3d Cir. 1990).

¹⁵⁵ *Id.*

¹⁵⁶ Janoski, *supra* note 7.

¹⁵⁷ *Lanin v. Borough of Tenafly* No. 2:12-02725 (KM)(MCA), 2014 U.S. Dist. LEXIS at *26 (D.N.J. Jan. 2, 2014); *Galicki v. New Jersey*, No. 14-169 (JLL), 2016 U.S. Dist. LEXIS at *46 (D.N.J. Sep. 15, 2016).

ordinance. There, the regulation barred entry of a particular mode of transit through a public park.¹⁵⁸ Here, a broader ban exists on all motor vehicles entering a municipality. The court in *Shanks* established that a right to intrastate localized movement constitutes movement by a means to a publicly accessible location, not necessarily around one.¹⁵⁹ Here, travel to points in Leonia is entirely barred to non-residents during rush hour, unless traveling by foot or other non-motorized transport. This restriction is significantly more burdensome on travelers than the park regulation, necessitating a much more drastic change in mode of transportation to reach a destination in Leonia. Therefore, it seems unlikely a court would weigh the holding in *Shanks* as relevant to the Leonia ordinance.

In *Townes*, the Court concluded that a blocked street did not constitute a violation because of an important government interest.¹⁶⁰ However, if the court had applied intermediate scrutiny, the ordinance would have been struck down as overly broad.¹⁶¹ Other methods of addressing the issue—such as increased police activity—amounted to more narrowly tailored solutions to the proffered governmental interest.¹⁶² Here, the town of Leonia has numerous potential options to address congestion issues, short of a total ban. For instance, the town could—taking a cue from the City of York in *Lutz*—just prohibit both Leonia residents and outsiders from excessively repetitive driving around Leonia during rush hour. The court in *Lutz* held that such a regulation is constitutional, and it amounts to a less restrictive means than a total ban.¹⁶³ According to city planning experts, Leonia could also pursue less restrictive means by changing the layout and flow of some of its more congested routes—governmental functions broadly within its police powers and far less restrictive than the total ban.¹⁶⁴ Under this reading of intermediate scrutiny—although not holding precedent—the Leonia ordinance must also fail.

On the other hand, proponents of the Leonia ordinance could argue—per *Lanin* and *Snowden*—that the municipality simply seeks to protect its residents' safety and well-being. Were a court to find that safety is the main interest behind the ordinance like in *Snowden*, the

¹⁵⁸ *Shanks v. Forsyth Cnty. Park Auth.*, 869 F. Supp. 1231, 1238 (M.D.N.C. 1994).

¹⁵⁹ *Id.*

¹⁶⁰ *Townes v. City of St. Louis*, 949 F. Supp. 731, 736 (E.D. Mo. 1996).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Lutz v. York*, 899 F.2d 255, 270 (3d Cir. 1990).

¹⁶⁴ *Janoski*, *supra* note 7.

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ordinance could pass intermediate scrutiny.¹⁶⁵ The distinctions between *Snowden* and the Leonia ordinance are vast—one seeks to prevent harassing and potentially violent behavior, whereas the other addresses traffic. Nevertheless, if a court were to draw a line between the two cases, a challenger would perhaps find a greater likelihood of success challenging the law under other grounds—such as Equal Protection. Similarly, were proponents of the ordinance to draw from the case regarding the Minnesota ordinance directly succeeding *Lutz*, they could argue that unlike the case there, the important governmental need in Leonia is not addressed by already-existing law in any form—necessitating a change.

III. CONCLUSION

Under the balance of case law, a court would most likely strike the Leonia ordinance as unconstitutional because the ordinance does not amount to a narrowly tailored solution to an important government interest.

¹⁶⁵ *Snowden v. State*, 677 A.2d 33, 38 (Del. 1996).