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## The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?

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## **The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?**

Timothy Baldwin

“A rich man can choose to drive a limousine; a poor man may have to walk.”<sup>1</sup> So declared the Ninth Circuit in 1972, when walking was a common phenomenon in the United States.<sup>2</sup> Today, the overwhelming majority of Americans travel in a motor vehicle.<sup>3</sup> This Comment will examine the implications of the institutional preference for motor vehicles, and the categorical exclusion of other modes of transportation in many segments of the transportation system. Interstate highways, for example, usually exclude all forms of traffic except motor vehicles.<sup>4</sup> Many public roads have no sidewalks for pedestrians, and no special facilities to accommodate bicyclists.<sup>5</sup> Few roads, particularly in suburban and rural communities, offer any form of public transportation.<sup>6</sup>

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<sup>1</sup> *Monarch Travel Servs. v. Associated Cultural Clubs*, 466 F.2d 552, 554 (9th Cir. 1972).

<sup>2</sup> *See, e.g.*, Ann M. Dellinger & Laurie Beck, *How Risky Is the Commute to School? Deaths and Injuries by Transportation Mode*, *TRANSP. RES. NEWS*, Mar.-Apr. 2005, at 22, available at <http://trb.org/publications/trnews/trnews237commute.pdf> (“In the early 1970s . . . an estimated 66% of children walked to school.”).

<sup>3</sup> *See, e.g.*, CLARA RESCHOVSKY, U.S. CENSUS BUREAU, *CENSUS 2000 BRIEF: JOURNEY TO WORK 2000 3* (2004), available at <http://www.census.gov/prod/2004pubs/c2kbr-33.pdf> (finding that 88% of all commuters traveled to work by motor vehicle in the year 2000).

<sup>4</sup> *Pedestrian and Bicycling Info. Ctr.*, *FAQ's: Legal and Policy Issues*, [http://www.bicyclinginfo.org/insight/faqs/legal\\_policy.htm#seventh](http://www.bicyclinginfo.org/insight/faqs/legal_policy.htm#seventh) (last visited Apr. 1, 2006).

<sup>5</sup> THE GALLUP ORG., *NAT'L SURV. OF PEDESTRIAN & BICYCLIST ATTITUDES & BEHAVS.: HIGHLIGHTS REPORT 5, 9* (2002), available at [http://www.walkinginfo.org/pdf/FinalBikePedSurveyHighlightsReport\\_v2.pdf](http://www.walkinginfo.org/pdf/FinalBikePedSurveyHighlightsReport_v2.pdf) (finding that bicycle lanes are available for 5% of bicycle trips, and one quarter of all pedestrian trips occur without a sidewalk or shoulder available).

<sup>6</sup> *See, e.g.*, Surface Transp. Pol'y Project, *Surface Transportation Policy Project Findings on the 2000 Census Journey-to-Work Figures*, <http://www.transact.org/report.asp?id=190> (last visited Apr. 1, 2006) (finding that only 4% of America's four million miles of roads are served by transit, either by bus or parallel train lines).

Without an automobile, many individuals in the U.S. are left without a means to reach their destination because they cannot drive.<sup>7</sup> Many others cannot afford to use a motor vehicle. In the year 2000, the average annual cost to use a motor vehicle was \$7363.<sup>8</sup> The poorest fifth of American families pay forty-two percent of their income for the purchase, operation, and maintenance of automobiles.<sup>9</sup> A famous cartoon illustrates the problem well -- a driver of a motor vehicle turns to his passenger and says, "I hate driving . . . But I need a car to get to work."<sup>10</sup> Later that day, the driver sits at work in a cubicle. He turns to a co-worker and says, "I hate my job, but I gotta make car payments."<sup>11</sup>

At face value, the governmental preference for motor vehicles does not create a cause of action based on a constitutional right.<sup>12</sup> This Comment will explore the constitutional ramifications of reduced access for non-motor vehicle travel, and focus on ways in which the Constitution might provide relief non-motorized forms of transportation.

The major modes of transportation include private motor vehicles on highways (consisting of interstates and other roads), public transit (including buses and trains), bicycling, and walking.<sup>13</sup> The ability to travel using these transportation modes is one of the basic building

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<sup>7</sup> Surface Transp. Pol'y Project, Transportation and Social Equity, <http://www.transact.org/library/factsheets/equity.asp> (last visited Apr. 1, 2006)(finding that one-third of all Americans are either too young, too old, or infirm to drive).

<sup>8</sup> In 2005, the average cost of operating a passenger motor vehicle in the United States was \$8410. Press Release, Am. Automobile Ass'n, Despite Higher Gas Prices, 2005 Driving Costs Nearly Unchanged from 2004, AAA Says (Mar. 21, 2005), <http://www.aaanewsroom.net/Main/Default.asp?CategoryID=4&ArticleID=361>.

<sup>9</sup> Surface Transp. Pol'y Project, *supra* note 7.

<sup>10</sup> ANDY SINGER, CARTOONS 25 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Monarch Travel Servs. v. Associated Cultural Clubs*, 466 F.2d 552, 554 (9th Cir. 1972) (explaining that "[a] rich man can choose to drive a limousine; a poor man may have to walk. The poor man's lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional.").

blocks of society.<sup>14</sup> Roads, bridges, and other forms of transportation infrastructure are necessary for people to function in a modern community.<sup>15</sup> Visits to a bank, school, or anywhere else utilize a form of transportation. A community without transportation infrastructure becomes a community of inefficiency and chaos.<sup>16</sup> Thomas Harris McDonald, the father of the American interstate road system,<sup>17</sup> once noted, “next to the education of the child, road building is the greatest public responsibility.”<sup>18</sup>

The preference for road building and motor vehicles dominates the American psyche<sup>19</sup> and receives support at the highest levels of U.S. government. In 2001, President George W. Bush’s Press Secretary was asked whether Americans “may have to adopt limits on their lifestyles as part of a national energy strategy.”<sup>20</sup> The Press Secretary responded, the President “believes . . . that it should be the goal of policy makers to protect the American way of life. The American way of life is a blessed one and we have a bounty of resources in this country. It’s not the presence of SUVs that has caused the problem.”<sup>21</sup>

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<sup>13</sup> See Bureau of Transp. Statistics, The Intermodal Transportation Database, <http://www.transtats.bts.gov> (last visited Apr. 1, 2006) (some of the other defined modes include aviation, maritime, freight railroads, and pipelines).

<sup>14</sup> See, e.g., 139 CONG. REC. E2037 (daily ed. Aug. 6, 1993) (statement of Rep. Sabo) (stating that support of bicycling and walking “are essential to a viable intermodal transportation system.”).

<sup>15</sup> See, e.g., 151 CONG. REC. H10913 (daily ed. Nov. 18, 2005) (statement of Rep. Diaz-Balart) (“It is well-known that our transportation infrastructure is the backbone of the economy. Obviously, its continued strength is essential to economic growth.”).

<sup>16</sup> Cf. Faye Fiore, *Gulf Coast Besieged: Opening the Road to Safety Not Easy: An Urban Exodus from Disaster Generates Chaos for Cities that Can Barely Handle Daily Commutes*, L.A. TIMES, Sept. 23, 2005, at A22.

<sup>17</sup> See TOM LEWIS, *DIVIDED HIGHWAYS* 5 (2d ed. 1999).

<sup>18</sup> *Id.* at 8.

<sup>19</sup> See generally JANE HOLTZ KAY, *ASPHALT NATION* (1997).

<sup>20</sup> Glen Johnson, *Gas Prices Fuel Debate Over SUVs: Lawmakers May Demand Better Mileage*, BOSTON GLOBE, May 13, 2001, at A1.

The dominance of the automobile as a policy choice of federal and state governments is undeniable.<sup>22</sup> And yet, remarkably, American courts do not protect an individual's right to use a motor vehicle.<sup>23</sup> Courts have guarded the right to move freely, but they have not protected a person's ability to choose a method of transport.<sup>24</sup>

This Comment will explore the laws that affect an individual's ability to choose a particular travel mode. It will review the implications of legal rules that hinder the use of non-motorized transportation modes. The Comment is divided into four parts. Part I places the legal discussion in context by describing the current problems with the transportation system, and by providing an overview of the evolution of the American transportation system from its beginnings to its present state. Part II reviews cases involving constitutional rights to interstate travel and intrastate travel.<sup>25</sup> Legal developments in the right to travel between states, and within one state, will provide insight into rights that might be attached to travel by a particular mode. Part III addresses the countervailing trends in the development of legal rights from the

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<sup>21</sup> *Id.* "SUV" refers to a sport utility vehicle. In 2006, during his State of the Union Speech, President George W. Bush may have modified policy when he stated that "America is addicted to oil." *See, e.g.,* Elisabeth Bumiller & Adam Nagourney, *Bush, Resetting Agenda, Says U.S. Must Cut Reliance On Oil*, N.Y. TIMES, Feb. 1, 2006, at A6. However, if motor vehicles change energy sources, it does not logically follow that America's reliance on them as a form of transportation will decrease.

<sup>22</sup> *See* KAY, *supra* note 19, at 270 (reporting that President Reagan called the private automobile the "last great freedom," and then went on to attack passenger trains).

<sup>23</sup> *See, e.g.,* *Ducan v. Cone*, No. 00-5705, 2000 U.S. App. LEXIS 33221 (6th Cir. Dec. 7, 2000) (finding there is no fundamental right to drive a car); *State v. Cox*, 16 A.2d 508, 512 (N.H. 1940) ("The operation of an automobile upon the public highways is not a right but only a privilege.") (internal citations omitted), *aff'd* *Cox v. New Hampshire*, 312 U.S. 569 (1941).

<sup>24</sup> *Cf. People v. Sweetser*, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977) ("Although the members of the public have an inalienable right to use public highways in a reasonable manner without obstruction and interruption, this right is subject to the power of a county to impose reasonable regulations restricting the use of a county highway.") (citations omitted); *State in re Hoffman v. Potomac Edison Co.*, 170 A. 568, 570 (Md. 1934) ("a [transportation] use is usually held to be lawful and reasonable so long as it does not interfere with or endanger others lawfully and reasonably engaged in the use of the way.").

<sup>25</sup> *See generally* *Saenz v. Roe*, 526 U.S. 489 (1999) (the Supreme Court's most recent pronouncement on the right to travel).

perspective of transportation modes. While American courts have been quite unwilling to create a constitutional right to drive an automobile, the Supreme Court seems protective of a “freedom of movement” doctrine that protects an individual’s right to travel as a pedestrian.<sup>26</sup> Part IV addresses the legal implications of the current transportation situation in the U.S. The Comment concludes by arguing that a denial of access to the transportation system creates a cause of action under the federal equal protection doctrine of “total deprivation” laid out in *San Antonio Independent School District v. Rodriguez*.<sup>27</sup>

## PART I

### A. The Transportation Problem

Transportation access directly affects many public policy issues. Excessive use of motor vehicles damages the environment, reduces public health, and negatively influences land use patterns and the supply of affordable housing.<sup>28</sup> Transportation access also has important consequences for homeland security because it ensures freedom of movement for security personnel responding to crises<sup>29</sup> and for individuals trying to flee disasters.<sup>30</sup>

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<sup>26</sup> See generally *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972); *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

<sup>27</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 23 (1973) (finding that “lack of personal resources has not occasioned an absolute deprivation of the desired benefit” and is thus not a violation of equal protection).

<sup>28</sup> See, e.g., Surface Transp. Pol’y Project, *Transportation and Health*, <http://www.transact.org/library/factsheets/health.asp> (last visited Apr. 1, 2006); Surface Transp. Pol’y Project, *Transportation and Economic Prosperity*, <http://www.transact.org/library/factsheets/prosperity.asp> (last visited Apr. 1, 2006).

<sup>29</sup> See Robert D. McFadden, *The Crash of Flight 587: Security; Lessons From Sept. 11 Are Followed in Quick Transportation Shutdowns and Restarts*, N.Y. TIMES, Nov. 13, 2001, at D8.

<sup>30</sup> See, e.g., Jerry Adler, *Ground Zero*, NEWSWEEK, Sept. 24, 2001, at 72.

The transportation problem in the U.S. will only worsen in the future. The interstate highway system, as planned by the Federal Highway Administration, is largely built;<sup>31</sup> today, fewer opportunities exist to build new roads or widen existing ones. With the overall number of people and automobiles rising,<sup>32</sup> more Americans will be forced onto a stagnant supply of transportation infrastructure.<sup>33</sup> As these conditions worsen, conflicts over land use and transportation modes will become more frequent.<sup>34</sup> Interest groups will fight over scarcer resources.<sup>35</sup> Under these conditions, alternative transportation users will likely find it difficult to counteract the majoritarian tendencies of the motoring public.

One need look no further than New Orleans after Hurricane Katrina to understand the importance of access to transportation. On August 29, 2005, Hurricane Katrina decimated New Orleans.<sup>36</sup> Much of the city was built below sea level, and the hurricane destroyed nearby levees and flooded the city.<sup>37</sup> Leading up to and after the hurricane, public officials tried unsuccessfully to organize a massive evacuation effort, in part by encouraging residents to flee the city.<sup>38</sup> But many people, mostly African American,<sup>39</sup> were simply too poor to leave New Orleans by car.<sup>40</sup> They needed a bus or another form of transportation to escape.<sup>41</sup>

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<sup>31</sup> KAY, *supra* note 19, at 7.

<sup>32</sup> *See id.* at 270-71.

<sup>33</sup> *See id.* at 7, 14.

<sup>34</sup> *See id.* at 14-15.

<sup>35</sup> *But cf.* EDWARD BLAKELY, SHAPING THE AMERICAN DREAM: LAND USE CHOICES FOR AMERICA'S FUTURE 19-32 (1993).

<sup>36</sup> *See, e.g.*, John McQuaid, *Alarm Sounded Too Late as N.O. Swamped*, TIMES-PICAYUNE (New Orleans), Sept. 8, 2005, at A10.

<sup>37</sup> *See, e.g., id.*

<sup>38</sup> *See, e.g.*, James Dao, *Lawmakers Question Louisiana Governor on Storm Response and Preparation*, N.Y. TIMES, Dec. 15, 2005, at A33.

The dilemma facing the poor in New Orleans during Hurricane Katrina symbolizes the larger transportation problem facing the poor in the U.S. They often bear the brunt of the nation's transportation problems. During the 1950s, the first major decade of interstate highway construction in the U.S., over 350,000 homes were raised, and new highways were often placed in poor communities.<sup>42</sup> Today, even though most individuals live near road networks, ninety percent of former welfare recipients do not have access to a car.<sup>43</sup> Less than half of all jobs in the U.S. are accessible by public transportation.<sup>44</sup> Poorer individuals like welfare recipients, most of whom cannot or can only barely afford a car, are shut out from half of all jobs in the country.<sup>45</sup> Compounding the problem, most cities do not provide public transportation during the second and third shift jobs that tend to be available to the poor.<sup>46</sup> Unable to afford a car and without any method of commuting to work, many welfare recipients are unable to find jobs.<sup>47</sup>

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<sup>39</sup> See, e.g., Gregory Stanford, *Poverty a Storm that Batters the Poor Every Day*, MILWAUKEE J. SENTINEL, Sept. 11, 2005, at J4.

<sup>40</sup> See, e.g., James B. Johnson, *3 Bay Area Residents Share Escape Stories*, S.F. CHRON., Sept. 4, 2005, at A27.

<sup>41</sup> See, e.g., Marc Sandalow, *Katrina Thrusts Race and Poverty onto National Stage*, S.F. CHRON., Sep. 23, 2005, at A13.

<sup>42</sup> Surface Transp. Pol'y Project, *supra* note 7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Surface Transp. Pol'y Project, *Transportation and Poverty Alleviation*, <http://www.transact.org/library/factsheets/poverty.asp> (last visited Apr. 1, 2006)(finding that three in every five jobs suitable for welfare to work participants are not accessible by public transportation).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

On the other side of the coin, Americans above the poverty level<sup>48</sup> own more cars than they used to, and are driving longer distances.<sup>49</sup> They have the ability to devote substantial resources to automotive travel and can take advantage of the car-centric transportation system.<sup>50</sup>

American courts generally consider restrictions on forms of travel lawful under a state's discretion to exercise its police power.<sup>51</sup> If a state deems it unsafe for a person to use a motor vehicle, the state is within its power to revoke his or her driver's license.<sup>52</sup> This general authorization of a state's police power, however, does not contemplate an increasingly likely scenario -- what if a person does not own a car, and cannot afford a car? Further, what if there are no forms of public transportation available for that person? If a state, through its police power, can restrict an individual's use of a motor vehicle, they can presumably restrict other forms of transportation, such as walking and bicycling.<sup>53</sup> If a state uses its police power to restrict bicycling and walking, a person without a motor vehicle may not be able to reach a job or other important destinations.

In many cases, units of government do not need to pass regulations that explicitly restrict alternative forms of travel. The design of the facility will be enough to deter usage by non-

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<sup>48</sup> The poverty line is the gross income below the standard threshold needed to acquire necessities for living. The U.S. Census Bureau sets the poverty line for families and individuals depending upon age. For example, for a family of two, both below the age of sixty-five, the 2003 poverty line was \$12,649. *See* U.S. CENSUS BUREAU, POVERTY THRESHOLDS 2004 (2005), available at <http://www.census.gov/hhes/poverty/threshld/thresh04.html>.

<sup>49</sup> 58.5 million households owned two automobiles in 2000, and eighteen million households owned three or more vehicles. These figures are increases over previous U.S. Census reports. Surface Transp. Pol'y Project, *supra* note 6.

<sup>50</sup> *See* KAY, *supra* note 19, at 120-23.

<sup>51</sup> *See, e.g.,* Mackey v. Montrym, 443 U.S. 1 (1979) (finding that reasonable restrictions on travel, such as deterring drunk driving, are constitutional under a state's authority to exercise its regulatory powers).

<sup>52</sup> Dixon v. Love, 431 U.S. 105 (1977).

<sup>53</sup> The Fifth Circuit has ruled that bicyclists do not have a cause of action under federal transportation law to challenge agency actions for failure to consider bicycle safety in transportation projects. Lundeen v. Mineta, 291 F.3d 300, 310 (5th Cir. 2002) (finding that Congress "anticipated that the failure to consider specific factors in planning a particular transportation project -- even bicycle safety -- would not be judicially reviewable.").

motorized transportation such that it becomes practically impossible to travel other than by motor vehicle. Even if a road remains legally open to bicyclists and pedestrians, it may be very unsafe if it is not designed for them.<sup>54</sup> Further compounding the problem, roads that fit civil engineering guidelines<sup>55</sup> are often perceived as unsafe by alternative transportation users.<sup>56</sup>

The “Green Book,” published by the American Association of State and Highway Transportation Officials (AASHTO), is the pre-eminent civil engineering manual in the U.S. for designing roads.<sup>57</sup> First published in 1956, it contains guidance on everything from the appropriate width of a roadway to the proper placement of a drainage grates.<sup>58</sup> Until 2001, the stated mission of the AASHTO Green Book was “to provide operational efficiency, comfort, safety, and convenience for the motorist.”<sup>59</sup> As noted by one commentator, “the needs of

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<sup>54</sup> See, e.g., Mass. Bicycle Coalition, Policies, <http://massbike.org/about/policies.htm#roads> (last visited Apr. 1, 2006).

<sup>55</sup> It is worth noting that significant disagreement exists about the definition of a safe facility for alternative transportation, particularly in the bicycle community. For example, some bicycle experts believe that bicycle lanes are the safest form of bicycle travel, while others believe that bicycle travel is most safely performed in the normal roadway. See, e.g., WAYNE FEIN, CRITIQUE OF SHARED-USE FACILITIES FOR BICYCLES AND MOTOR VEHICLES 1 (2004), available at [http://www.humantransport.org/bicycledriving/library/SharedUse\\_critique.pdf](http://www.humantransport.org/bicycledriving/library/SharedUse_critique.pdf) (taking the position that there is insufficient evidence that bike lanes are safer than wide outside lanes). For those taking the latter view, they often believe that the current road system is sufficient for safe bicycle use and see education as the primary method of increasing bicycle mode safety. See generally JOHN FORRESTER, EFFECTIVE CYCLING 1 (6th ed. 1993). From a macro perspective, both sides are probably correct, in the sense that bicycle facilities are appropriate in some contexts and inappropriate in others. In any event, most cyclists seem to support the creation of more bicycle facilities. The Gallup Org., *supra* note 13, at 5 (finding that almost half of cyclists surveyed recommended changes to the transportation system, and of those desiring changes, 73% wanted more bicycle facilities).

<sup>56</sup> See FED. HIGHWAY ADMIN., 2005 TRAVELER OPINION AND PERCEPTION (TOP) SURVEY, DETAILED FINDING, SAFETY (2005), available at <http://www.fhwa.dot.gov/reports/traveleropinions/6.htm>.

<sup>57</sup> FED. HIGHWAY ADMIN., FLEXIBILITY IN HIGHWAY DESIGN, HIGHWAY DESIGN STANDARDS(1999), available at <http://www.fhwa.dot.gov/environment/flex/ch02.htm>.

<sup>58</sup> *Id.*

<sup>59</sup> AM. ASS'N OF ST. AND HIGHWAY TRANSP. OFFICIALS, A POLICY ON GEOMETRIC DESIGN xliv (1994).

pedestrians and bicyclists [in the Green Book], and the effects of roadway projects on the environment and communities[,] are secondary.”<sup>60</sup>

Available safety data strongly suggests that many roads are not safe for non-motorized forms of transportation.<sup>61</sup> Roughly 5000 pedestrians and bicyclists are killed on the public roadways each year,<sup>62</sup> but only 1.9% of available federal safety funds are spent on bicycle and pedestrian safety annually.<sup>63</sup> By contrast, bicyclists and pedestrians account for over 13% of all fatalities that occur on roadways.<sup>64</sup>

The poor in the U.S. are left in a quandary. They cannot afford a car, and the state may curtail their ability to use other transportation modes, sometimes intentionally.<sup>65</sup> Even if their rights to use other modes are not curtailed, a strong probability exists that they do not think they

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<sup>60</sup> Stephen Burrington, Conservation Law Foundation, *Take Back Your Streets*(1998), <http://www.clf.org/general/index.asp?id=383>. In the 2001 edition of the Green Book, AASHTO deleted the motorist centered language from its mission statement, but the actual content of the manual remained largely the same from the 1994 edition. *Compare* AM. ASS'N OF ST. AND HIGHWAY TRANSP. OFFICIALS, *A POLICY ON GEOMETRIC DESIGN* (2001) *with* AM. ASS'N OF ST. AND HIGHWAY TRANSP. OFFICIALS, *supra* note 59.

<sup>61</sup> *See, e.g.*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *TRAFFIC SAFETY FACTS 1* (2002), *available at* <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2002/2002pcyfacts.pdf> (finding that in 2002, 667 cyclists were killed and 48,000 were injured). It is somewhat debatable whether the source of these crashes was poor design or user behavior. *See supra* note 55.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> America Bikes, *Bicycle Pedestrian Fatality Data*, <http://www.americabikes.org/images/resource/bicyclefriendly/completestreetsdata.pdf> (last visited Apr. 1, 2006).

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g.*, John Tuohy, *IndyGo's Passengers Don't Fit in 1 Mold, Some Say Taking the Bus is Their Choice*, INDIANAPOLIS STAR, Jan. 29, 2004, at 1B (reporting that the local transit agency has intentionally under-funded its transportation service since 1975).

have safe facilities nearby to bicycle or walk.<sup>66</sup> Nor do they likely have reasonable access to public transportation if they live anywhere outside of a large city.<sup>67</sup>

Compounding the problem is the fact that many public transportation users are minorities. “Nationally, public transportation users are disproportionately minorities with low to moderate incomes.”<sup>68</sup> Minorities are hit hardest in cities, where “[A]frican Americans and Latinos together comprise 54 percent of public transportation users . . . [nationally] just 7 percent of white households do not own a car, compared with 24 percent of African American households, 17 percent of Latino households, and 13 percent of Asian American households.”<sup>69</sup> Minority populations are hit harder when public transportation is not available.<sup>70</sup> Sidewalks and other engineering solutions create a safe environment for alternative transportation. In many cases, if safe facilities existed, it would be possible to travel by non-motorized transportation:

According to the 1995 Nationwide Personal Transportation Survey, 25% of all trips are made within a mile of the home, 40% of all trips are within two miles of the home, and 50% of the working population commutes five miles or less to work - all distances easily traveled by bike. Yet more than 82% of trips five miles or less are made by personal motor vehicle.<sup>71</sup>

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<sup>66</sup> See *supra* notes 55-56; BUREAU OF TRANSPORTATION STATISTICS, 2002 NATIONAL SURVEY OF PEDESTRIAN AND BICYCLIST ATTITUDES AND BEHAVIORS 5 (2002), available at [http://www.walkinginfo.org/pdf/FinalBikePedSurveyHighlightsReport\\_v2.pdf](http://www.walkinginfo.org/pdf/FinalBikePedSurveyHighlightsReport_v2.pdf).

<sup>67</sup> See, e.g., Surface Transp. Pol’y Project, STPP Findings on the 2000 Census Journey-to-Work Figures, <http://www.transact.org/report.asp?id=190> (last visited Apr. 1, 2006) (finding that public transportation systems are usually available in most larger American cities but not in suburbs).

<sup>68</sup> THOMAS SANCHEZ ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES vii (2003), available at <http://www.civilrightsproject.harvard.edu/research/transportation/MovingtoEquity.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> See Surface Transp. Pol’y Project, Transportation and Social Equity, <http://www.transact.org/library/factsheets/equity.asp> (last visited Apr. 1, 2006).

<sup>71</sup> Bicycle Friendly Community Frequently Asked Questions, <http://www.bicyclefriendlycommunity.org/faqs.htm> (last visited Apr. 1, 2006).

Despite the high cost of motor vehicles,<sup>72</sup> public transportation programs frequently come under attack.<sup>73</sup> Motor vehicles themselves, however, are highly subsidized in the U.S. In 2002, local governments spent \$27.9 billion on local roads (non-interstate roads), where most pedestrian and bicycle travel occurs.<sup>74</sup> Roadway user charges covered only \$3.1 billion of the \$27.9 billion tab.<sup>75</sup> Nationally, including bond financing, taxes and fees on motor vehicle usage account for only 70% of all roadway expenditures; fuel taxes would need to rise 45% to cover all roadway costs.<sup>76</sup>

Non-motorized transportation infrastructure and programs do not always require large sums of public funding. In the context of new land development, governments can use exactions to make roadways more bicycle and pedestrian friendly.<sup>77</sup> Additionally, bicycle and pedestrian friendly design elements do not necessarily increase the cost of a roadway project.<sup>78</sup> In the context of public transportation, removing people from cars and putting them onto buses, trains,

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<sup>72</sup> See *supra* note 8.

<sup>73</sup> See, e.g., 151 CONG. REC. 1210 (2005) (statement of Rep. Cummings) (“Particularly during the last 5 years, Amtrak has repeatedly faced threatened shutdowns and proposed elimination of its operating subsidy.”).

<sup>74</sup> TODD LITMAN, WHOSE ROADS? 6 (Victorian Policy Institute 2004), available at <http://www.vtpi.org/whoserd.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Cf. *Dolan v. Tigard*, 512 U.S. 374, 395 (1994) (“Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.”).

<sup>78</sup> See, e.g., MASSACHUSETTS HIGHWAY DEPARTMENT, PROJECT DEVELOPMENT AND DESIGN GUIDE, 5-19 (2006), available at [http://www.vhb.com/mhdGuide/pdf/CH\\_5\\_a.pdf](http://www.vhb.com/mhdGuide/pdf/CH_5_a.pdf) (“if motor vehicle speeds are too high, the designer should consider selecting a lower motor vehicle design speed to increase the comfort and safety of the facility for bicycles. Additionally, the designer could consider narrowing motor vehicle lanes to provide wider shoulders.”). This guidance shows that civil engineers can take a limited amount of road and make it safer for bicyclists while still allowing motor vehicles to travel safely.

and boats mitigates hidden societal costs.<sup>79</sup> Some have argued that public transportation costs are offset by reduced expenditures in other government sectors.<sup>80</sup>

In the final analysis, travel in the U.S. is largely wedded to motor vehicle use, even if American courts refuse to protect motorized travel as an individual right.<sup>81</sup> But how did we get to this point in the first place? Automobiles, after all, were not produced in any quantity until the turn of the twentieth century.<sup>82</sup> Examining the development of transportation infrastructure in the U.S. will lend insight into the so-called constitutional rights to interstate travel, intrastate travel, and freedom of movement.

#### B. A Short History of the Early Development of the American Transportation Infrastructure

In the early days of the American republic, zoning laws did not exist.<sup>83</sup> There was no large railway system, and residential and commercial uses tended to be in close proximity to each other.<sup>84</sup> “Until the mid-1800s, the practical distance for commuting was limited to the range of a horse and coach.”<sup>85</sup>

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<sup>79</sup> Cf. Clifford Cobb, *The Roads Aren't Free*, CHALLENGE, May-June 1999, at 63-83.

<sup>80</sup> See Sonja Ryst, *Sector Spotlight: Public Good, Fiscal Risk: Mass Transit's Delicate Balance*, THE BOND BUYER, July 8, 1999, at 7.

<sup>81</sup> See, e.g., *Ducan v. Cone*, No. 00-5705, 2000 U.S. App. LEXIS 33221 (6th Cir. filed Dec. 7, 2000) (finding that there is no fundamental right to drive a car even when a car is the primary method of travel for society, as explained in *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)).

<sup>82</sup> RUSSELL BOURNE, *AMERICAN ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS, AND HIGHWAYS* 112-17 (1995).

<sup>83</sup> JAMES HOWARD KUNTSLER, *THE GEOGRAPHY OF NOWHERE* 34 (1993).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 46.

As the industrial revolution grew in the 1800s, however, wealthy citizens began moving out of the downtown core in urban areas.<sup>86</sup> Factories required large numbers of workers, and large numbers of workers required massive amounts of housing in cities.<sup>87</sup> In New York City, for example, the population grew from 696,115 in 1850 to 3,437,202 by 1900.<sup>88</sup> The advent of the railroad enabled wealthier individuals to live farther away from the center of urban cities.<sup>89</sup> For example, in the mid to late 1800s, many of Chicago's elite moved to Riverside, nine miles away from downtown Chicago.<sup>90</sup> Each house in the neighborhood sat within ten minutes walking distance from the train.<sup>91</sup> Eventually, Riverside developed into one of the first "suburbs," as commercial development sprung up to serve the new community.<sup>92</sup> This is one of the first examples of "sprawl" that now dominates American land use.<sup>93</sup>

Sprawl is the "[h]aphazard growth or extension outward, especially that resulting from real estate development on the outskirts of a city."<sup>94</sup> With the advent of sprawl, available jobs move away from the center of cities to suburbs, making it more difficult for urban dwellers to

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<sup>86</sup> *Id.* at 55-57.

<sup>87</sup> *Id.* at 60.

<sup>88</sup> *Id.* at 36.

<sup>89</sup> *Id.* at 55-57.

<sup>90</sup> *Id.* at 50.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 51.

<sup>93</sup> *Id.* (explaining that Riverside represented country living accessible to a city but removed from its problems, but that it was a far cry from the suburbs created by the automobile culture); *see generally* KAY, *supra* note 19 (surveying the relationship between the automobile and sprawl).

<sup>94</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1682 (4th ed. 2000).

find employment.<sup>95</sup> Sprawl also has significant environmental and infrastructural costs,<sup>96</sup> and a severe impact on the public health of residents living within sprawl areas.<sup>97</sup>

Between 1890 and 1915, before sprawl was a common occurrence, the electric streetcar and the motor vehicle came into wide use.<sup>98</sup> In the early years of the automotive industry, streetcar companies did not receive large tax subsidies, while private automobile manufacturers benefited from massive public expenditures in the form of road building.<sup>99</sup> Another form of transportation, the bicycle, also came into wide use around this time.<sup>100</sup> Bicyclists needed smooth surfaces to operate, and Albert Pope, the inventor of the modern bicycle, founded the "Good Roads" movement.<sup>101</sup>

By 1900, more than 300 companies were producing over a million bicycles a year. Pope did not stop with manufacturing but turned his attention to road conditions bicyclists had to endure. "American roads are among the worst in the civilized world, and always have been," he wrote in a pamphlet entitled *Highway Improvement*. "I hope to live to see the time when all over our land, our cities, towns, and villages shall be connected by as good roads as can be found." Pope organized riders into an early lobbying group, The League of American Wheelmen, financed courses in road engineering at the Massachusetts Institute of Technology, and built a short stretch of macadam road in Boston to give people an idea how wonderful a smooth pavement could be. He helped persuade the Commonwealth government of Massachusetts to create a

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<sup>95</sup> See Surface Transp. Pol'y Project, *Transportation and Poverty Alleviation*, <http://www.transact.org/library/factsheets/poverty.asp> (last visited Apr. 1, 2006).

<sup>96</sup> See, e.g., KAY, *supra* note 19, at 130-34.

<sup>97</sup> See, e.g., Smart Growth America, *Measuring the Health Effects of Sprawl* (finding that communities with greater sprawl cause residents to have more health problems), <http://www.smartgrowthamerica.org/healthreportes.html> (last visited Apr. 1, 2006).

<sup>98</sup> KUNTLER, *supra* note 83, at 86-87.

<sup>99</sup> *Id.* at 87.

<sup>100</sup> LEWIS, *supra* note 17, at 7.

<sup>101</sup> *Id.*

highway commission. By the turn of the century, the "Good Roads" movement was sweeping the country. The League of American Wheelmen became the first highway lobby group that served as a model for others to follow. Through its own publication, Good Roads, the League supported "good roads" associations across the country; it supported good roads conventions and argued ceaselessly before state legislatures for road improvements.<sup>102</sup>

As bicycling grew into a phenomenon in America, states and municipalities and governments began enacting and enforcing safety laws.<sup>103</sup> Many municipalities banned bicycles altogether because they scared horses.<sup>104</sup> State supreme courts almost uniformly upheld these bans until the late 1880s.<sup>105</sup> The legal trend soon changed around the turn of the century, however, and many courts afforded bicyclists legal rights.<sup>106</sup>

The early bicycle rulings show that bicyclists were not only legally allowed to use roads in the United States, but that they were expected to.<sup>107</sup> If bicyclists were not allowed to use the roads, they would have been totally restricted from riding because they were banned from riding on sidewalks.<sup>108</sup> Faced with such a harsh result, it is not surprising that state courts shied away from a total denial of bicycle use throughout the transportation system.

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<sup>102</sup> *Id.* at 7-8.

<sup>103</sup> Ross Petty, *The Impact of the Sport of Bicycle Riding on the Safety Law*, 35 AM. BUS. L.J. 185 (1998).

<sup>104</sup> *Id.* at 193.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 195-96 ("ruling[s] giving cyclists equal rights on roadways soon became widely adopted . . . [one] decision ruled that bicycle riders were not allowed to practice their sport on the sidewalk") (internal citations omitted). By not allowing bicyclists to ride on the sidewalk, the court required bicyclists to ride in the street like any other vehicle and thus be considered part of the regular traffic flow.

<sup>107</sup> *Id.* at 196.

<sup>108</sup> *Id.* at 195-96.

While bicycling was reaching the peak of its popularity, the automobile began its steady ascent to the prominence it has enjoyed since the 1950s.<sup>109</sup> The automobile lobby initially joined with Albert Pope's "Good Roads" movement.<sup>110</sup> In 1893, the League of American Wheelmen and Pope had convinced President Grover Cleveland's staff to create a new "Office of Road Inquiry," in hopes of educating the public about the benefits of paved roads.<sup>111</sup> Around this time, there were about three million miles of roads in America, but only three hundred fifty-thousand miles of them had any kind of smooth surface.<sup>112</sup>

Before paved streets became prevalent throughout the country, most Americans traveled by foot, horse, water, or railroad;<sup>113</sup> and after the 1860s, many Americans also bicycled.<sup>114</sup> The automobile industry benefited from the "Good Roads" lobbying efforts to pave roads, and automobile registrations grew from 8,000 in 1900 to 469,000 by 1910.<sup>115</sup> By 1914, the "Office of Road Inquiry," originally intended to pave roads for bicyclists, became the Bureau of Independent Roads.<sup>116</sup> By 1916, 3.5 million automobiles were in existence,<sup>117</sup> and the federal government began appropriating large sums of funding for road building, although World War I initially impeded construction efforts.<sup>118</sup> By 1930, the Federal Bureau of Public Roads had spent

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<sup>109</sup> LEWIS, *supra* note 17, at 23-24.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 10.

<sup>113</sup> *See generally* BOURNE, *supra* note 83.

<sup>114</sup> Petty, *supra* note 103, at 187.

<sup>115</sup> LEWIS, *supra* note 17, at 10-11; KAY, *supra* note 19, at 142.

<sup>116</sup> LEWIS, *supra* note 17, at 11.

<sup>117</sup> *Id.*

\$750 million dollars and created the imprint of the national highway system that would follow decades later.<sup>119</sup>

The years 1900 to 1920 were also the golden age of streetcars in the United States. From 1890 to 1920, streetcar ridership increased from 2 to 15.5 million passengers annually.<sup>120</sup> During this period, local governments required streetcar companies to pay all of their operating costs, while automobile companies were not required to subsidize road building.<sup>121</sup> The City of Chicago, for example, “spent \$340 million on road widening between 1910 and 1940.”<sup>122</sup>

As vehicle production and road construction grew, so did the large trucking industry that ultimately decimated the railroads.<sup>123</sup> Unlike the mature railroad industry, the trucking industry went largely unregulated until 1935.<sup>124</sup> In 1915, the railroad industry had 1.8 million employees, carried 1.5 million passengers, and moved over 2 million tons of freight.<sup>125</sup> Railroad companies faltered, however, as federal highway funding continued to increase, ostensibly to “relieve railroad congestion” by providing roads for trucks.<sup>126</sup> Congress and President Roosevelt spent over \$1.8 billion on road construction in the years leading up to World War II.<sup>127</sup>

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<sup>118</sup> LEWIS, *supra* note 17, at 11 (explaining that Congress appropriated seventy five million dollars to road building in 1916, but only \$500,000 was actually spent during the war).

<sup>119</sup> *Id.* at 18.

<sup>120</sup> KAY, *supra* note 19, at 142.

<sup>121</sup> KUNTSLER, *supra* note 83, at 90.

<sup>122</sup> *Id.*

<sup>123</sup> LEWIS, *supra* note 17, at 21-22.

<sup>124</sup> *Id.* at 21.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 22 (explaining that throughout the Great Depression, federal road building subsidies continued to increase, which led to the rapid decline of railroads).

Meanwhile, streetcar companies were under attack from automobile manufacturers. Many governments required streetcar companies to guarantee a low fare in exchange for the privilege to operate on public streets, and did not allow them to cease operations on unprofitable routes.<sup>128</sup> Automobile manufacturers understood the weakened position of the streetcar companies and acted. “The General Motors Corporation undertook a systemic campaign to put streetcar lines out of business all over America . . . [by] using its financial muscle to buy up streetcar lines, scrap the tracks, and convert the routes to buses.”<sup>129</sup> In 1949, a federal grand jury indicted General Motors for criminal conspiracy; it emerged unscathed after paying a \$5000 fine.<sup>130</sup>

With railroad and streetcar companies out of the picture, automobile manufacturers had no major competitors after World War II.<sup>131</sup> In 1956, President Dwight Eisenhower formed the President’s Advisory Committee on a National Highway Program, and the Interstate Highway System was born.<sup>132</sup> Between 1956 and 1991, the federal government spent about \$50 billion a year on road construction, funded largely by federal gasoline taxes.<sup>133</sup> The Interstate National Highway System project eventually yielded 41,000 miles of new roads.

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<sup>127</sup> *Id.* at 22-23. In the 19th century, railroads also received subsidies from government before becoming highly regulated. STEPHEN B. GODDARD, *GETTING THERE: THE EPIC STRUGGLE BETWEEN ROAD AND RAIL IN THE AMERICAN CENTURY* 8-42 (1994). Many in the railroad industry at that time were also corrupt or engaged in questionable business practices. *See* BOURNE, *supra* note 82, at 95-96, 107-09, 122.

<sup>128</sup> KUNTSLER, *supra* note 83, at 90.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 92.

<sup>131</sup> The story of the transportation infrastructure post World War II is both well known and well documented, and there is no need to cover it in detail here. *See, e.g.*, DAN MCNICHOL, *THE ROADS THAT BUILT AMERICA, THE INCREDIBLE STORY OF THE U.S. INTERSTATE SYSTEM* (2005); WILLIAM KASZYNSKI, *THE AMERICAN HIGHWAY: THE HISTORY AND CULTURE OF ROADS IN THE UNITED STATES* (2000); GODDARD, *supra* note 127, at 179-245; MARK H. ROSE, *INTERSTATE: EXPRESS HIGHWAY POLITICS 1939-1989*.

<sup>132</sup> KAY, *supra* note 19, at 231.

In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act, which re-defined the federal government's role in transportation policy.<sup>134</sup> Since 1991, the states have played a larger role in allocating federal transportation dollars.<sup>135</sup> More funding has been available for alternative forms of transportation such as bicycling and walking,<sup>136</sup> but the vast majority of transportation funding continues to support motorized transportation on roadways.<sup>137</sup>

## Part II

### A. The Constitutional Right to Interstate Travel

The Supreme Court has used the right to interstate travel to strike down residency requirements for welfare benefits,<sup>138</sup> voting laws,<sup>139</sup> to protect an individual's free movement from interference by non-state actors,<sup>140</sup> and to prohibit a state from excluding indigents.<sup>141</sup> The

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<sup>133</sup> *Id.*

<sup>134</sup> Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240 (1991). Reauthorizations to the original 1991 version were passed in 1997, 105 Pub. L. No. 178 (1997), and 2005, 109 Pub. L. No. 59 (2005). They include minor changes, but the overall original structure is still intact. *See generally* Federal Highway Administration, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005), [http://www.fhwa.dot.gov/safetealu/safetea-lu\\_summary.pdf](http://www.fhwa.dot.gov/safetealu/safetea-lu_summary.pdf).

<sup>135</sup> The Intermodal Surface Transportation Efficiency Act required the states to implement long range transportation plans and to create Metropolitan Planning Organizations that vote on the distribution of transportation funds. *See* Federal Highway Administration, *supra* note 134.

<sup>136</sup> Since 1991, about 1% of all federal transportation funds have been available for bicycling and walking – a significant increase over pre-1991 levels. *Id.*; *see also* BIKES BELONG COALITION, GUIDE TO BICYCLE ADVOCACY 7 (1999), <http://www.toolstudios.com/bikesbelong/Advocacy%20Guide.pdf>.

<sup>137</sup> *See, e.g.*, SURFACE TRANSP. POL'Y PROJECT, THE TRANSPORTATION FUNDING LOOPHOLE (2002), <http://www.transact.org/library/decoder/ObligationLimit.pdf>.

<sup>138</sup> *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>139</sup> *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>140</sup> *See, e.g.*, *Attorney Gen. of New York v. Soto-Lopez*, 470 U.S. 898 (1986).

<sup>141</sup> *See, e.g.*, *Edwards v. Cal.*, 314 U.S. 160 (1941).

main purpose of this section is to explain the various factual situations in which courts have upheld a poor individual's right to interstate travel. This overview will help inform the total deprivation doctrine analysis described later in this Comment.<sup>142</sup>

Federal case law and commentary make it clear that a constitutional right to travel between states exists.<sup>143</sup> Various members of the Supreme Court have derived this right from different constitutional sources. In *Oregon v. Mitchell*, Justice Harlan noted that the right to interstate travel is a "nebulous judicial construct" that could not be found in any one particular clause of the Constitution.<sup>144</sup> Other sources of the right to interstate travel have included the Privileges and Immunities Clauses in Article IV<sup>145</sup> and the Fourteenth Amendment,<sup>146</sup> the Due Process Clause of the Fifth Amendment,<sup>147</sup> the Due Process Clause of the Fourteenth Amendment,<sup>148</sup> and the Commerce Clause in Article III, Section 8.<sup>149</sup>

Article Four of the Articles of Confederation also addressed the privileges and immunities of citizenship. The Articles version contained additional language not included in the Constitution's Privileges and Immunities Clause.<sup>150</sup> Article Four of the Articles of Confederation reads:

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<sup>142</sup> See *infra* Part IV.

<sup>143</sup> See, e.g., Saenz v. Roe, 526 U.S. 489 (1999); Jide Nzelibe, *Free Movement: A Federalist Interpretation*, 49 AM. U.L. REV. 433 (1999); Sheldon Shapiro, *Annotation: Federal Constitutional Right of Interstate Travel – Supreme Court Cases*, 27 L. ED. 2D 862 (2005).

<sup>144</sup> *Oregon v. Mitchell*, 400 U.S. 112, 215 (Harlan, J., dissenting).

<sup>145</sup> See, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

<sup>146</sup> See, e.g., *Mitchell*, 400 U.S. 112.

<sup>147</sup> See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

<sup>148</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>149</sup> See, e.g., *Edwards v. Cal.*, 314 U.S. 160 (1969).

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states, and the people of each state shall have free ingress and regress to and from any other state.<sup>151</sup>

Article IV, Section 2 of the Constitution does not include the “free ingress and regress” or the “paupers [and] vagabonds” language found in the Articles of Confederation. The Constitution reads: “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>152</sup> Many commentators have theorized that the framers assumed the language used in the Articles of Confederation was obviously implicit in the meaning of “Privileges and Immunities” and did not need to be included in the Constitution.<sup>153</sup>

If the Articles of Confederation’s “Privileges and Immunities” clause was intended to be incorporated into the Constitution, important implications follow. The Articles clause does not extend the right to interstate travel to “paupers, vagabonds and fugitives.”<sup>154</sup> In today’s world, paupers and vagabonds could mean those below the poverty line. Presumably, in 1781, when the Articles of Confederation were passed, “paupers” and “vagabonds” applied to those traveling on foot because they could not afford a horse or other form of transportation. Under the law of the Articles, a state could thus deny entry to poor pedestrians. But as we will see later, while right to travel jurisprudence does not defend a person’s right to travel using more expensive forms of

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<sup>150</sup> Nicole Hyland, Comment, *On the Road Again: How Much Mileage is Left on the Privileges and Immunities Clause and How Far Will It Travel?*, 70 *FORDHAM L. REV.* 187, 196 (2001).

<sup>151</sup> ARTS. OF CONFEDERATION art. IV (1781).

<sup>152</sup> U.S. CONST. art. IV, § 2.

<sup>153</sup> See, e.g., Nzelibe, *supra* note 143, at 439-40.

<sup>154</sup> ARTS. OF CONFEDERATION art. IV (1781).

transportation, it does generally protect the right to travel on foot.<sup>155</sup> The Court has even struck down a law that punished individuals for helping indigents cross state lines.<sup>156</sup> These tendencies seem to cut against the incorporation of the Articles of Confederation definition of “Privileges and Immunities” into the Constitution.<sup>157</sup> This is an important point. If the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment are read to preclude extension of the right to travel to paupers and vagabonds, the poor may not have an equal protection claim under the Fourteenth Amendment.<sup>158</sup>

Many of the Supreme Court’s cases that involve the right to interstate travel include fact patterns that implicate distinct travel modes and the economic status of the travelers.<sup>159</sup> Most of the situations in which the Court has invoked the right to interstate travel involve situations where poorer members of society are likely to be impacted by a travel restriction. In *Crandall v. Nevada*, decided in 1868, the Court invalidated a Nevada statute that allowed the state to tax travelers one dollar as they entered or exited the state by railroad.<sup>160</sup> The Court rejected the law, reasoning that “if the State can tax a railroad passenger one dollar, it can tax him one thousand

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<sup>155</sup> See *infra* notes 278-92 and accompanying text.

<sup>156</sup> See, e.g., *Edwards v. Cal.*, 314 U.S. 172 (1941) (striking down a state law that punished residents for aiding the transport of indigents into the state).

<sup>157</sup> Under a strict textualist definition, the Privilege and Immunities Clause in Article IV would not lead to a restriction of travel for “paupers and vagabonds,” because those words do not appear in the Constitution. Nzelibe, *supra* note 143, at 463. The “paupers and vagabonds” reference only appears in the Articles of Confederation definition of Privilege and Immunities. See *supra* notes 150-152 and accompanying text.

<sup>158</sup> See *infra* Part IV (discussing ways the poor can use equal protection to challenge state transportation policies). In the Supreme Court’s most recent right to interstate travel decision, *Saenz v. Roe*, 526 U.S. 489 (1999), it grounded one aspect of right to travel in the Privileges and Immunities Clause of the Fourteenth Amendment and another aspect in the Privileges and Immunities Clause of Article IV of the Constitution.

<sup>159</sup> See, e.g., *Saenz*, 526 U.S. 489; *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>160</sup> *Crandall v. Nevada*, 73 U.S. 35 (1868); see also *Edwards*, 314 U.S. 172.

dollars.”<sup>161</sup> The Court also seemed particularly concerned with keeping major transportation routes open for the majority of citizenry.<sup>162</sup> The *Crandall* Court emphasized that “we are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption.”<sup>163</sup> Specifically mentioning “all citizens,” the Court implicitly included indigent passengers who presumably would have little impact on the commerce or the prosperity of the individual states.

Beginning in 1969, the Supreme Court started striking down laws that denied benefits to newer poor residents of states. States typically restricted benefits to newer residents by denying services until the individuals satisfied durational residency requirements.<sup>164</sup> This line of cases is important because it illustrates the “penalty” test the Court has used to assess factual situations involving the poor and the right to travel.

In *Shapiro v. Thompson*, the Court struck down a law that denied welfare benefits to residents until they had lived in the state for at least one year.<sup>165</sup> The Court reasoned that the residency requirement amounted to an unconstitutional classification under the Fourteenth Amendment’s Equal Protection clause.<sup>166</sup> The *Shapiro* decision held that “any classification

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<sup>161</sup> *Crandall*, 73 U.S. at 46.

<sup>162</sup> *Id.* (noting that if the tax was upheld, then “one or more States covering the only practicable routes of travel . . . may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.”).

<sup>163</sup> *Id.* at 49.

<sup>164</sup> A large volume of commentary exists on the relationship between the right to interstate travel and welfare benefits. See, e.g., Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); Calvert Chipcase, Note, *Saenz v. Roe: The Right to Travel, Durational Residency Requirements and a Misapplication of the Privileges and Immunities Clause*, 23 HAWAII L. REV. 685 (2001).

<sup>165</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>166</sup> See *id.* at 634.

which serves to penalize the exercise of [the right to interstate travel], unless shown to be necessary to promote a compelling government interest, is unconstitutional.<sup>167</sup>

*Shapiro* used the strict scrutiny test to review penalties that infringed on the right to interstate travel. Strict scrutiny, in the context of the right to travel, means that the state action must be “necessary to promote a compelling state interest.”<sup>168</sup> Absent strict scrutiny, state action is usually reviewed under the lax rational basis standard of review.<sup>169</sup>

In *Dunn v. Blumstein*,<sup>170</sup> the Court’s next major pronouncement on the right to travel and the poor after *Shapiro*,<sup>171</sup> “the Court clarified that the penalty factor promoted in *Shapiro* would have to burden recent migrants in a discriminatory fashion.”<sup>172</sup> The *Dunn* case did not directly involve a claim brought by low-income individuals.<sup>173</sup> The Court upheld the *Shapiro* strict scrutiny test as the proper standard of review.<sup>174</sup> Importantly, for our purposes here, *Dunn* reiterated that *Shapiro* strict scrutiny would be triggered by classifications that penalize the right to travel.<sup>175</sup> *Dunn* also clarified that in welfare cases involving the right to travel, it would not be important to show affirmative evidence that welfare recipients have in fact been deterred from

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<sup>167</sup> *Id.*

<sup>168</sup> *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

<sup>169</sup> *See infra* note 308.

<sup>170</sup> *Dunn*, 405 U.S. 330.

<sup>171</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970), was decided between *Shapiro* and *Dunn*. It reviewed right to travel penalties in the context of lowering the minimum voting age.

<sup>172</sup> *Nzelibe*, *supra* note 143, at 454-55.

<sup>173</sup> *See Dunn*, 405 U.S. at 331 (a professor at a university brought the equal protection claim in the case).

<sup>174</sup> *Id.* at 339.

<sup>175</sup> *Id.* at 340.

traveling.<sup>176</sup> Rather, the Court noted that residency requirements penalize the right to travel by *potentially deterring travel*, even if welfare recipients have not in fact attempted to move.<sup>177</sup>

The *Dunn* decision ultimately held that durational residency requirements in the context of voting rights violated the equal protection clause and did not survive strict scrutiny.<sup>178</sup>

As one commentator has noted, after *Dunn*, the Supreme Court watered down the standard of review to the point where the current test may be little more than an ad-hoc balancing test.<sup>179</sup> In *Memorial Hospital v. Maricopa County*,<sup>180</sup> the Supreme Court provided a more specific definition of state actions that penalize the right to travel.<sup>181</sup> *Memorial Hospital* addressed whether a state's denial of medical care to an indigent based on durational residency requirements infringed his right to travel.<sup>182</sup> The *Memorial Hospital* Court had a difficult time defining what types of penalties would infringe on the right to travel and thus require strict scrutiny.<sup>183</sup> Ultimately, *Maricopa* laid down a two-part test to help determine what constitutes a penalty to the right to travel: (1) denial of fundamental political rights, and (2) denial of the basic necessities of life.<sup>184</sup> The Court went on to describe the limits of the penalty analysis for basic necessities of life:

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<sup>176</sup> *See id.*

<sup>177</sup> *See id.* at 340-41.

<sup>178</sup> *Id.* at 360.

<sup>179</sup> *See generally* Nzelibe, *supra* note 143, at 455, 458.

<sup>180</sup> *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974).

<sup>181</sup> Nzelibe, *supra* note 143, at 455.

<sup>182</sup> *Mem'l Hosp.*, 415 U.S. at 251, 254-55.

<sup>183</sup> *Id.* at 256-260.

<sup>184</sup> *Id.* at 259.

Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. It would be odd, indeed, to find that the [state] was required to afford [the plaintiff] welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.<sup>185</sup>

As Part IV explains, non-motor vehicle users could assert a claim similar to welfare or health care classifications that warranted protection in *Memorial Hospital*. Under the *Memorial Hospital* test, lack of transportation access penalizes the right to travel at least as much as denial of access to welfare and health care benefits.

In cases after *Memorial Hospital*, the Court continued to struggle with defining what constitutes a penalty to the right to travel.<sup>186</sup> Nevertheless, the determination that a penalty exists remains a central factor in right to travel jurisprudence.<sup>187</sup> In *Saenz v. Roe*, the Court's most recent pronouncement on the right to travel, the court laid out three protections that the right to interstate travel guarantees: (1) the right of a citizen to enter and leave another state, (2) the right to be treated as a welcome visitor when temporarily present in a state, and (3) for travelers who become new residents of a state, the right to be treated like other citizens of the state.<sup>188</sup> The *Saenz* Court ruled that when a state actor makes a discriminatory classification, a partial denial (instead of an outright denial) of benefits is enough to constitute a penalty.<sup>189</sup>

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<sup>185</sup> *Id.* at 259-60 (internal citations omitted).

<sup>186</sup> Nzelibe, *supra* note 143, at 455-60.

<sup>187</sup> The court reasoned that "since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty." *Saenz v. Roe*, 526 U.S. 489, 505 (1999).

<sup>188</sup> *Id.* at 500.

<sup>189</sup> *Id.* at 504-05.

Even in cases where poverty is not an explicit issue, the Supreme Court tends to protect the transportation interests of poor people. In *United States v. Guest*,<sup>190</sup> for example, six white individuals were charged with harassing African Americans as they attempted to travel within and outside the state of Georgia.<sup>191</sup> The defendants' actions only indirectly implicated state government action, but the Court still held that "the right of interstate travel is . . . a right secured against interference from any source whatsoever, whether governmental or private."<sup>192</sup>

On its face, the *Guest* decision had nothing to do with poverty. Neither the majority opinion,<sup>193</sup> the concurrence,<sup>194</sup> nor the dissent<sup>195</sup> mentioned the economic status of African Americans living and traveling in Georgia. However, the majority opinion approvingly cited *Edwards v. California*,<sup>196</sup> where the Court invalidated "a California law which impeded the free interstate passage of the indigent," and declared that the decision was "consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities."<sup>197</sup>

The *Guest* decision indicates the Court's willingness to protect the ability of the poor to travel interstate. And it is not unreasonable to assume the Court clearly understood the different socio-economic positions of whites and African Americans during the 1960s. In 1966, when the

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<sup>190</sup> *United States v. Guest*, 383 U.S. 745 (1966).

<sup>191</sup> *Id.* at 746-748.

<sup>192</sup> *Id.* at 759.

<sup>193</sup> *Id.* at 746 (Stewart, J.).

<sup>194</sup> *Id.* at 761 (Clark, J., concurring).

<sup>195</sup> *Id.* at 762 (Harlan, J., dissenting).

<sup>196</sup> *Edwards v. Cal.*, 314 U.S. 172 (1941).

<sup>197</sup> *Guest*, 383 U.S., at 758-59 (explaining that the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, is one of the sources from which the Supreme Court has traditionally derived the right to interstate travel).

Court decided *Guest*, 41.8% of African Americans lived in poverty, compared to only 11.3% of the white population.<sup>198</sup>

In cases where the Court has suggested or held that the right to interstate travel is not violated, the plaintiff has typically been able to afford expensive forms of transportation. This line of jurisprudence suggests that newer, more costly forms of transportation are not entrenched liberties that demand respect from courts as fundamental rights.<sup>199</sup> In *Williams v. Fears*, the Court upheld a Georgia statute that taxed employers \$500 when they hired out of state laborers.<sup>200</sup> The Court based its decision on the premise that the tax did not directly impact the right to travel of the laborers.<sup>201</sup> Only the employer was affected, and the laborers were still free to travel in and out of the state at their own pleasure.<sup>202</sup> The Court emphasized that “the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by . . . the Constitution.”<sup>203</sup> The Court rooted the right to interstate travel, at the most fundamental level, as an attribute of personal liberty.

In one of the first right to travel cases involving motor vehicles, the Supreme Court ruled in *Hess v. Pawloski* that states could put reasonable restrictions on motor vehicles using state

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<sup>198</sup> ELEANOR BAUGHER & LEATHA LAMISON WHITE, POVERTY IN THE U.S.: 1995, U.S. DEPARTMENT OF COMMERCE, ECONOMIC AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS C-3, C-4 (1995), *available at* <http://www.census.gov/hhes/www/poverty/prevcps/p60-194.pdf>.

<sup>199</sup> *See infra* Part IV. Under federal equal protection analysis, courts look more closely at state actions that implicate the fundamental rights of citizens.

<sup>200</sup> *Williams v. Fears*, 179 U.S. 270 (1900).

<sup>201</sup> *Id.* at 275.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 274.

highways.<sup>204</sup> In *Hess*, an out of state resident hit an in-state resident.<sup>205</sup> While the Court noted that a state clearly had the power to regulate the use of its own highways, the Court also put special emphasis on the need to regulate the safety of motor vehicles on highways.<sup>206</sup> The Court reasoned that before a non-resident motorist could operate a motor vehicle within the state, the state could require her to appoint an official or agent within state on whom process must be served in the event of an accident.<sup>207</sup>

Other Supreme Court decisions have also restricted the rights of individuals to use more expensive or dangerous transportation modes. For example, in *Hendrick v. Maryland*, the District of Columbia required non-residents to register their cars before operating within city limits.<sup>208</sup> The Court upheld the registration requirement as a reasonable use of the police power, and noted that “the movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves.”<sup>209</sup> In another case, the Court ruled that state taxes on airline passengers were not an inhibition on interstate travel; rather, the taxes helped fund airport operations and benefited the public good.<sup>210</sup>

In sum, while the ability to reasonably regulate interstate travel does not offend the right to travel interstate, the Court has been much more willing to allow burdens on travel that affect

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<sup>204</sup> *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

<sup>205</sup> *Id.* at 353.

<sup>206</sup> *Id.* at 356 (“Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways.”).

<sup>207</sup> *Id.* at 354.

<sup>208</sup> *Hendrick v. Maryland*, 235 U.S. 610, 619 (1915).

<sup>209</sup> *Id.* at 622.

<sup>210</sup> *Evansville-Vandenburg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

individuals who can afford other means of travel.<sup>211</sup> When the plaintiffs are either poor or indigent, the Court has been willing to find a constitutional violation of the right to interstate travel.<sup>212</sup>

## B. The Constitutional Right to Intrastate Travel.

Similar to the discussion of the right to interstate travel, there is no shortage of literature that addresses the existence and implications of intrastate travel.<sup>213</sup> There is thus no need to delve into a general review of the topic. Intrastate travel refers to journeys that occur solely within one state. The right to intrastate travel is important because it helps define the contours of the rights of non-motor vehicle travelers.<sup>214</sup> Alternative transportation users would enjoy more constitutional protection if a court recognizes and protects intrastate travel.<sup>215</sup>

Contrary to interstate travel jurisprudence, the Court has explicitly decided *not* to decide whether a constitutional right to intrastate travel exists. In 1974, the Court decided *Memorial Hospital v. Maricopa County*, and declared, “[a] constitutional distinction between interstate and

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<sup>211</sup> The more dangerous or risky the form of transportation, the more likely the Supreme Court seems willing to regulate it. *See Hess v. Pawloksi*, *supra* note 204, at 40-41 (finding that the automobile is dangerous and should be regulated as a mode of travel).

<sup>212</sup> As one commentator has noted, the “contours [of the right to travel] are blurry and ill-defined.” Nzelibe, *supra* note 143, at 463. Nzelibe theorizes that “the claim of a right to travel provided a judicial vehicle for righting the wrong of legislative apathy towards the poor by the states—a judicial power that otherwise was limited by [other cases denying the poor constitutional rights such as housing and education].” *Id.*

<sup>213</sup> *See, e.g.*, Bruce Epperson, *Permitted But Not Intended: Boub v. Township of Wayne, Municipal Tort Immunity in Illinois, and the Right to Local Travel*, 38 J. MARSHALL L. REV. 545 (2004); Matthew Dombrowski, Comment, *Securing Access for the Urban Poor*, 105 COLUM. L. REV. 503 (2005); Nicole Hyland, Comment, *On the Road Again: How Much Mileage is Left on the Privileges and Immunities Clause and How Far Will It Travel?*, 70 FORDHAM L. REV. 187 (2001); Andrew Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U.L. REV. 820 (1992).

<sup>214</sup> Recall that the right to interstate travel protects three types of privileges. *See supra* note 189.

<sup>215</sup> *See infra* Part IV.

intrastate travel, [is] a question we do not now consider.”<sup>216</sup> Since then, the Court has remained silent on the issue.<sup>217</sup>

In the absence of a definitive ruling from the Supreme Court, federal appellate courts have split on the issue of the existence of a right to intrastate travel.<sup>218</sup> Despite this circuit split, the federal appellate decisions have followed a similar trend to the Supreme Court’s jurisprudence involving the right to interstate travel. When viewed through the lens of the economic status of the traveler, the circuit decisions follow a discernible pattern.<sup>219</sup> One outlier circuit exists -- the Third Circuit -- and it will be discussed at the end of this section.<sup>220</sup>

In the circuits that recognize a right to intrastate travel, case law looks sympathetically at the economic and social class of the individual affected by the restriction. In *Johnson v. City of Cincinnati*, the Sixth Circuit recognized the right to intrastate travel.<sup>221</sup> The plaintiffs were barred by local ordinance from an area of the city because of past criminal convictions.<sup>222</sup> Because of the travel restriction, one of the plaintiffs, a homeless man, could not visit his lawyer’s office because it was in the restricted zone.<sup>223</sup> The other plaintiff was a grandmother who could not legally visit her grandchildren after she was banned from the geographic area.<sup>224</sup>

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<sup>216</sup> *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974).

<sup>217</sup> *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005).

<sup>218</sup> *Id.* at 712-13.

<sup>219</sup> *See infra* pp. 44-48.

<sup>220</sup> *See Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990).

<sup>221</sup> *Johnson v. City of Cincinnati*, 310 F.3d 484, 487 (6th Cir. 2002).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 505.

<sup>224</sup> *Id.* at 503.

The grandmother needed to travel to the grandchildren's home to help raise them and take them to school.<sup>225</sup> The Sixth Circuit rejected the ban, finding that "due process . . . demands some individualized consideration before an individual's right to localized travel can be restricted."<sup>226</sup> The court was particularly concerned that the travel restriction denied the plaintiffs access to basic needs like food, shelter, and social and educational services.<sup>227</sup>

In *King v. New Rochelle Municipal Housing Authority*, the Second Circuit recognized the right to intrastate travel in a case involving housing and welfare recipients.<sup>228</sup> The local housing authority issued a rule that required individuals to reside in the state for five continuous years before becoming eligible for public housing.<sup>229</sup> All of the plaintiffs affected in the case supported families, and at least two of the three plaintiffs received public assistance.<sup>230</sup> The court reinforced the right to intrastate travel in strong terms, reasoning that "it would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."<sup>231</sup> The court also noted that the residency restriction penalized the new residents as a class by forcing them to wait longer than their in-state peers.<sup>232</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 504.

<sup>227</sup> *Id.* at 503.

<sup>228</sup> *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971).

<sup>229</sup> *Id.* at 647.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 648.

<sup>232</sup> *Id.*

In the circuits that hold no right to intrastate travel exists, the individuals affected in the cases tend to be either from a higher income bracket or considered less worthy of protection. In *Wright v. City of Jackson*, for example, the Fifth Circuit upheld a city ordinance requiring that all city employees reside within city limits.<sup>233</sup> The court ruled the ordinance was related to a legitimate government purpose, and that there was no “fundamental ‘right to commute.’”<sup>234</sup>

Sex offenders do not fare any better with courts that reject the right to intrastate travel. In *Doe v. City of Lafayette*, the Seventh Circuit held that a sex offender ban in public parks did not give rise to a right to intrastate travel claim.<sup>235</sup> The court defined any supposed intrastate travel right narrowly – by considering whether or not the right to enter a public park was “implicit in the concept of ordered liberty.”<sup>236</sup> In *Doe v. Miller*, the Eighth Circuit pursued similar reasoning to *Lafayette*, holding that a restriction of sex offenders living near schools did not implicate any potential right to intrastate travel.<sup>237</sup>

In *Miller*, the court ruled that the state statute did not prevent a sex offender from entering or leaving any part of the state (including travel near schools), and that the statute did not erect a barrier to intrastate movement.<sup>238</sup> The Eighth Circuit also noted that “the decisions finding infringement of a fundamental right to intrastate travel have involved laws that trigger

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<sup>233</sup> *Wright v. City of Jackson*, 506 F.2d 900, 901 (5th Cir. 1976).

<sup>234</sup> *Id.* at 902; *see also* *Andre v. Bd. of Trs. of Maywood*, 561 F.2d 48 (7th Cir. 1977).

<sup>235</sup> *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004).

<sup>236</sup> *Id.* at 771-74. Perhaps the court defined the right narrowly because the law regulated a morally reprehensible group – sex offenders. In *Bowers v. Hardwick*, the Supreme Court also narrowly defined a right against what it probably considered a morally reprehensible group – homosexuals. *Bowers v. Hardwick*, 47 U.S. 186 (1986). In *Bowers*, the Court ruled there was no constitutional right to the narrow issue sodomy, *id.* at 189, when it probably could have based its decision on the more broad constitutional right to privacy. *Id.* at 205-06 (Blackmun, J., dissenting).

<sup>237</sup> *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

<sup>238</sup> *Id.* at 713.

concerns not present here – interference with free ingress to and egress from certain parts of a State, or treatment of new residents of a locality less favorably than existing residents.”<sup>239</sup>

The Eighth Circuit seemed to reason that sex offenders still have the liberty to travel anywhere in the state, even if they are prohibited from living near schools. On one level, the Eighth Circuit’s reasoning in *Miller* directly conflicts with the Supreme Court’s interstate travel welfare benefits jurisprudence.<sup>240</sup> The welfare cases hold that residency restrictions that restrict access to benefits are unconstitutional violations of the right to travel.<sup>241</sup> The law that prohibited sex offenders from living near schools could also be seen as a penalty that restricts access the privilege of choosing one’s home. The Eighth Circuit probably saw sex offenders as a very different class than poor individuals needing economic assistance, and drew a distinction between a privilege and a benefit.

The Third Circuit takes a unique approach to the right to intrastate travel, and in many ways it represents a compromise in the current circuit split. In *Lutz v. City of York*, the court delved into a detailed search for a constitutional source to the right of intrastate travel.<sup>242</sup> The case turned on the constitutionality of a “cruising” ordinance that prohibited driving a motor vehicle repeatedly in a loop at certain hours of the day.<sup>243</sup> The plaintiff challenged the law as facially invalid because it violated the right to intrastate travel.<sup>244</sup> The court first reviewed the source of the constitutional right to intrastate travel, and ultimately settled on substantive due

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<sup>239</sup> *Id.* (internal citations omitted).

<sup>240</sup> *See supra* pp. 33-38.

<sup>241</sup> *Id.*

<sup>242</sup> *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990).

<sup>243</sup> *Id.* at 257 (the ordinance at issue restricted passing the same point twice between 7:00 p.m. and 3:30 a.m. during any two hour period).

<sup>244</sup> *Id.* at 261.

process inherent in the Fifth Amendment.<sup>245</sup> The Third Circuit concluded that “the right to move freely about one’s neighborhood or town, even by automobile, is indeed ‘implicit in the concept of ordered liberty’ and ‘deeply rooted in the Nation’s history.’”<sup>246</sup> The *Lutz* court also made the cryptic statement that:

The right or tradition we consider may be described as the right to travel locally through public spaces and roadways. Under [the City of] York's view, a state or local government could constitutionally prohibit all freedom of movement that does not involve interstate migration, interstate commerce, business between a citizen and the federal government, and (presumably) travel incident to otherwise protected activity. Conceivably this result could be made less implausible by attempting to distinguish a more particularized, protected tradition of travel or wandering on foot . . . from an unprotected tradition of localized travel by automobile. But accepting that distinction would imply the constitutionality of the limited travel ban described above, enforced exclusively by state control of the public roadways. It would permit, for example, the prohibition of simply "going for a ride" through one's neighborhood, so long as the prohibition could be effected without burdening the protected forms of travel and justified by any legitimate state purpose it conceivably furthered.<sup>247</sup>

The court’s comments suggest the Third Circuit would protect all forms of transportation from regulations that burden intrastate travel. The court also seemed to acknowledge that there may indeed be a constitutionally protected right to walk, and it arguably extended this constitutional right to include a protected interest in driving a car. However, the implications of recognizing such a right would be enormous, and go against Supreme Court precedent allowing the restriction of travel modes.<sup>248</sup>

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<sup>245</sup> *Id.* at 258-68.

<sup>246</sup> *Id.* at 268.

<sup>247</sup> *Id.*

In the end, the Third Circuit found a way to uphold the cruising ordinance in *Lutz*.<sup>249</sup> Borrowing from First Amendment jurisprudence, the court created a new intermediate scrutiny review test to analyze the substantive due process right to drive an automobile.<sup>250</sup> The court then applied the new test and upheld the city ordinance, finding that the City of York had a significant interest in ensuring public safety and reducing congestion.<sup>251</sup> But, as we will soon see, the *Lutz* court's reasoning went against established precedent that disfavors the automobile as a transportation mode. The *Lutz* decision falls into the netherworld of jurisprudence between the constitutional right to "freedom of association"<sup>252</sup> and cases that do not guarantee a right to use a particular travel mode.<sup>253</sup>

### Part III

#### A. The Strong Presumption Against Choice of Transportation Mode.

The presumption against choice of transportation mode in right to travel jurisprudence began with *Monarch Travel Services v. Associated Cultural Clubs*.<sup>254</sup> In *Monarch*, the Ninth

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<sup>248</sup> See, e.g., *Dixon v. Love*, 431 U.S. 105 (1977) (finding that it is within the state's police power to revoke a driver's license and refuse an individual's right to drive).

<sup>249</sup> *Lutz v. York*, 899 F.2d 255, 270 (3d Cir. 1990).

<sup>250</sup> *Id.* at 268-70.

<sup>251</sup> *Id.* at 270.

<sup>252</sup> See *infra* Part III.B.

<sup>253</sup> At least one court has used *Lutz* as precedent in analyzing the right to travel as a fundamental right subject to intermediate scrutiny. See *Townes v. City of St. Louis*, 949 F. Supp. 731 (E.D. Mo. 1996).

<sup>254</sup> *Monarch Travel Servs. v. Associated Cultural Clubs*, 466 F.2d 552 (9th Cir. 1972).

Circuit reviewed a statute that regulated air carriers.<sup>255</sup> The defendant in the case argued that the regulations led to higher ticket prices, and that not everyone could afford to pay the higher prices to travel to Europe.<sup>256</sup> In the defendant's view, the regulation violated the constitutional right to travel.<sup>257</sup>

The *Monarch* court ruled that higher prices caused by the regulations did not violate the right to travel.<sup>258</sup> The court reasoned, "higher air tariffs will limit travel of those who cannot pay the price. A rich man can choose to drive a limousine; a poor man may have to walk. The poor man's lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional."<sup>259</sup> Of course, the court left out the point that it is literally impossible to walk to Europe.

*Shanks v. Forsyth County Park Authority* is another example rejecting protection of a particular travel mode.<sup>260</sup> The *Shanks* court reviewed the constitutionality of a statute that banned motorcycles from a park.<sup>261</sup> Even while assuming that the right to intrastate travel existed, the court found that the ban did not affect a travel right because it only regulated a particular method of travel.<sup>262</sup> The court reasoned, "[p]eople are free to travel inside the Park through other methods of travel such as by foot, car, bicycle, etc. As such, the ban on

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<sup>255</sup> *Id.* at 553-54.

<sup>256</sup> *Id.* at 554.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Shanks v. Forsyth County Park Auth.*, 869 F. Supp. 1231 (M.D.N.C 1994).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1238.

motorcycles does not impede a person's right to travel but merely regulates the method of travel once inside the Park."<sup>263</sup>

Other courts have almost uniformly rejected an implied right to choose a transportation mode in right to travel cases, and most cite to *Monarch* or its companion case in the Ninth Circuit, *Miller v. Reed*.<sup>264</sup> However, reliance by other courts on *Monarch* and *Miller* for a blanket restriction in choosing a transportation mode goes too far. *Monarch* addressed a fact situation involving airplanes that traveled internationally.<sup>265</sup> As such, it implicated the right to international travel, not the right to travel interstate or intrastate. The Supreme Court has consistently held international travel to different standards than travel within the United States.<sup>266</sup>

In *Miller*, the Ninth Circuit held that the plaintiff did not have a fundamental "right to drive" an automobile, and that a state could constitutionally revoke a driver's license.<sup>267</sup> The court also noted that "we have previously held that burdens on a single mode of transportation do not implicate the right to interstate travel."<sup>268</sup> In support of its reasoning, in addition to citing

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<sup>263</sup> *Id.*

<sup>264</sup> *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999). Some of the cases that cite *Miller* or *Monarch* include *Ducan v. Cone*, No. 00-5705, 2000 U.S. App. LEXIS 33221 (6th Cir. filed Dec. 7, 2000) (finding that there is no fundamental right to drive a car); *Avery v. Perrysburg Mun. Court Prosecutor*, No. 05-7246, 2005 U.S. Dist. LEXIS 13433 (N.D. Ohio 2005 filed Jul. 6 2005) (holding that restrictions on a single mode of transportation do not rise to the level of a violation of the fundamental right to interstate travel); *Tutor v. City of Hailey*, No. 02-475-S-BLW, 2004 U.S. Dist. LEXIS 28354 (D. Idaho 2005 filed Apr. 6, 2005) (holding there is no right to travel by private jet).

<sup>265</sup> *Monarch Travel Servs. v. Associated Cultural Clubs*, 466 F.2d 552, 553 (9th Cir. 1972).

<sup>266</sup> *See, e.g.*, *Haig v. Agee*, 453 U.S. 280 (1981) (reasoning that international travel implicates national security issues and should be measured under a different standard than the right to interstate travel); *Califano v. Aznavorian*, 439 U.S. 170 (1978) (finding that statutes that implicated the right to international travel cannot be reviewed under the same constitutional standard as statutes that implicate the right to interstate travel).

<sup>267</sup> *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999).

<sup>268</sup> *Id.* at 1205.

*Monarch*, the *Miller* court relied upon two other cases – *City of Houston v. FAA*<sup>269</sup> and *Berberian v. Petit*.<sup>270</sup>

*City of Houston* reviewed an airport travel restriction that prevented airplanes from flying particular routes.<sup>271</sup> The court rejected the argument that the restriction burdened the right to travel, noting “[the] argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever [in case law].”<sup>272</sup>

In *Berberian*, the court ruled:

The plaintiff’s argument that the right to operate a motor vehicle is fundamental because of its relation to the fundamental right of interstate travel is utterly frivolous. The plaintiff is not being prevented from traveling interstate by public transportation, by common carrier, or in motor vehicle driven by someone with a license to drive it. What is at issue here is not his right to travel interstate, but his right to operate a motor vehicle on the public highways, and we have no hesitation in holding that this is not a fundamental right.<sup>273</sup>

The *Berberian* and *City of Houston* decisions drive home the point that an individual does not have a right to the most convenient form of travel. But they do not address the situation in which there is only one method of reaching a destination. In *Berberian*, the court went so far as to specifically mention that it might rule differently if the case involved public transportation,

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<sup>269</sup> *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982).

<sup>270</sup> *Berberian v. Petit*, 374 A.2d 791 (R.I. 1977).

<sup>271</sup> *City of Houston v. FAA*, 679 F.2d 1184, 1194 (5th Cir. 1982).

<sup>272</sup> *Id.* at 1198.

<sup>273</sup> *Berberian v. Petit*, 372 A.2d 791, 794 (R.I. 1977) (internal citations omitted) (cited in *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)).

instead of a private automobile.<sup>274</sup> The *Miller* case involved a private automobile, and *Monarch* implicated international airplane travel. In short, the facts in these cases, unlike the facts in the Supreme Court's interstate travel jurisprudence, do not involve situations in which the people are *unable* to choose another travel mode within the United States.

## B. Supreme Court Freedom of Movement Jurisprudence

Unlike the lower court cases that find no protected interest in choosing a transportation mode,<sup>275</sup> Supreme Court cases that invoke the freedom of movement nearly always involve personal liberty.<sup>276</sup> Federal appellate courts, when not looking explicitly at a particular transportation mode, have also recognized a freedom of movement.<sup>277</sup> The Court has defined freedom of movement as the right to free movement inside a nation's frontiers, and it seems to include the right to remain in a public place on foot.<sup>278</sup> The Supreme Court has never explicitly recognized freedom of movement as an explicit fundamental right,<sup>279</sup> and federal appellate courts are currently split over whether or not such a right exists.<sup>280</sup>

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<sup>274</sup> *Berberian v. Petit*, 372 A.2d 791, 794 (R.I. 1977).

<sup>275</sup> *See supra* Part III.A.

<sup>276</sup> *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900) ("The right to remove from one place to another according to inclination . . . is an attribute of personal liberty") (cited in *Johnson v. City of Cincinnati*, 310 F.3d 484, 497 (6th Cir. 2002)).

<sup>277</sup> *See, e.g., Gomez v. Turner*, 672 F.2d 134, 143-44 (D.C. Cir. 1982) ("walk[ing] the streets, without explanation or formal papers is surely among the cherished liberties that distinguish this nation from so many others").

<sup>278</sup> *See Chicago v. Morales*, 527 U.S. 41, 54 (1999).

<sup>279</sup> *Hutchins v. District of Columbia*, 188 F.3d 531, 535-39 (D.C. Cir. 1999).

<sup>280</sup> *Compare Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) *with Hutchins v. Dist. of Columbia*, 188 F.3d 531 (D.C. Cir. 1999).

Nevertheless, Supreme Court cases strongly suggest that, at the very least, a fundamental right to travel on foot exists. In *Papachristou v. City of Jacksonville*, the Court struck down a vagrancy statute in which two individuals were arrested while walking down a sidewalk.<sup>281</sup> Justice Douglas, writing for the majority, described walking as a basic “amenit[y] of life,”<sup>282</sup> and quoted Henry David Thoreau for the proposition that “every walk is a sort of crusade, preached by some Peter the Hermit in us, to go forth and reconquer this Holy Land from the hands of the Infidels.”<sup>283</sup> Justice Douglas’s language is not what one reads in the garden variety Supreme Court decision, but the implications are unmistakable. Justice Douglas thought it was important to protect walking, even if it is “not mentioned in the Constitution or in the Bill of Rights.”<sup>284</sup>

In *Kolender v. Lawson*, the Court also protected an individual’s right to walk.<sup>285</sup> *Kolender* involved a statute that allowed police to stop any person walking on the street and ask for identification.<sup>286</sup> The Court struck down the statute, reasoning that the right to walk the public streets implicated freedom of movement.<sup>287</sup>

In its freedom of movement jurisprudence, the Supreme Court has also addressed the ability of individuals to maintain a livelihood. In *Kent v. Dulles*, the court said, “[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage . . . [T]ravel within a country, may be necessary for a livelihood. It may be as close to

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<sup>281</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

<sup>282</sup> *Id.* at 164.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983).

<sup>286</sup> *Id.* at 358.

<sup>287</sup> *Id.* (“Our concern here is based upon . . . First Amendment liberties . . . [and] consideration of the constitutional right to freedom of movement.”) (internal citations omitted).

the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”<sup>288</sup> However, it is important to note that *Kent* and its successor case, *Aptheker v. Secretary of State*, both involved international travel. Also, most of the Justices’ reasoning discussing freedom of association resides in dictum.<sup>289</sup>

Further complicating the situation is the Supreme Court’s long line of jurisprudence upholding a state’s power to regulate use of its public roads.<sup>290</sup> Lower courts have vigorously upheld a state’s right to impose regulations that ostensibly make roads safer.<sup>291</sup> Lower courts also allow regulations that limit individuals’ behavior while using transportation modes, such as rules that require motorcyclists to wear helmets.<sup>292</sup>

#### Part IV – Analysis and Conclusion

In the final analysis, federal case law is in conflict with itself. The Supreme Court and lower courts protect interstate and intrastate travel when cases include factual situations that affect the poorer members of society.<sup>293</sup> The right to walk, in particular, receives strong support in the Supreme Court’s amorphous freedom of movement doctrine.<sup>294</sup> But, lower courts have

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<sup>288</sup> *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *see also* *Aptheker v. Sec’y of State*, 378 U.S. 500, 505-06 (1964).

<sup>289</sup> *Kent*, 357 U.S. 116; *Aptheker*, 378 U.S. 500 (both cases review the denial of passports based on political belief).

<sup>290</sup> *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that a state can reasonably restrict uses on its public streets); *see also supra* p. 11.

<sup>291</sup> *See, e.g.*, *United States v. Hare*, 308 F. Supp. 2d 955 (D. Neb. 2004).

<sup>292</sup> *See, e.g.*, *Love v. Bell*, 465 P.2d 118 (Colo. 1970).

<sup>293</sup> *See supra* Part II.

<sup>294</sup> *See supra* Part III.B.

repeatedly and unanimously rejected the right of an individual to choose one particular travel mode.<sup>295</sup>

The poor person, especially in today's transportation environment, is left in a quandary. In *Monarch*, the Ninth Circuit justified its rejection of a right to select a travel mode by stating that if a person cannot afford another mode,<sup>296</sup> "[the] poor man may have to walk."<sup>297</sup> But public transportation frequently does not serve areas where new jobs are created, and today's transportation infrastructure makes it difficult or unsafe to walk (or bicycle) on much of the transportation system.<sup>298</sup>

In interstate travel and freedom of movement jurisprudence, the Supreme Court seems most concerned with removing restrictions on personal liberty.<sup>299</sup> In intrastate travel jurisprudence, the Supreme Court has not yet spoken definitively on the issue, and the circuit courts are split.<sup>300</sup> But most circuit courts, even in the cryptic *Lutz* decision, seem to recognize that transportation access for basic services is protected under the Constitution.<sup>301</sup> In future right to travel cases, judges will have to reconcile a poor person's theoretical liberty to move within and across states with the fact that many living in poverty have no access to basic services and jobs because they are unable to afford a car.<sup>302</sup>

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<sup>295</sup> See *supra* Part III.A.

<sup>296</sup> An analysis of the transportation rights of individuals with disabilities is beyond the scope of this comment.

<sup>297</sup> *Monarch Travel Servs. v. Associated Cultural Clubs*, 466 F.2d 552 (9th Cir. 1972).

<sup>298</sup> See *supra* Part I.

<sup>299</sup> See *supra* pp. 39-40.

<sup>300</sup> See *supra* Part II.B.

<sup>301</sup> *Id.*

<sup>302</sup> See *supra* Part I.

Before the rise of modern roadway engineering and the automobile, alternative travel modes were popular. Individuals from all socio-economic backgrounds were able to move throughout the country.<sup>303</sup> Bicycling, walking, and public transportation were all viable modes of transportation.<sup>304</sup> Since the Great Depression, however, the United States has become increasingly reliant on the automobile for transportation. Today, in many areas of the country, it is practically impossible to reach a destination with any form of transportation other than an automobile.<sup>305</sup>

Perhaps the most promising legal doctrine to protect the travel rights of poor individuals is the Equal Protection Clause of the Fourteenth Amendment.<sup>306</sup> In *Plyler v. Doe*, the Supreme Court reaffirmed the principle that the Equal Protection Clause requires that all persons in similar circumstances should be treated alike.<sup>307</sup> The *Plyler* Court noted that, "[i]n applying the Equal Protection Clause to most forms of state action, [the Court] seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate state purpose."<sup>308</sup>

However, the *Plyler* Court went on to remark:

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect

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<sup>303</sup> See *supra* Part I.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> U.S. CONST. amend. XIV, § 1.

<sup>307</sup> *Plyler v. Doe*, 457 U.S. 202, 212 (1982).

<sup>308</sup> *Id.* at 216.

to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.<sup>309</sup>

Right to travel cases involving the poor have often implicated the Fourteenth Amendment's Equal Protection Clause. While "the right to travel jurisprudence is somewhat muddled,"<sup>310</sup> the "Supreme Court has stated . . . [that] in reality, right to travel analysis refers to little more than a particular application of equal protection analysis."<sup>311</sup> The Equal Protection Clause does not create the right to interstate or intrastate travel.<sup>312</sup> Rather, it is a method of relief for state actions that infringe on the right to travel.<sup>313</sup>

Under federal equal protection doctrine, state actions that impede an individual's ability to travel receive judicial review under the rational basis test or some higher form of judicial

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<sup>309</sup> *Id.* at 216-17 (internal citations omitted).

<sup>310</sup> *Westenfelder v. Ferguson*, 998 F. Supp. 146, 150, 151 n.6 (D.R.I. 1998) (explaining that some right to travel cases have been decided using a lax rational basis test under equal protection, while other cases have employed higher standards of review); *see also* *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (deriving the right to intrastate travel and employing an intermediate scrutiny standard of review).

<sup>311</sup> *Westenfelder*, 998 F. Supp. at 151 n.6 (D.R.I. 1998) (internal citations omitted). The *Westenfelder* court went on to apply strict scrutiny to actions that impeded the right to interstate travel. *Id.* at 151.

<sup>312</sup> *See* *Saenz v. Roe*, 526 U.S. 489 (1999) (grounding different parts of the right to interstate travel in the Privileges and Immunities Clauses); *Lutz*, 899 F.2d 255 (deriving the right to intrastate travel from substantive due process).

<sup>313</sup> *Lutz*, 899 F.2d at 266.

scrutiny.<sup>314</sup> Courts analyze equal protection claims under strict scrutiny if state action involves a fundamental right or a suspect class.<sup>315</sup>

Most laws, regulations, and other state actions relating to transportation are facially neutral because they do not explicitly single out one group. The only conceivable facial classification would probably claim that state action favors automobile drivers over other transportation users; but this is hardly within the realm of what the Supreme Court would consider a suspect classification.<sup>316</sup> However, state action involving transportation almost certainly involves interstate or intrastate travel, and could presumably penalize travel implicated as a fundamental right.<sup>317</sup>

The non-motor-vehicle user has a colorable claim using a fundamental rights approach under the Fourteenth Amendment. Generally, in cases involving fundamental rights, the plaintiff does not need to show that she is part of a suspect class.<sup>318</sup> But in right to travel cases, “[e]qual protection focuses on whether there is disparity in treatment among a class of individuals on the basis of the exercise of a fundamental right.”<sup>319</sup> The relevant inquiry is whether the citizen’s right to travel has been penalized.<sup>320</sup> One of the ways in which state action penalizes the right to travel occurs when a state’s classification denies a basic necessity of life.<sup>321</sup>

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<sup>314</sup> See *supra* note 309 and accompanying text.

<sup>315</sup> *Id.*

<sup>316</sup> Cf. *Lutz*, 899 F.2d at 265-266 (finding that a law regulating the use of a transportation mode does not create a suspect or quasi suspect classification).

<sup>317</sup> See *Saenz*, 526 U.S. at 504-05 (explaining that the fundamental rights test applies to equal protection analysis when state action acts as a penalty to traveling interstate); *Westenfelder v. Ferguson*, 998 F. Supp. 146, 151-52 (D.R.I. 1998).

<sup>318</sup> See *supra* note 309 and accompanying text.

<sup>319</sup> Nzelibe, *supra* note 143, at 454.

A right to travel claim based on lack of transportation access is unlikely to succeed as a stand-alone claim, even though most Americans travel daily to accomplish all sorts of tasks.<sup>322</sup> One commentator, Jide Nzelibe, has convincingly pointed out that the Supreme Court's right to travel jurisprudence is confusing and conflated.<sup>323</sup> In particular, the Court has a difficult time determining: (1) what constitutes a penalty to the right to travel,<sup>324</sup> (2) what constitutes basic necessities of life,<sup>325</sup> and (3) the proper constitutional test to apply to classifications that penalize the right to travel.<sup>326</sup> From a practical point of view, as Nzelibe argues, a court would probably analyze a fundamental rights claim involving the right to travel<sup>327</sup> using an ad-hoc balancing test that measures the amount of penalty involved in the state action.<sup>328</sup>

States do not explicitly discriminate between motor vehicle and non-motor vehicle users, and generally do not enact laws that preclude citizens from driving motor vehicles that are

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<sup>320</sup> *Saenz*, 526 U.S. at 505 (finding that California's denial of welfare benefits penalized the plaintiff); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974).

<sup>321</sup> *Mem'l Hosp.*, 415 U.S. at 259.

<sup>322</sup> *See supra* Part I.

<sup>323</sup> *See generally* Nzelibe, *supra* note 143.

<sup>324</sup> *Id.* at 455, 457.

<sup>325</sup> *Id.* at 458.

<sup>326</sup> *Id.* (arguing that the Court's jurisprudence in practice functions more like the intermediate scrutiny test under the Comity Clause than the standard strict scrutiny test utilized to protect fundamental rights).

<sup>327</sup> If a court were to protect individual transportation modes, walking would be the most likely to received protection as a fundamental right. Logically, if one accepts that courts often look to history and tradition to derive fundamental rights in applying strict scrutiny analysis, *see generally* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002) (explaining that courts often use history and tradition to derive fundamental rights), the ability to walk on public roads is surely worthy of heightened constitutional protection. Walking, by its very nature, has been around since humans have been able to stand on two feet. Justice Douglas called walking a "basic amenity of life," and ample case law exists that implicitly protects walking as a travel mode. *See supra* Part II.B. Applying history and tradition to individual travel modes, motor vehicles are the least likely form of ground transportation to receive constitutional protection; they came into wide use after the train, bicycle, and boat gained prominence.

<sup>328</sup> *See generally* Nzelibe, *supra* note 143, at 457-58.

outside the scope of valid exercises of the police power.<sup>329</sup> Any citizen can drive a car if they can afford it -- regardless of whether they happen to be a new resident or a visitor of a state. In order to find the right to travel “penalized,” a court would have to hold that the high cost of owning an automobile is a penalty *per se*, and possibly that the right to intrastate travel exists. Given the large catalogue of jurisprudence that does not protect an individual’s right to use particular travel modes, courts seem unlikely to protect non-motor vehicle users under the fundamental rights rubric by itself. Nevertheless, defining the right to travel as fundamental might help define the contours of a suspect class of poor people for the purposes of challenging the lack of transportation options under equal protection.

Under the Supreme Court’s equal protection doctrine of total deprivation,<sup>330</sup> poor individuals could make the claim that they cannot afford a motor vehicle and are thus totally deprived of transportation mobility. If a “total deprivation” argument were combined with a right to travel claim, the Supreme Court would be faced with an argument that is very similar to its prior cases.<sup>331</sup> The grouping of poor people as a suspect class provides the discrimination required to bring the claim that state action penalizes the fundamental right to travel. And if a court recognizes a right to intrastate travel, non-motor vehicle users would have a cause of action even if they were not engaging in acts traditionally protected under interstate travel jurisprudence.<sup>332</sup> If the right to intrastate travel exists, non-motor vehicle users operating completely within a state could also receive constitutional protection.

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<sup>329</sup> *See supra* p. 11.

<sup>330</sup> *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

<sup>331</sup> *See supra* Part II.A (describing cases where the Court considered whether the right to travel was “penalized” by state classifications of poor people).

The total deprivation doctrine reached fruition in *San Antonio Independent School District v. Rodriguez*, where poor citizens in Texas challenged the state's school funding system.<sup>333</sup> The Supreme Court rejected the claim, and held that no federal fundamental right to education exists.<sup>334</sup> However, the Court also stated, "[t]he individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."<sup>335</sup> Crucial to the Court's factual analysis was the fact that the people impacted did not show they were indigent or beneath "any designated poverty level."<sup>336</sup> *San Antonio* also reasoned that no constitutional violation occurs when the state creates an adequate substitute for the desired benefit.<sup>337</sup>

This language opened the door for future Equal Protection Clause suspect classification claims based on total deprivation due to poverty. Under the total deprivation doctrine, even if the state classification is rationally related to a state interest, the court must find that the state action satisfies strict scrutiny.<sup>338</sup> To date, however, this author is not aware of any case that has invoked the total deprivation doctrine in the context of the right to travel.

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<sup>332</sup> *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (defining the right to interstate travel as encompassing the right to enter and leave a state, visit a state, and move to a new state).

<sup>333</sup> *San Antonio Indep. Sch. Dist.*, 411 U.S. at 4-6.

<sup>334</sup> *Id.* at 45.

<sup>335</sup> *Id.* at 21 (arguing that earlier classifications involving indigents were properly labeled suspect classifications and subject to heightened scrutiny).

<sup>336</sup> *Id.* at 22-23.

<sup>337</sup> *See id.* at 21.

<sup>338</sup> *Id.* at 21-25.

The total deprivation standard laid out in *San Antonio* is extremely hard to meet. The Court's general rule for equal protection claims holds that "[i]f a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end."<sup>339</sup> The lack of wealth, in and of itself, does not create a suspect classification for the purposes of the Equal Protection Clause.<sup>340</sup> Indeed, the Supreme Court "has held repeatedly that poverty, standing alone, is not a suspect classification."<sup>341</sup> The key difference in the transportation context, versus a standard poverty claim involving equal protection, is that the right to travel implicates both the total deprivation doctrine (and thus a suspect classification) and the fundamental right to travel. Together, a total deprivation/right to travel argument fuses the various strands of transportation jurisprudence and demonstrates that a penalty has occurred that infringes the right to travel. Total deprivation and right to travel arguments combine notions of individual liberty in cases like *Williams v. Fears*<sup>342</sup> and freedom of movement jurisprudence<sup>343</sup> with the broader notions of class protection evident in many of the interstate and intrastate travel cases.

Abundant evidence exists to show that increasing numbers of poor Americans are totally deprived of the right to travel.<sup>344</sup> The primary transportation engineering manual in the United States puts the needs of motor vehicles squarely ahead of alternative forms of transportation.<sup>345</sup>

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<sup>339</sup> *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal citations omitted).

<sup>340</sup> *Unites States v. Myers*, 294 F.3d 203, 209 (1st Cir. 2002).

<sup>341</sup> *Harris v. McRae*, 448 U.S. 297, 323 (1980).

<sup>342</sup> *See supra* note pp. 39-40.

<sup>343</sup> *See supra* Part III.B.

<sup>344</sup> *See supra* Part I.

<sup>345</sup> *Id.*

For decades, transportation policy focused on enabling motor vehicle use at the expense of other transportation modes.<sup>346</sup> Large numbers of people below the poverty line are unable to flee from natural disasters, and these individuals tend to be African American.<sup>347</sup> The average cost of operating a motor vehicle is now over \$8000 per year.<sup>348</sup> The average individual on welfare cannot afford a car, and less than half of all jobs in the United States are accessible by public transportation.<sup>349</sup>

These overwhelming facts appear to satisfy the total deprivation doctrine laid out in *San Antonio*. Many of the poor individuals that need transportation access are below the poverty line, they have no adequate replacement for the desired benefit in the form of public transportation, and they suffer from a total deprivation of significant portions of the transportation system. Seen through this lens, the total deprivation doctrine avoids the problems associated with a stand-alone fundamental rights analysis involving the right to travel,<sup>350</sup> and remains faithful to the Supreme Court's jurisprudence that protects the travel rights of poorer members of society.

Could a state justify state action that limits non-motor vehicle use under a total deprivation challenge? This remains an open question, and by no means an easy one. A reviewing court could apply intermediate scrutiny to intrastate travel litigation<sup>351</sup> or strict

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *See supra* note 8.

<sup>349</sup> *See supra* note 45.

<sup>350</sup> *See supra* pp. 64-65. Using the total deprivation doctrine to protect the right to travel avoids the problems of (1) having no definable group of persons that have been penalized, and (2) deciding which constitutional test to use to protect the right to travel.

<sup>351</sup> *See, e.g., Lutz v. City of York*, 899 F.2d 255, 268-70 (3d Cir. 1990).

scrutiny to interstate travel cases.<sup>352</sup> As in *Lutz*, a court might easily find that restrictions on automobiles are a significant state interest.<sup>353</sup> However, in the context of poverty and lack of mobility, a court could also easily find that deprivation of transportation access can not be justified by policy arguments — particularly when public transportation, bicycling, and walking accommodation exist as feasible solutions. In the end, courts will have to decide whether the transportation rights involved are significant enough to be considered “penalties” that warrant interference with legislative policy decisions.

It will probably remain true that a rich man will drive in a limousine, while a poor man will have to walk. Nevertheless, the total deprivation doctrine of the Equal Protection Clause offers a legitimate pathway towards protecting the rights of poor individuals to walk, bicycle, and use public transportation. The Supreme Court’s repeated protection of poorer individuals’ travel rights indicates that total deprivation claims have a significant likelihood of success.<sup>354</sup> Non-automobile users finally have the vehicle they need to achieve a balanced transportation system.<sup>355</sup>

This Comment has endeavored to show that some forms of transportation do not have to be more equal than others. While the *Monarch* decision and its progeny suggest the non-existence of a constitutional right to use a particular travel mode, Supreme Court case law

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<sup>352</sup> See, e.g., *Mem’l Hospital v. Maricopa County*, 415 U.S. 250, 256-60 (1974).

<sup>353</sup> See *supra* p. 49.

<sup>354</sup> If the Supreme Court is willing to rule that residency requirements for welfare benefits infringe on the right to travel, they should also be willing to rule that direct restrictions, like a complete denial of access to the transportation system, violate constitutional rights.

<sup>355</sup> It is very possible that if a total deprivation equal protection claim did come before the Court, transportation experts would dispute whether or not individuals have been completely denied transportation access. In an ironic twist, advocates promoting the same form of transportation would likely disagree. Some bicycle experts, for example, would argue that cyclists could safely ride on a road even if they do not feel safe, while other experts would probably claim a total deprivation of access. See *supra* note 55.

remains sympathetic to a person with no travel options.<sup>356</sup> Neither the Supreme Court, nor the lower courts, has considered a case where an individual, either by choice or because of poverty, literally has no way of reaching a destination absent a motor vehicle. Considering the general state of the transportation infrastructure in the United States, particularly in rural areas, it is certainly possible to imagine such a scenario.<sup>357</sup> If such a case ever does wind its way through the courts, ample Supreme Court and lower court case law exists to maintain that an individual does have a right to reach a destination, at least through an inexpensive and reasonable means like bicycling or walking. In sum, the constitutional right to travel, combined with the total deprivation doctrine under the Equal Protection Clause, can help reverse America's addiction to the automobile.

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<sup>356</sup> *See supra* Parts II, III.

<sup>357</sup> *See* Surface Transportation Policy Project, Transportation and Social Equity, (finding that 36% of all rural residents are transit dependent, and 25% percent of rural communities have either no service or infrequent service), available at <http://www.transact.org/library/factsheets/equity.asp> (last visited Apr. 1, 2006).