
I. INTRODUCTION

In 1972, the city of Petaluma, California, pursuant to its zoning power enacted legislation that would limit the construction of residential housing in the city for at least five years. The purpose of this legislation was to limit the growth of the city to enable it to maintain its small town character. Arguing that under the United States Constitution the city could not limit its own growth, the Construction Industry Association of Sonoma County challenged the city’s action in the United States District Court for the Northern District of California. Judge Lloyd H. Burke perceived the issue to be whether “a municipality capable of supporting a natural population expansion [may] limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand.” Judge Burke concluded that such limitation of growth was not permissible. The court found that the zoning plan enacted by Petaluma violated the constitutional right to travel. The court found that the right to travel requires the states of the union and their political subdivisions to accept the burdens accompanying national growth without isolating themselves by using their zoning power.

This case note attempts to explain the rationale underlying the court’s decision and to compare that holding to federal precedents dealing with the right to travel. The note concludes that although there is some justification for the Petaluma court’s concept of the right to travel, this concept is inconsistent with the majority of the cases dealing with the right to travel, which hold that the right to travel is a personal right of United States citizens. In addition, the broad concept envisioned by the Petaluma court would change the right to travel in a way that could have unpredictable and unwanted results. Finally, such a change is not necessary because other legal theories are adequate for evaluating legislation such as Petaluma’s limit on residential construction.

II. A QUICK LOOK AT ZONING

Prior to the 20th century, urban land use control consisted of a

1 375 F. Supp. 574, 583 (N.D. Cal. 1974).
2 The discussion in this section is taken primarily from D. Hagman, Urban Planning
combination of isolated municipal ordinances, the common law of nuisance, and convenants between private landowners. Early municipal ordinances were of two types and were designed primarily either to remove obnoxious uses from the city or to promote the health and safety of its citizens. Among the latter type were fire zones prohibiting the construction of wood frame buildings, sanitary codes requiring minimum living space and waste elimination facilities, and height ordinances attempting to ensure an adequate supply of light and fresh air to city dwellers. In the absence of such governmental control, the most significant means of land use regulation was the common law of nuisance. Through it, individual landowners could protect themselves from damage inflicted by neighboring landowners who put their land to obnoxious uses. In addition, landowners could convenant with one another to restrict the use of their lands. Early in the 20th century, city planners came to the conclusion that modern city life required that land use be controlled through comprehensive planning by city government. It was the city planners' belief that the 19th century's haphazard array of separate ordinances, tort actions, and property law was woefully inadequate to achieve beneficial urban life for the greatest number of people.

In 1916, the first comprehensive city zoning plan was enacted by the city of New York and this plan has since become the standard for most contemporary zoning plans. These first attempts at urban land use control proceeded upon the premise that the physical structure of cities makes possible a wide variety of land uses. Because not all uses are compatible, however, they must be separated and controlled to assure the optimum benefit to all landowners.

To effectuate this separation and control of uses, early planners devised a scheme of legislation that has come to be characterized as "Euclidian" zoning. This nomenclature is appropriate for two reasons. First, it was in a case entitled *Village of Euclid v. Ambler Realty Co.* that the Supreme Court in 1926 upheld a zoning scheme as a valid exercise of the police power. Second, the term is appropriate because the various regulations that concurrently apply to a given area of land are depicted on city maps in different geometric shapes. Most of the early Euclidian zoning plans regulated land use through (1) outright restrictions upon use, (2) regulation of the height of

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3 It was comprehensive because almost all the land within the city was regulated and because all of the various restrictions were compiled into one ordinance.
5 272 U.S. 365 (1926).
structures placed upon the land and (3) regulation of the sizes of the lots required for each use. Thus, a given piece of real estate could be encumbered by one, two, or all three classifications. These three categories do not, however, exhaust the possibilities for land control, and a brief look at a modern city plan confirms the suspicion that city planners have not limited themselves to these categories. But the basic structure of contemporary city planning is still quite similar to the first zoning plans.

Zoning power is an aspect of the police power and must be exercised to achieve the general welfare. In Euclid, the Court's concept of the general welfare was not much broader than the reach of nuisance law. For example, factories could be segregated from single family units to reduce noise and foul fumes; building heights could be limited to facilitate fire fighting; minimum lot sizes could be required to prevent congestion; and multiple family units could be separated from single family units to ensure a proper setting for raising children. Between 1926 and 1972—the year in which Petaluma enacted its disputed plan—the concept of general welfare has been broadened. Many zoning controls that would have been beyond the scope of the police power in 1926 are now commonplace—including ordinances aimed at achieving beautification or promoting particular life styles.

The increase in municipal control over land use has been met with objections and heated battles have been waged in both state and federal courts to contain that growth. To date, however, no legal theory of attack has been strong enough to consistently overcome the presumption of constitutionality that zoning enactments enjoy. If the Petaluma decision is upheld, however, it would establish a federal legal theory that would pose a serious threat to what has been a growing source of municipal power over land use.

III. GROWTH CONTROLS

Once the basic propriety of locally-imposed land use controls was established, city planners set about developing more refined techniques to accomplish their goals. One such technique was the use of timing controls, which are also known as "slow growth" or "no growth" plans. Simply stated, a timing control attempts to regulate not only the use that can be made of a certain piece of land but also the time when such a use will be allowed. Thus, prior to the time that

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6 Id. at 390.
a particular use is permitted, the land may be either used for other purposes consistent with the regulation or required to remain in its natural state. Although the use of timing controls was advocated as early as 1955, little use was made of such controls until the mid-1960's when people began to question both the validity of the "growth-is-good" ethic and the effect of unchecked growth upon urban areas.

Advocates of timing controls point out that such controls fill one of the major gaps in traditional Euclidian zoning. Since most current zoning schemes regulate only the spatial aspect of land use controls, a city in a period of rapid growth may find itself constantly one step behind the production of residential housing in its attempt to provide necessary supporting services such as water, sewerage, schools and roads. Further, while the city's attention is diverted by its attempts to catch up, construction of new developments may be proceeding in a haphazard manner, generating an unpleasant urban sprawl. Timing controls, supporters argue, can alleviate this problem by allowing cities to prevent development of new areas until the needed services have been planned, funded and constructed.

Critics of timing controls, on the other hand, are fearful of the uses to which these controls may be put. In the past, traditional zoning devices such as minimum lot size, minimum cost per unit, and minimum floor space were used by communities intent upon keeping out minority groups, low income residents, and other "undesirables." Critics point out that, through the use of timing controls, communities can isolate themselves from "problems"; in effect, they could "stop the world and get off." Further, growth prevention not only denies certain individuals the opportunity to live where they please, but also has a snowball effect: the added burdens shunned by one community are passed along to nearby communities, which, finding themselves besieged by their own responsibilities as well as those of their neighbor, then seek to erect their own growth barriers. Thus, critics fearful of a proliferation of growth controls in a given region oppose the use of growth controls on the local level.

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In the first judicial test of timing controls, the New York court of appeals in *Golden v. Planning Board* upheld their use in a specific instance, but warned that if growth controls are used to avoid the very burdens that growth inevitably brings the controls must be struck down. In *Golden*, the town of Ramapo, New York, had enacted legislation that would prevent the development of certain lands until the necessary supporting services were available. If such services were provided by the developer, the timing restriction would be removed, but in the event that no developer would construct the necessary services, a particular piece of land would be unavailable for development until the city’s master plan of sequential growth called for such items to be built. Unaccelerated operation of the plan would keep some land undeveloped for up to eighteen years. The majority of the court of appeals, while recognizing the dangers inherent in such a scheme, held that the Ramapo plan was not an attempt to prevent growth; instead, the plan was an attempt to assimilate growth in an orderly manner. The justification advanced for the Petaluma plan, however, was precisely the rationale rejected by the New York court of appeals. Petaluma sought to limit its growth simply to “protect its small town character.”

### IV. The Petaluma Case

#### A. The Facts

Petaluma, California, is a community of 25,000 residents located approximately thirty-five miles north of San Francisco. Prior to this litigation Petaluma was known primarily as an area dedicated to the production of dairy and poultry products. Petaluma was a rural community, but because of its proximity to the San Francisco Bay area metropolitan region, it began to experience a surge in growth during the late 1960’s. As early as 1962, city officials estimated that if growth occurred at the predicted rate, Petaluma would be a city of 77,000 residents by 1985 and its “rural” character would be lost.

In June of 1971 the city council, in accordance with what council members perceived to be community sentiment, adopted an “Official Statement of Development Policy for the City of Petaluma.” This policy statement began with the declaration that “[i]n order to protect its small town character and surrounding open spaces, it shall be the policy of the city to control its future rate and distribution of

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15 *Id.* at 575.
growth.” To effectuate this policy the city imposed a temporary freeze on housing starts while it retained a professional city planning firm. Following the recommendations of the planners the city adopted a series of statements and passed enabling legislation. By August of 1972 the necessary control mechanisms were complete and the “Petaluma Plan” could be implemented.

The plan, while complex in design, was simple in effect. In the period from 1973 to 1977 the city would issue building permits for no more than 2,500 dwelling units; approximately 500 permits would be available per year. In addition, the city established an “urban extension line” which marked the ultimate geographical growth that the city intended to achieve for at least twenty years. Land situated beyond this line would not be annexed; nor would services be extended to it. Although the official allotment plan was authorized to last only through 1977, Judge Burke, sitting without a jury, found that “official” efforts were being made to extend the plan through 1990. Judge Burke also found that the issuance of 2500 permits from 1973-77 would satisfy only one-third to one-half of the demographic and market demands that Petaluma would face, and that if the plan were extended to 1985 the city’s population would be approximately 55,000 rather than the projected 77,000.

B. The Decision and its Rationale

The plaintiffs charged, and the court agreed, that the “Petaluma Plan” infringed upon the fundamental right to travel. The court found that “[t]he express purpose and intended and actual effects of the ‘Petaluma Plan’ have been to exclude substantial numbers of people who would otherwise have elected to immigrate to the city.” Such an exclusion, the court found, infringed upon the right to travel of those individuals who would move to Petaluma were it not for the plan.

Having found such a violation, the judge called upon the city to present some compelling interest to support the plan. The city al-

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16 Id. at 576.
17 Appellant's Brief for Stay of Judgment at 2-3.
18 375 F. Supp. at 576-77.
19 Id. at 582.
20 Id. at 581.
21 The phrase, “compelling state interest” has generally been used in equal protection cases to indicate the level of need that the state must show in order to justify the use of a classification that is “suspect,” Korematsu v. United States, 323 U.S. 214 (1944), or that infringes upon a “fundamental” right, Skinner v. Oklahoma, 316 U.S. 535 (1942). The use of this phrase by the Petaluma court, however, should not give the reader the impression that Petaluma is an equal protection case. At no time does the court identify or treat this as an equal protection
ledged three such interests. The first was its contention that the sewage treatment facilities of the city were not adequate to handle any greater degree of growth. However, the court had earlier found that the city’s facilities were adequate to meet the projected demands of the community, and therefore this argument was unfounded. The second justification was the inadequacy of the city’s water supply. Again, the court found that the city had purposefully limited its water supply to a level adequate to meet the needs of a city limited in growth by the 500 unit per year plan. This, combined with the fact that the city could increase its contract with the Sonoma County Water Agency, led the court to find this second justification invalid.

It was the city’s third argument that generated the heart of the court’s opinion in which the court outlined its concept of the right to travel. The city contended that since virtually all zoning schemes limit the manner in which people move about, and since zoning is within the police power of the municipality, this overt attempt to control growth to protect Petaluma’s small town character was a valid exercise of the police power. The court could have simply held that this was not an interest sufficiently compelling to warrant an infringement of the right to travel, but the court went farther. It held that a community’s refusal to grow at the rate demanded by the marketplace was inconsistent with the rationale underlying the right to travel. That rationale is that no state (or its political subdivision) can isolate itself from the world and shun the responsibilities attendant upon membership in a national union.

In arriving at this interpretation of the Constitution the Petaluma court relied both upon the general concepts expressed by the Supreme Court in Edwards v. California, and upon a series of recent Pennsylvania supreme court cases which the Petaluma court felt best expressed the rationale underlying the right to travel. In Edwards the Supreme Court was faced with an attempt by California to prevent the influx of indigent persons during the Depression. The case. Further, the court consistently treats the issue as one involving the invasion of a substantive right. Finally, the test embodied in the phrase “compelling state interest” is consistent with that used to judge invasions of substantive rights. See, e.g., Herndon v. Lowry, 301 U.S. 160 (1941); Gitlow v. New York, 268 U.S. 652 (1925).
Court held that no state could isolate itself from the problems facing the nation as a whole and that

[the constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.]

The line of Pennsylvania decisions upon which the Petaluma court relied began with the Pennsylvania supreme court’s decision in National Land & Investment Co. v. Kohn. In Kohn, Easttown Township’s zoning ordinance required a minimum four acre lot for the construction of a residential unit. The court, while sympathizing with the community’s desire to maintain its rural character and open spaces, held the ordinance unconstitutional. The ordinance, the court found, was an attempt to “avoid future burdens, economic and otherwise...” by excluding future residents. This attempt, the court reasoned, was not a proper use of the zoning power:

[zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. ... Zoning provisions may not be used ... to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.

In the cases that followed, the Pennsylvania court expanded its National Land holding to show that, in Pennsylvania, communities must accept the increased responsibilities that growth inevitably brings. Communities can use the zoning power to cope with problems, but they cannot use it to avoid them.

Although not articulated by the Pennsylvania court, it appears that the legal basis for the National Land doctrine is that the zoning power must be exercised for the general welfare. Since the authority to zone is delegated to local legislatures by the state and is not inher-
ent, such authority must be used to benefit the state as a whole and cannot be used by one political subdivision of a state to shift its burdens onto another subdivision. In short, local governing bodies must respond to the needs of the state as a whole.\textsuperscript{32}

The Petaluma court’s justification for accepting the Pennsylvania cases as proper precedent for a federal court was its belief that those cases developed, in the land use area, the concept of unity expressed in Edwards. The court, however, labeled this an aspect of the right to travel:

\textit{In consideration of the general concepts expressed in Edwards v. California, we believe that the reasoning employed in... [the]... cases from the Commonwealth of Pennsylvania best expresses the underlying rationale of those cases which do recognize the right to travel as fundamental. Accordingly, we concur with those decisions and adopt their reasoning as our view of the law under the Federal Constitution also.}\textsuperscript{33}

In accepting the theory of the Pennsylvania cases, the Petaluma court has, in effect, incorporated Pennsylvania’s general welfare requirement into the federal right to travel.\textsuperscript{34} This unusual merger of two \textit{apparently} different legal theories (\textit{i.e.} the general welfare rationale and personal right to travel) resulted from the Petaluma court’s reading of Edwards. Thus, the propriety of the merger depends upon the validity of that interpretation. If Edwards was a holding under the right to travel then the court’s merger of the theories is warranted; but if the Supreme Court based its holding in Edwards upon some other constitutional principle, the Petaluma decision is questionable.

The Petaluma court was quite concerned about the possible results of a pervasive no-growth attitude in the San Francisco Bay region. In its findings of fact, the court detailed the social and eco-


\textsuperscript{33} 375 F. Supp. at 584.

\textsuperscript{34} Incorporating the general welfare requirement into the right to travel was a roundabout way of achieving a result that the Pennsylvania supreme court reached directly. The Petaluma court could have held that the “Petaluma Plan” violated the due process clause because the police power was not being exercised for the general welfare as was required in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926). The difficulty with this approach is that, since Euclid, zoning enactments have been accorded a presumption of constitutionality with the result that a standard of minimal rationality is applied. For a discussion of this approach and others, see Walsh, \textit{Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?}, 3 CONN. L. REV. 244 (1970).
econmic ills that may befall a region if growth controls are themselves uncontrolled: if suburbs limit their rate of growth, individuals will be forced to compete for a limited suburban housing supply, thereby driving up the price of this new housing; those who might have moved then will retain their present housing, thereby limiting the supply of good used housing. This lack of good used housing would be felt most keenly by low income individuals who, in a freer market, could afford better quarters; in a region with growth controls these individuals will be priced out of the market place and forced to remain in substandard housing at an increased cost.\(^{35}\)

Recognizing ills that need attention is one thing; finding a legal basis for combatting them is another. By articulating a right to travel that includes a requirement that states and local governing bodies refrain from the misuse of growth controls the Petaluma court has found a way to prevent the ends it fears. This raises the issue of whether the Petaluma court's interpretation of the right to travel is warranted.

V. *Petaluma* AND THE RIGHT TO TRAVEL

Upon a first reading, the Petaluma court's concept of the right to travel as a substantive right, may appear unfamiliar to students of recent constitutional law. Since 1968 the right to travel has figured prominently in a series of Supreme Court cases dealing with residency requirements.\(^{36}\) In these cases an infringement upon the right to travel overcame the presumption of constitutionality usually enjoyed by legislative enactments and laid the enactments bare to strict scrutiny under the equal protection clause of the fourteenth amendment. The residence requirement invariably perished, but it did so, not because it invaded the substantive right to travel, but because it could not meet the standard of constitutionality required under a strict equal protection review. Unlike the recent Supreme Court cases, in which an invasion of the right was only a procedural trigger to the strict standards of judicial review, the decision in Petaluma was based entirely upon the finding of an invasion of the substantive right to travel.\(^{37}\)

The right to travel has had an unusual legal history. It is a right

\(^{35}\) 375 F. Supp. at 578-81.


\(^{37}\) Because the right-to-travel doctrine has been used extensively in connection with the residency cases, there is a tendency to view the right to travel as peculiar to equal protection cases. However, the right to travel is not a part of the equal protection clause; it is a substantive right, as the remainder of this section will show.
arising from no specific portion of the Constitution yet, throughout the years, the Supreme Court has affirmed its status as a fundamental right and has dealt severely with attempts to restrict it. The right of the people to have "free ingress and regress to and from any other state" was guaranteed by article IV of the Articles of Confederation, but when the Constitution was adopted no specific mention of the right to travel was included. This omission may have been the result of an intention to omit the right, an oversight, or the belief that the right was adequately provided for elsewhere in the document. While the intent of the framers is unclear, any doubts as to the existence of such a right were removed by the courts. In Crandall v. Nevada, the United States Supreme Court first utilized the right to travel to invalidate a legislative enactment. The state of Nevada had levied a tax on railroad passengers leaving or traveling through the state. This was attacked as a violation of the commerce clause but the Court found no such violation. It did, however, find an infringement upon the individual right to travel. Without assigning a specific constitutional basis to the right, the Court found that members of one nation have the right to "pass and repass through every part of it" unburdened by taxes on that right. After Crandall the Court had other occasions to discuss the right to travel and generally viewed the right as being based either in the privileges and immunities clause of article IV, §2 of the Constitution or in the privileges and immunities clause of the fourteenth amendment. In the 1941 Edwards case, however, the Court found that the right to move between states was simply an aspect of interstate commerce and therefore not subject to local regulation. Edwards involved the prosecution of an individual who was charged with bringing an indigent person into the state of California, in violation of the Welfare and Institutions Code of California. The Court held that "attempts on the part of any single state to isolate itself from difficulties common to all [states] by restraining the transportation of persons and property across its borders . . ." violates the commerce clause because such a course of action is incon-
sistent with the concept of federalism inherent in the commerce clause. The emphasis was not upon the individual right to cross state lines, but upon a principle that prohibits states from refusing to confront national problems manifested by citizens on the move. Justices Douglas and Jackson, however, were uncomfortable with the notion that the right to travel was dependent upon the commerce clause. In separate concurring opinions they stated that the right to travel was a privilege of national citizenship protected against state infringement by the fourteenth amendment.\(^4\)

In 1958 the Court again discussed the right to travel in connection with the refusal by the State Department to issue a passport to an individual because of alleged Communist beliefs. In \textit{Kent v. Dulles} the Court found that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."\(^5\)

Finally in 1969, in \textit{Shapiro v. Thompson}, the Court held that although the right to travel does exist, there is no need to "ascribe the source of this right to travel interstate to a particular constitutional provision."\(^6\) To date the Court has steadfastly refused to state the specific constitutional source of the right to travel, and because of this refusal the nature and scope of the right are uncertain. However, some generalizations may be made concerning the right.

The right to travel has generally been viewed as a personal right of the individual, to be protected against infringement by the state and federal governments. This is evidenced by the fact that most cases dealing with the subject have arisen because an individual challenged the treatment he or she received on the ground that it infringed upon his or her right to travel, \textit{e.g.}, a tax on railroad passengers,\(^7\) failure to issue a passport,\(^8\) denial of voting rights because of recent travel,\(^9\) and denial of welfare or medical benefits because of recent travel.\(^10\) It is also evidenced by the fact that those Justices willing to lodge the right in a specific textual portion of the Constitution have either selected one of the privileges and immunities clauses or have seen the right to travel as an aspect of the liberties protected by the fifth amendment. In fact, the very words "the right to travel" evoke the notion of a personal right.

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\(^4\) \textit{Id.} at 177-86.
\(^7\) Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).
In light of this characterization as a personal right, the Petaluma court's concept of the right to travel appears to be improper. It is difficult to reconcile a holding that no state may avoid growth and its problems because of the constitutional right to travel with precedents which speak of the right to travel as a right of national citizenship. The reconciliation of this dilemma lies in the Edwards decision and the use that the Petaluma court made of it.

The Petaluma court assumed that Edwards was a case interpreting the right to travel and, therefore, that the right to travel embodies the requirement that communities can not erect barriers to shield themselves from the problems attendant to growth. However, the language from Edwards upon which the Petaluma court relied was not intended by the Supreme Court to be an interpretation of the right to travel. Although Edwards is often cited as a case which supports the proposition that the right to travel exists, a few sources point out that the case was, technically, a commerce clause case and that the language of the Court was intended as an explanation of why the commerce clause prohibited California's legislation.

Congress was given the power to regulate commerce because of the difficulties the nation faced immediately following the Revolutionary War, when petty jealousies threatened to dissolve the fragile union. These jealousies often took the form of restrictions upon goods and people passing among the former colonies. The framers realized that if the federal union was to survive the states could not be allowed to erect barriers among themselves, in an attempt either to maintain a favored position or to attain one. Since the most obvious manifestation of this hazardous competition was in the area of commerce, the framers decided that Congress should regulate commerce among the states. The principle embodied in the commerce clause is broader than the literal language; all potential sources of conflict among the states must be remedied by federal power. Thus, the commerce clause is a manifestation of the essence of the union:

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54 On May 31, 1787 the Constitutional Convention, acting as a committee of the whole, adopted a resolution which provided in part: “that the national legislature ought to be empowered . . . to legislate in all cases, to which the separate states are incompetent . . . or in which the harmony of the United States may be interrupted by the exercise of individual legislation.” 1 M. Farrand, The Records of the Federal Convention of 1787 47 (1911).
This broad grant of power was later rejected in favor of the more particularized grant of power found in article I. See Able, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432 (1941); Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1 (1940).
the belief that ultimate success lies in cooperation and not in conflict. To effectuate this broad principle, the Court has held that even in the absence of congressional action, a state may not act in a manner that impermissibly affects interstate commerce. Such interference may result from attempts to discriminate against products of another state, or from attempts to deal with intrastate problems. Regardless of the state's intent, however, any action which unduly burdens interstate commerce must be held invalid.

This does not necessarily mean that the right to travel and the commerce clause are mutually exclusive and that the Petaluma court's use of Edwards as a right to travel case was totally improper. The commerce clause and the right to travel simply reflect different aspects of the nature of our union. On a broad scale, the federal union requires that the states work in harmony to resolve common problems and on a narrow scale it requires that individual citizens be allowed to travel among the states without undue burdens being placed upon the exercise of that right. The Supreme Court in Shapiro acknowledged this when it said that

the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land . . .

In Edwards itself, the continuity between the commerce clause and the right to travel was shown but not articulated. All of the Justices were willing to hold that the California law could not stand but were unable to agree upon a reason for that holding. Perhaps they all saw the same constitutional principle, but preferred to emphasize different aspects of it.

VI. CONCLUSION

In spite of the fact that the right to travel and the commerce clause have their genesis in the same principle, each has developed along different lines and different tests have been established to determine violations of each. In the extreme, any relationship between the two constitutional doctrines is obscure. For example, a state law which prohibits the sale of an item manufactured in another state

58 394 U.S. at 629.
would probably not be deemed to violate the right to travel although it clearly would violate the commerce clause. Nor would a law prohibiting intrastate travel by residents while permitting such travel by interstate travelers seem to violate the commerce clause, although it would certainly burden the individual’s right to travel, assuming the federal right applies to intrastate travel. In cases such as these, the courts have responded by invoking the more appropriate principle without finding any need to reconcile the two. It is only in situations like those in *Edwards* and in (Petaluma, where both theories may be equally applicable, that a court may have difficulty in selecting a rationale for its decision. The two theories each have different criteria for standing, different tests for determining the merits of the case and will produce varying precedents. If a court relies on the right to travel it should allow only the individual affected by an infringement of that right to complain of the violation; it should determine whether the act complained of penalizes the exercise of that right; and it will produce a precedent which is applicable to both the state and federal acts. If, on the other hand, a court relies on the commerce clause, an opportunity to raise the issue should be afforded to anyone who can show injury as a result of the state action. The court should determine whether the state’s action impermissibly interferes with the harmonious relationship between the states. Use of the commerce clause will produce a precedent that only limits state action. In fact, a decision based upon the commerce clause opens the door to congressional action because of Congress’ power to regulate commerce.

It may have been consideration of all these factors that led the *Petaluma* court to fashion a doctrine that, in effect, merges the two theories. It had before it a plaintiff who was not an individual but whose right to travel had been violated. This, however, is not a

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59 To date, the Court has not decided whether the right to travel applies only to interstate travel or whether it also applies to intrastate travel. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-56 (1974).

60 If the right to travel is a personal right, it seems incongruous to allow the Construction Industry Association to raise the constitutional rights of third persons. Only on rare occasions has the Supreme Court allowed outsiders to have standing in such situations. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953). In its Conclusion of Law No. 3, the *Petaluma* court does discuss the standing issue, but only to the extent of holding that when someone asserts a violation of the right to travel he need not show that anyone was actually deterred from traveling, but only that an act penalizes the exercise of that right. 375 F. Supp. at 581-82. This allows an individual who did actually travel to complain about a subsequent penalty or deprivation, but this in no way indicates that someone other than the penalized party can complain of the act. The *Petaluma* court relied upon the recent Supreme Court case of *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in making its standing decision. In that case the state of Arizona denied non-emergency medical care benefits to indigents who had resided in the state less than one year. Although it appears that the
problem when one becomes aware of the court's broadened concept of the right to travel. By relying upon the language of the *Edwards* case that seems to prohibit governments from avoiding common problems in the name of the right to travel, the court develops a *principle* that is almost as broad as the commerce clause. It seems more appropriate to allow the Construction Industry Association to complain of an act which has injured its members and violates this principle. In determining the merits, the court did not have to find that Petaluma's act unduly burdened interstate commerce, but only that the act penalized the right to travel. Most importantly, by basing its decision on the right to travel, it has set a precedent that is applicable to both state and federal governments, and one that does not seem to give Congress the power to legislate in the area.

While the incorporation into the right to travel of a requirement that states and communities accept the problems that growth brings may be theoretically tenable, it is unwise and should be rejected. To uphold this decision in its present posture would be to inject a broad new element of federal power into local land use control. As the defendants noted, almost any zoning ordinance will have the effect of limiting growth to some extent, and a strict application of the *Petaluma* doctrine would strike such an ordinance down. It may be that the court intended to limit its holding to those cases in which a city admits that its purpose is to exclude additional residents, but there is no guarantee that future courts will acknowledge that limitation. In addition, if this decision becomes a part of the body of law applicable to the federal right to travel it will add a dimension to that doctrine that can have far reaching effects. Finally the fact that the decision does not purport to rely upon the commerce clause may not foreclose Congressional action. Since the right to travel is a federal right, Congress could, in order to protect that right, enact some form of land use control that would insure that all communities do not shirk their responsibilities.

Balanced against this is the fact that there are other federal legal theories that would achieve the same result as the *Petaluma* court's concept of the right to travel without its unwarranted theoretical baggage. First, if an individual plaintiff were to assert that his or her

Memorial Hospital was given standing to sue, it should be noted that the indigent patient, for whose treatment payment was requested, was before the Court.

43 375 F. Supp. at 587.

62 See *Oregon v. Mitchell*, 400 U.S. 112 (1970). In a case in which there was no majority opinion, the Court upheld the power of Congress to do away with voting residency requirements in state elections. Six justices, in two separate opinions, approved this act, holding that Congress has the right to protect the federal right to travel.
right to travel was infringed by Petaluma’s ordinance, then the court could employ an appropriate degree of review to evaluate the city’s reason for imposing restrictions upon building permits. The Construction Industry Association should not, however, be given standing to assert these rights, because to do so theoretically gives any party who is affected by reduced growth standing to sue. A Petaluma grocer will certainly suffer if he can not sell to individuals who are excluded from the city by its growth policy, but that does not mean that he can raise their rights.

Second, the requirement that the zoning power be exercised for the general welfare is as applicable in federal court as it is in the Pennsylvania courts. A federal court might well conclude that the exclusion of additional residents by the city of Petaluma is a misuse of its delegated authority because it utilizes a power belonging to all the people of the state to benefit a few of them to the detriment of the others.

Finally, a federal court, perhaps finding that Petaluma’s enactment does pose a threat to the harmony of our federal system, might strike it down under the authority of the commerce clause. Seen in isolation, Petaluma’s building permit restriction probably does not rise to such a level, but if one imagines a proliferation of such ordinances throughout the San Francisco Bay region or throughout the state of California then the chance that other states might respond similarly does not seem to be negligible. Given the ambivalence towards growth that is current in the United States, such a prospect may be more real than one would suspect.

In Petaluma the court was concerned about an enactment with a potential for abuse. To meet the threat the court fashioned a concept of the right to travel which would prevent the misuse of growth controls while allowing communities to cope with the problems of growth. Whether or not one shares the court’s concern, it is not necessary to formulate new legal theories when there are judicial tools in existence that can contain the excesses of growth controls.

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