MUNICIPAL EMPLOYEE RESIDENCE REQUIREMENTS AND THE RIGHT TO TRAVEL

Abrahams v. Civil Service Commission, 65 N.J. 61, 319 A.2d 483 (1974)

Appellant, a stenographer, was dismissed from the law department of the city of Newark because her residence outside the city violated the municipal employee residence ordinance.[1] She appealed to the Civil Service Commission, alleging that the ordinance unconstitutionally restricted her right to travel. The Commission dismissed her appeal, and review by the Appellate Division was certified to the Supreme Court of New Jersey,[2] which affirmed the Commission order and *held*: The Newark ordinance requiring municipal employees to reside within the city did not unconstitutionally penalize the exercise of the right to travel.[3]

The majority of cities and counties in the United States impose residence requirements upon their employees.[4] Such requirements do not violate the equal protection clause under the traditional standard of review—whether the requirement is reasonably related to a legitimate state interest.[5] Such municipal employee residence requirements, how-

1. Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 85-86 n.4, 319 A.2d 483, 496 n.4 (1974) (dissenting opinion); Brief for Appellant at 1, Abrahams v. Civil Serv. Comm'n, *supra*, *citing* NEWARK, N.J., REV. ORDINANCES § 2:14-1.

2. Abrahams v. Civil Serv. Comm'n, 63 N.J. 561, 310 A.2d 476 (1973).

3. Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974). Two other issues determined by the court will not be discussed in this Comment: (1) whether the "special circumstances" exemption to the ordinance, unanimously determined to be unconstitutionally vague, was severable; and (2) whether uniform enforcement within one department of the city but nonenforcement in all other departments constituted discriminatory enforcement and was a violation of equal protection.

4. Goldstein, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?*, 7 U.S.F.L. REV. 508, 511 n.11 (1973) [hereinafter cited as Goldstein].

5. *E.g.*, Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Gould v. Bennett, 153 Misc. 818, 276 N.Y.S. 113 (Sup. Ct. 1934); *see* McGowan v. Maryland, 366 U.S. 420, 426 (1961); Flemming v. Nester, 363 U.S. 603, 611 (1960); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

Some of the interests which a court may hold to be furthered by employee residence are ethnic balance, reduction of unemployment, minority relations, employee involvement with the community, administrative efficiency, availability of trained manpower in emergencies, and local salary expenditure. Ector v. City of Torrance, 10 Cal. 3d 129,

ever, cannot meet the stringent "compelling state interest" standard of review.[6] Constitutional attacks on such ordinances have been infrequent[7] since there seemed to be no rationale requiring application of the compelling state interest standard. This rationale may have been provided, however, by recent decisions requiring application of that standard to classifications that infringe the constitutional right to travel.[8] The constitutionality of municipal employee residence requirements depends, therefore, on whether the compelling state interest standard of review is appropriate, which in turn depends on whether such residence requirements infringe the right to travel.

Although the right to travel interstate was guaranteed by the Articles of Confederation,[9] it received no direct mention in the Constitution. Rather, it is one of the penumbral rights that have become clearly established only through judicial interpretation of elastic constitutional clauses.[10] The cases, however, have not determined definitively the clause or clauses from which the right is derived.[11] Prior to 1969, each case up-

514 P.2d 433, 109 Cal. Rptr. 849 (1973). For a case holding a municipal employee residence ordinance unreasonable, see State Employees Local 339 v. City of Highland Park, 363 Mich. 79, 108 N.W.2d 898 (1961) (ordinance required residence in city even though adequate accommodations were not available).

6. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting):

> So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

But see Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972).

7. Employees, however, frequently have argued on technical grounds that residence requirements did not, or should not, apply to them. Goldstein 511 n.12, 512 n.13 (cases collected).

8. Shapiro v. Thompson, 394 U.S. 618 (1969); cases cited note 19 *infra.*

9. ARTICLES OF CONFEDERATION art. IV:

> [T]he people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . .

10. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965).

11. In early cases, the right of a citizen of one state to pass through or reside in any other state was said to be one of the privileges and immunities guaranteed by U.S. CONST. art. IV, § 2. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823). *See also* Twining v. New Jersey, 211 U.S. 78, 97 (1908); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873). Other cases stated that the right of interstate travel was derived from the commerce clause. Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1868) (concurring opinion); Passenger Cases, 48 U.S. (7 How.) 283 (1849). The privileges or immunities clause of the fourteenth amendment has been suggested as another source.

holding the right to travel involved a direct and obvious infringement. Thus, a tax imposed by a state on individuals leaving the state was held constitutionally impermissible as contrary to the most basic concepts of federalism.[12] A statute criminalizing the act of bringing an indigent into the state was also held unconstitutional "under any known test of the validity of State interference with interstate commerce."[13] The refusal to issue a passport, however, was upheld by balancing the extent of the restriction on travel against the necessity for the restriction.[14]

In 1969, *Shapiro v. Thompson*[15] held that the right to travel was a fundamental right that might not be infringed without a demonstration of a compelling state interest.[16] *Shapiro* struck down a state requirement

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Edwards v. California, *supra* at 181, 183-85 (Douglas & Jackson, JJ., concurring); Twining v. New Jersey, *supra* at 97. *See also* Crandall v. Nevada, *supra* at 43-44, 48-49 (majority opinion). One decision held the right to be implicit in the creation of a national government. *Id.* The right of a United States citizen to travel outside of the country is protected by the due process clause of the fifth amendment. Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958).

12. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

13. Edwards v. California, 314 U.S. 160, 174 (1941).

14. Zemel v. Rusk, 381 U.S. 1 (1965). But refusal to issue a passport because of the political associations of the recipient was held unconstitutional, since first amendment rights were also involved. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

15. 394 U.S. 618 (1969).

16. The compelling state interest test was created in a rather speculative footnote to a decision using the rational basis test. The note indicated that a more stringent standard may be applicable when legislation appears on its face to be prohibited by the Constitution, or when it restricts "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or when it is a product of "prejudice against discrete and insular minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The test has since developed into the cornerstone of the "new" equal protection, and is used in two kinds of cases. First, classifications based upon certain criteria are inherently suspect and require demonstration of a compelling interest in order to be sustained. *E.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality). Secondly, classifications which impinge upon certain fundamental, constitutionally protected rights require a showing of compelling interest. *E.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (classification restricting right to vote in special election to parents of local public school children or property owners); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right of procreation infringed by classification under which persons committing grand larceny are sterilized but embezzlers are not); *cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (right to free exercise of religion of Seventh Day Adventist infringed by denial of unemployment compensation for failure to accept employment on Saturdays); Shelton v. Tucker, 364 U.S. 479 (1960) (teacher's right of association infringed by requiring affidavit listing all organizations

that an individual applying for welfare aid must have been a resident of the state for at least one year. The Court pointed out that a durational residence requirement divides welfare applicants into two groups distinguishable only on the basis of recent interstate movement.[17] Since the requirement infringed the right to travel by denying the basic means of

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to which teacher belonged or contributed within past five years). *Shapiro* falls in the second category, and thus the Court stated:

> Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* State interest.

394 U.S. at 638 (emphasis original).

Incantations of "suspect classifications" and "fundamental rights" have led to mechanical application of the compelling state interest standard in the state and lower federal courts, even when the underlying public policy grounds which provide the rationale for disregarding the legislative judgment have not been present. *E.g.*, Printing Indus. v. Hill, 382 F. Supp. 801, 807-11 (S.D. Tex.), *prob. juris. noted*, 95 S. Ct. 677 (1974) (statute requiring political advertising to state name of printer held unconstitutional under compelling state interest test); Sturrup v. Mahan, — Ind. App. —, 290 N.E.2d 64 (1972), *modified*, — Ind. App. —, 305 N.E.2d 877 (1974) (high school athletic association requirement that student must attend school within district where his parents reside in order to be eligible for varsity athletics subjected to compelling interest test as restriction on right to travel, and found unconstitutional). Such automatic application of the stringent standard has led to dissatisfaction with the compelling interest/rational basis dichotomy. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 15-24 (1972).

The problem could be resolved in one of three ways. First, the Supreme Court could declare that the compelling interest standard is not to be extended to any new factual situation without a full evaluation of the reasons for ignoring the legislative judgment—a return to the standards suggested by the *Carolene Products* footnote. *Cf.* White Motor Co. v. United States, 372 U.S. 253 (1963) (established similar policy with regard to extension of per se rule of antitrust law). Secondly, the Court could recognize that in reality no dichotomy exists and that its

> decisions in the field of equal protection defy such easy categorization. . . . [This Court] has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Such recognition would result in overt use of a balancing test. Town of Milton v. Civil Serv. Comm'n, — Mass. —, —, 312 N.E.2d 188, 195 (1974). Finally, the Court could approve lower court decisions purporting to use the compelling interest standard but in fact applying a balancing test. *E.g.*, United States v. Davis, 482 F.2d 893, 912-13 (9th Cir. 1973) (sustaining airport security systems against constitutional attack on grounds of privacy and right to travel); Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972). *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Houle, *Compelling State Interest vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma*, 3 URBAN LAW. 375 (1971); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-78 (1969).

17. 394 U.S. at 627.

subsistence to those who had recently exercised that right, the Court held that the requirement would violate the equal protection clause unless justified by a compelling state interest.[18]

The *Shapiro* approach has frequently been used to invalidate durational residence requirements.[19] *Dunn v. Blumstein*[20] struck down durational residence requirements for voter registration, the Court incorporating Justice Stewart's concurring statement in *Shapiro* that the right to travel is an "unconditional personal right."[21] It held that the compelling state interest test is "triggered" by any classification penalizing the exercise of the right to travel;[22] *Shapiro* did not require that travel be deterred. In *Memorial Hospital v. Maricopa County*,[23] the Court clarified its analysis. First, it held that the right to travel involved in *Shapiro* and its progeny was specifically the right "to migrate, resettle, find a new job, and start a new life."[24] Secondly, it implied that *Dunn* had used the word "penalty" in a very narrow sense; it emphasized that a penalty on the exercise of the constitutional right to travel had been found only in cases involving denial of a fundamental political right or of the basic necessities of life.[25] The status of the law was narrowly stated:

> [T]he right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents.[26]

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18. *Id.* at 634.

19. *E.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (free medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Oregon v. Mitchell, 400 U.S. 112 (1970) (voting); King v. Housing Authority, 442 F.2d 646 (2d Cir. 1971) (public housing); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (public housing); Barnes v. Board of Trustees, 369 F. Supp. 1327 (W.D. Mich. 1973) (veteran's benefits); Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971) (veteran's employment preference); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971) (medical care); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971) (abortion); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.), *aff'd mem.*, 400 U.S. 884 (1970) (mental health care). *But see* Sosna v. Iowa, 95 S. Ct. 553 (1975) (sustaining durational residence requirement for filing divorce petition); Vlandis v. Kline, 412 U.S. 441, 452 (1973) (dictum) (durational residence requirement for lower tuition at state university would be valid); *cf.* U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 1 (durational residence required for eligibility to hold political office).

20. 405 U.S. 330 (1972).

21. 394 U.S. at 643, *quoted in* 405 U.S. at 341.

22. 405 U.S. at 339-41.

23. 415 U.S. at 250 (1974) (unconstitutional to require one year's residence in county to qualify for nonemergency medical care at county expense).

24. 394 U.S. at 629, *quoted in* 415 U.S. at 255.

25. 415 U.S. at 258-59.

26. *Id.* at 261.

Some lower courts have used the *Shapiro* approach to evaluate the constitutionality of municipal employee residence ordinances.[27] Applied to persons already employed, such ordinances arguably create two classes of municipal employees[28] distinguishable only on the basis of exercise of the right to travel. Employees who migrate from city to suburb are penalized by dismissal. Under this view, *Shapiro* dictates the compelling state interest standard of review.

In *Abrahams v. Civil Service Commission*,[29] appellant challenged a residence ordinance that had been previously tested against the rational basis standard and upheld.[30] The court declined to adopt the compelling state interest standard and distinguished *Shapiro* in two ways. First, *Memorial Hospital* was cited as limiting *Shapiro* to durational residence requirements—residence as a precondition to employment.[31] The Newark ordinance was a continuing residence requirement—residence as a condition to continued employment.[32] To support this distinction, the court relied on *Detroit Police Officers Association v. City of Detroit*,[33] which held continuous residence requirements for police constitutional under a rational relationship test. Secondly, the court asserted that, under *Memorial Hospital*, the right to travel was fundamental only with

27. *E.g.*, Ector v. City of Torrance, 28 Cal. App. 3d 293, 104 Cal. Rptr. 594 (Ct. App. 1972), *rev'd*, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971); *cf.* State v. Wylie, 516 P.2d 142 (Alas. 1973); Town of Milton v. Civil Serv. Comm'n, — Mass. —, 312 N.E.2d 188 (1974); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973) (durational employee residence requirements). For a case holding employee residence requirements constitutional under the compelling interest standard, see Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972) (statute examined only with respect to policemen and firemen).

28. (1) Residents, and (2) former residents who have moved out of the municipality.

29. 65 N.J. 61, 319 A.2d 483 (1974).

30. Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Mercadante v. City of Paterson, 111 N.J. Super. 35, 266 A.2d 611 (Ch. 1970), *aff'd*, 58 N.J. 112, 275 A.2d 440 (1971). In *Kennedy*, Chief Justice Weintraub stated:

> The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by the government.

Supra at 183, 148 A.2d at 476, *quoted in* Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 65, 319 A.2d 483, 485 (1974). For a discussion of the right-privilege argument that this aphorism suggests see note 40 *infra*.

31. 65 N.J. at 68, 319 A.2d at 487.

32. *Id.* at 66, 319 A.2d at 486.

33. 405 U.S. 950 (1972), *dismissing appeal from* 385 Mich. 519, 190 N.W.2d 97 (1971) (no substantial federal question).

respect to migration between states.[34] The travel or migration of the appellant had been wholly within the state. Lower federal and state decisions using the constitutional right to travel to protect intrastate movement[35] were rejected.[36] In the words of the majority, appellant asserted not the right to travel, but "merely the common right to live where one will."[37] In applying the rational basis test, the court listed a number of local policy interests that might be furthered by the ordinance.[38] Special emphasis was placed on the city's interest in promoting employment of its residents.

In his dissenting opinion, Justice Pashman argued that there was sufficient precedent to establish constitutional protection of intrastate movement.[39] He did not find the distinction between durational and continuous residence requirements significant, since in his view the ordinance clearly penalized exercise of the right to travel.[40] Concluding that the compelling state interest standard was appropriate, he proceeded to examine the various rationales advanced to justify the ordinance and found them "individually" and "collectively" insufficient.[41]

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34. 65 N.J. at 70-71, 319 A.2d at 488.

35. *E.g.*, King v. Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970); Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971); Josephine County School Dist. v. Oregon School Activities Ass'n, 15 Ore. App. 185, 515 P.2d 431 (1973); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973); *cf.* Karp v. Collins, 310 F. Supp. 627, 634 (D.N.J. 1970); *In re* Barcomb, 132 Vt. 225, 234, 315 A.2d 476, 482 (1974).

36. 65 N.J. at 71, 319 A.2d at 488.

37. *Id.* at 72, 319 A.2d at 488-89.

38. *Id.* at 72-73, 319 A.2d at 489. The interests are listed in note 5 *supra.*

39. *Id.* at 81-84, 319 A.2d at 494-95; *see* cases cited note 34 *supra.*

40. 65 N.J. at 93, 319 A.2d at 500:

> The residence requirement . . . directly affects one's ability to "migrate with intent to settle and abide," . . . . If one works for a local government, the majority would allow the choice of where to settle to be made by the governing body, and not the individual. Such restrictions pose a clear threat to migration by causing a second dislocation when new arrivals or present employees find government work in a jurisdiction adjacent to that in which they have decided to settle.

41. *Id.* at 85-92, 319 A.2d at 496-99. The argument that residence ordinances recirculate tax money (the "public coffer" argument) was rejected as a constitutionally impermissible defense. *Id.* at 87-88, 319 A.2d at 497. The public coffer doctrine has been examined by the Supreme Court in cases dealing with state restrictions on employment of aliens and held not to provide a compelling state interest. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Leger v. Sailer, 321 F. Supp. 250 (E.D. Pa. 1970), *aff'd sub nom.* Graham v. Richardson, 403 U.S. 365 (1971); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969). In *Memorial Hospital*

The majority opinion is flawed by its reliance on ambiguous dicta. According to the court, *Memorial Hospital* severely restricts the *Shapiro* analysis to cases involving both interstate travel and durational residency. *Memorial Hospital*, however, struck down the challenged statute and can easily be read to support a position contrary to that of the *Abrahams* court.[42] Likewise, the dismissal in *Detroit Police Officers* should not be decisive. It was a memorandum opinion dismissing an appeal without argument "for want of a substantial federal question;" the case is readily

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the Court said: "[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . ." 415 U.S. at 263.

The idea that public employment, being a privilege rather than a right, could be conditioned on failure to exercise a constitutional right (the "right-privilege" argument) was similarly rejected by the *Abrahams* dissent as impermissible. 65 N.J. at 90-91, 319 A.2d at 498-99. The right-privilege distinction was first articulated by then-Judge Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892); *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). The doctrine assumes the point to be decided; it appears to have been totally rejected by the Supreme Court. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 643-44 (1973); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See generally* Van Alstyne, *supra*.

Justice Pashman found no relationship between a desire to reduce ghetto unemployment and a requirement that employees live in the city. "The reduction in unemployment among inner-city minority groups relates to those whom the city hires, and not the requirement that employees live in the city." 65 N.J. at 88, 319 A.2d at 497; *cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960). He agreed that the residence requirement might be defensible if applied only to police or firemen. Significant advantages, including better community relations and more available trained manpower in emergencies (the "proximity" arguments), can result from assuring that members of these groups reside within the community they serve. No such advantage, however, would result from applying the requirement to a stenographer. *Cf.* Krzewinski v. Kugler, 338 F. Supp. 492, 498-501 (D.N.J. 1972).

42. *Memorial Hospital* did not go beyond the factual setting of prior cases to strike down the challenged statute, but was careful to leave that option open.

> *Whatever its ultimate scope, however,* the right to travel was involved in only a limited sense in *Shapiro*. . . .
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> . . . Even were we to draw a constitutional distinction between interstate and intrastate travel, *a question we do not now consider,* such a distinction would not support the judgment . . . .
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> *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.

415 U.S. at 254-56, 259 (emphasis added; footnotes omitted). The Court also discussed the illogic of allowing a residence requirement to bar the employment of intrastate migrants but holding it unconstitutional with regard to interstate migrants. *Id.* at 256 n.9.

distinguished[43] and in any event ought to have limited value according to conventional principles of stare decisis.[44] The court's assertion that

43. The dissent in *Abrahams* distinguished *Detroit Police Officers* by demonstrating that the justifications for requiring police residence are more convincing than the justifications for requiring residence of all employees. 65 N.J. at 85-86 n.4, 319 A.2d at 496 n.4.

44. Two other courts have held the dismissal of *Detroit Police Officers* to be a binding decision on the merits of the question whether the compelling state interest test should apply to employee residence requirements. Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973) (alternative holding). It has been suggested that such a dismissal should be considered as merely persuasive rather than binding. *See* Note, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 790-92 (1968). One recent decision, in refusing to be bound by a Supreme Court dismissal of the same claim "for want of a substantial federal question" several years earlier, said: "The Supreme Court has on occasion dismissed a case on this ground only to deal with the same issue in subsequent appeals." Welsch v. Likins, 373 F. Supp. 487, 501 (D. Minn. 1974). The court concluded that "doctrinal developments" outweighed the dismissal. *Cf.* Edelman v. Jordan, 415 U.S. 651, 670-71 (1974) (summary affirmance "not of the same precedential value as would be an opinion of this court treating the question on the merits").

The Supreme Court rejected the less-than-binding-precedent approach in the 5-4 decision of Hicks v. Miranda, 95 S. Ct. 2281 (1975). In *Hicks*, the three-judge district court held unconstitutional an obscenity statute previously upheld in the state courts against constitutional attack. Appeal of the state court decision had been dismissed by the Supreme Court for lack of a substantial federal question. Miller v. California, 418 U.S. 915 (1974). Holding that the dismissal precluded the district court from reconsidering the statute's constitutionality, the Court stated that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" 95 S. Ct. at 2289, *quoting* Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973), *cert. denied*, 414 U.S. 1096 (1974). Mr. Justice Clark has strongly criticized the *Hicks* decision:

> The Supreme Court's statements in *Hicks v. Miranda* . . . to the effect that such dismissals are decisions "on the merits", seem to me to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. An unquestioning application of the *Hicks* rule can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudication.

Hogge v. Johnson, Civil No. 74-1656 (4th Cir., Aug. 19, 1975) (concurring opinion of Justice Clark, retired, sitting by designation).

It is submitted, however, that regardless of the weight given such dismissals when they are properly raised as precedent, *Detroit Police Officers* should not govern here. It is an established requirement that "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time," before the question will be heard by the Supreme Court. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), *quoted in* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 107, at 486 (2d ed. 1970). Yet neither the majority nor the dissenting opinions in *Detroit Police Officers* cited *Shapiro* or raised the question of whether the com-

the right involved is "merely the right to live where one will" is also deficient, for the same statement could be made about any of the right-to-travel cases.

Nevertheless, the result in *Abrahams* seems to be sound. Application of the compelling state interest test would require significant extension of the *Shapiro* doctrine in three areas.[45] First, the Supreme Court has never decided that the fundamental right to travel protected by the Federal Constitution extends to movement entirely within a state. Though recent dicta indicate that an intrastate right may exist,[46] it is difficult to defend that conclusion under any of the constitutional clauses from which the right to travel was derived.[47] Second, it is not clear whether

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pelling state interest standard was applicable. Also, the Supreme Court dismissal should be relevant only to questions actually considered by the Court. *Cf.* David v. New York Tel. Co., 470 F.2d 191 (2d Cir. 1972). The Supreme Court Rules limit the questions that may be considered:

> The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.*

SUP. CT. R. 15-1(c) (1970) (emphasis added). In *Detroit Police Officers*, the appellants asserted in their jurisdictional statement a right under the due process clause to "live where one pleases while working for a local municipality." Brief for Appellants at 8, Detroit Police Officers Ass'n v. City of Detroit, 405 U.S. 950 (1972). The context makes it clear that the appellants did not intend by this to present the *Shapiro* equal-protection—denial-of-right-to-travel question. They did not cite *Shapiro*, and their equal protection argument did not seek application of the compelling state interest standard. *Id.* at 19-21. Since the question was not raised, it is unreasonable to consider the issue to have been foreclosed. *See* Hicks v. Miranda, *supra*, 95 S. Ct. at 2290 n.14. *See generally* C. WRIGHT, *supra* § 107, at 485-87; *id.* § 108, at 494-95.

45. Two definitional extensions would also be needed if the Court retained the term "migration" to describe exercise of the constitutional right to travel. A holding that migration had taken place in *Abrahams* would mean that (1) migration occurs even when the moving party remains so close to the original locality as to retain permanent employment there, and (2) migration refers to movement from a locality as well as movement into a locality (the cases are limited to the latter type of movement).

46. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256 n.9 (1974).

47. *See* note 11 *supra*. Descriptions of the right to travel as a fundamental personal right suggest that the right extends intrastate. *Cf.* Bell v. Maryland, 378 U.S. 226, 255 (1964) (Douglas, J., concurring); Kent v. Dulles, 357 U.S. 116, 125-26 (1958). Giving the right to travel the same status as other "fundamental rights," such as fully incorporated first amendment rights, however, would bring into question an enormous range of local and state governmental activity. *Cf.* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 581 (N.D. Cal. 1974) (land-use planning), *noted in* 1975 WASH. U.L.Q. 234. The Court ought to be reluctant to extend the doctrine unless it has a firm constitutional basis; yet the cases establishing the right to travel speak only in terms of interstate travel, and may restrict the right to such migration. *But see* Stirrup v. Mahan, — Ind. App. —, 290 N.E.2d 64 (1972), *modified*, — Ind. App. —, 305

the right can be infringed by continuous residence requirements. *Shapiro* and its progeny all dealt with durational residency. As Justice Pashman pointed out, the logic of *Shapiro* would apply to any statutory classification based solely on the exercise of the right to travel.[48] The Supreme Court, however, has applied the *Shapiro* analysis to durational residence classifications only. The distinction is too clear to be ignored.[49] Third, it is not clear that loss of public employment constitutes a "penalty" in the *Memorial Hospital* sense. This issue would probably be resolved in the employee's favor, however, for the Court has recognized the importance of employment, even if never quite establishing it as a right.[50] In *Memorial Hospital* the Court found denial of nonemergency medical care to be a penalty—but that denial would affect an individual's physical well-being no more than dismissal from employment would affect his economic well-being. The dissent is probably correct in its conclusion that, if the compelling state interest test did apply, municipal resident requirements would be struck down as applied to most occupations, for the rationales advanced for such ordinances cannot withstand more than superficial analysis.[51]

Abrahams demonstrates the continuing confusion in the case law over whether *Shapiro* will be extended in accordance with its logic, or limited by its facts. The Supreme Court should define the limits of *Shapi-*

N.E.2d 877 (1974). *But cf.* Note, *Residence Requirements After* Shapiro v. Thompson, 70 COLUM. L. REV. 134, 138-39 (1970); Note, Shapiro v. Thompson: *Travel, Welfare, and the Constitution*, 44 N.Y.U.L. REV. 989, 998-99 (1969). Since the interstate right is firmly established, to deny that intrastate travel is a fundamental right would result in giving preference to interstate over intrastate migrants. Goldstein 522. A state court may, however, interpret the state constitution to eliminate whatever inequities result. *Cf.* State v. Wylie, 516 P.2d 142 (Alas. 1973).

48. 65 N.J. at 82-83, 319 A.2d at 495.

49. It is also possible that some continuous residence requirements would meet the compelling interest test.

> States have the power to require that voters be bona fide residents of the relevant political subdivision. . . . An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. But *durational* residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard.

Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972) (emphasis original; footnotes omitted).

50. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Truax v. Raich, 239 U.S. 33 (1915); note 40 *supra* (discussion of "public coffer" argument). *But see* Goldberg v. Kelly, 397 U.S. 254, 264 (1969).

51. *See* note 40 *supra* and accompanying text.

ro in nondurational residence cases. Until it does so, cases like *Abrahams* indicate that the right to travel will not be converted into a right to commute.[52]

52. Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 443, 109 Cal. Rptr. 849 (1973). *But see* Goldstein 535; *cf.* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 581 (1974), *noted in* 1975 WASH. U.L.Q. 234.