# RESIDENCY REQUIREMENTS FOR CITY EMPLOYEES: IMPORTANT INCENTIVES IN TODAY'S URBAN CRISIS

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Two hundred years after colonization, the United States continues to be a remarkably mobile society. Migration patterns, as well as public reaction to the gasoline shortage, make it apparent that Americans appreciate and cherish their right to travel throughout the country. This constant redistribution of the population is far from random, however. While demonstrating the so-called "right" each person has to live where he chooses, Americans are abandoning the central cities in ever-increasing numbers.[1]

Since free movement of persons has developed into a constitutionally protected fundamental right to travel,[2] few legal restrictions may

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1. According to statistics, Americans no longer wish to live in the central cities but prefer suburbia. During the 1960's, the central cities gained 5.3% in population while the surrounding areas grew by 28.2%. Only the population of nine of the 20 largest cities increased during the decade. Except for New York, which showed a 1% gain, all of the major cities of the North and East lost more residents than they added. For a fine summary of this trend, see Costello, *The Future of the City* in EDITORIAL RESEARCH REPORTS ON THE FUTURE OF THE CITY 3-7 (1974).

2 Although the courts have recognized a constitutional right to travel for many years, the source of that right remains unclear. In the Passengers Cases, 48 U.S. (7 How.) 283 (1849), the Supreme Court traced the right to the commerce clause; in Ward v. Maryland, 789 U.S. (12 Wall.) 418 (1870), to the privileges and immunities clause; in Kent v. Dulles, 357 U.S. 116 (1958) to the Fifth Amendment; and to no particular constitutional provision in Shapiro v. Thompson, 394 U.S. 618 (1969). For

be imposed on its exercise.[3] Nevertheless, municipal governments nationwide have infringed on this right to travel by establishing residency requirements for their city employees since the earliest city charters.[4] As a consequence of this encroachment, these provisions have been the source of extensive constitutional litigation, primarily on equal protection grounds.[5]

Typically, restricted public employees and legal commentators denounce this deprivation of a right so fundamental.[6] These advocates

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a brief discussion of the historical search for the source of the right to travel, see Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, 1140-45 (1975).

3. The courts have actively invalidated any restrictions which unconstitutionally interfere with the right each citizen has to move from state to state. Many residency requirements that require a new resident to endure a "waiting period" before receiving some benefit have been struck down. *See, 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. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971) (federally financed low-cost housing); Cole v. Housing Auth., 435 F.2d 807 (1st Cir. 1970) (public housing); Barnes v. Board of Trustees, 369 F. Supp. 1327 (W.D. Mich. 1973 (veterans' benefits); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (state bar examination); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971) (therapeutic abortions); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970) (commitment to state mental hospital). *But see* Mathews v. Diaz, 426 U.S. 67 (1976), in which the court upheld a five-year residency requirement for aliens to qualify for Medicare.

4. Lawmakers frequently impose residency requirements through city charter provisions. *E.g.*, ST. LOUIS, MISSOURI, CODE art. VIII, § 2 (1976). Municipalities also establish mandatory residence through Civil Service Commission rules. *See, e.g.*, NASHVILLE, TENN., CIVIL SERV. COMM'N RULES ch. 5, § 1 (1972); and city ordinances, *e.g.*, DETROIT, MICH., ORDINANCE No. 327-G (June 6, 1968).

5. Municipal residency requirements have not always been subjected to constitutional challenge. The earliest attacks turned on technical defects in the provisions. For a good summary of this approach, see Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute*? 7 U.S.F. L. REV. 508, 511-15 (1973).

6. *See* note 16 and accompanying text *infra* for an explanation of those rights deemed "fundamental."

The legal commentators have unanimously decided that municipal residency requirements infringe on an individual's right to travel to such an extent as to render them unconstitutional. *See, e.g.*, Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute*? 7 U.S.F. L. REV. 508 (1973); Note, *Municipal Employees Residency Requirements & Equal Protection*, 84 YALE L.J. 1684 (1975); Comment, *The Constitutionality of Residency Requirements for Municipal Employees*, 24 EMORY L.J. 447 (1975); Comment, *Municipal Residency Requirements: Constitutional & Collective Bargaining Aspects*, 52 J. URBAN L. 767 (1975); Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129 (1975); Comment, *Constitutional Law: New Distaste for Equal Protection Analysis*, 27 U. FLA. L. REV. 839 (1975); Comment, *City Employment Residency Requirements*, 7 URBAN L. ANN. 414

of the constitutional right to commute contend that public employment cannot demand contractual surrender of such a basic freedom. When the present condition of older American cities is taken into account, though, new considerations arise that must be resolved in favor of the city. Confronted with the legitimacy of residency requirements, it now is appropriate to weigh the crisis of the cities against restrictions on a fundamental personal right. The courts should not eliminate one of the few remaining incentives to live in the city—employment.

Initially, this Note examines the judicial challenges to residency requirements, evaluating the individual interests at stake. After reviewing these personal rights, the Note then focuses on municipal interests involved in establishing residency provisions. The significance of this examination, however, will be found in the urban crisis context that must control when studying the residency problem in 1980. Residency requirements are a municipal issue which cannot be dealt with fairly in an abstract constitutional setting alone. Ultimately, the Note discusses significant governmental interests in saving the American city that justify curtailment of the constitutional right to travel.

## I. INDIVIDUAL RIGHTS AND THE CONSTITUTIONAL CHALLENGE TO RESIDENCY REQUIREMENTS

Although municipal employees forced to live within city limits as a condition of their employment have attacked these provisions as violations of due process[7] and the privileges and immunities clause,[8]

(1974), Comment, *Municipal Employee Residence Requirements & the Right to Travel*, 1975 WASH. U.L.Q. 250; Comment, *Constitutional Law—Equal Protection—Penalty on the Right to Travel—Durational Residency Requirements*, 1973 WIS. L. REV. 914.

7. In Williams v. Civil Serv. Comm'n, 383 Mich. 507, 176 N.W.2d 593 (1970), municipal employees interested in relocating outside city limits challenged a residency requirement as a violation of substantive due process. Although the state court of appeals found the requirement a violation, the Michigan Supreme Court reversed. Because the civil service rule was not arbitrary or irrational and was reasonably related to the municipal interest of promoting better government, the court upheld the requirement. The court concluded that there is no constitutional right to work for the City of Detroit while living elsewhere. 383 Mich. at 512, 176 N.W.2d at 597.

8. In Construction & General Laborers, Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965), union members successfully challenged the validity of a residency requirement under the privileges and immunities clause. In this case, a St. Paul city ordinance compelled all contractors who were performing work for the city to employ only Ramsey County residents. The city claimed no direct authority to enact such an ordinance, but relied upon derivative authority from the police powers

equal protection has become the most viable means of objection.[9] In the majority of cases, the arguments are similar: a public employee alleges that every citizen has the right to live where he chooses and to travel freely within and across state borders. The aggrieved worker then argues that state and federal constitutions guarantee that such movement is a fundamental right.[10] These constitutions also provide each citizen equal protection of the laws. Discrimnation against nonresidents denies that protection, and thereby encroaches on the fundamental right to travel freely.[11]

The courts, responding to equal protection claims, must determine how closely to scrutinize residency requirements. Generally, in the absence of harm or threat of harm to a "fundamental" right, courts apply the "traditional" equal protection standard to a disputed regulation.[12] This traditional or "minimum scrutiny" test allows statutory discrimination "if any state of facts reasonably may be conceived to justify it."[13] A violation of equal protection will be found "only if the classification rests on grounds wholly irrelevant to the achievement of

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and its home rule charter to legitimize the regulation. 270 Minn. at 430, 134 N.W.2d at 30.

9. The Fourteenth Amendment guarantees the protection of equal treatment under the laws: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

10. More than 20 cases have used an equal protection approach to residency. Donnelly v. City of Manchester, 111 N.H. 50, 51-52, 274 A.2d 789, 791-92 (1971), contains a piece-by-piece equal protection analysis.

11. Only a minority of courts have found the right of intrastate travel to be "fundamental." *See, e.g.*, Krzewinski v. Kugler, 338 F. Supp. 492, 498 (D.N.J. 1972); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971). *See also* Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 77, 319 A.2d 483, 491 (1974) (Pashman, J., dissenting). While the right to travel is generally the only fundamental right courts confront in residency, plaintiff in Hanson v. Unified School Dist., 364 F. Supp. 330 (D. Kan. 1973) urged the fundamental rights "to work" and "to live where one chooses."

12. For an excellent discussion of equal protection standards, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994-1011 (1978). This is a fairly simplified explanation of each test's appropriateness in various constitutional problems.

13. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). The traditional equal protection test has been articulated by the Supreme Court on several occasions. *See, e.g.*, Kotch v. Board of River Port Pilots Comm'rs, 330 U.S. 552 (1947); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Lindlsey v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Atchison, T. & S.F.R.R. Co. v. Matthews, 174 U.S. 96 (1899).

the State's objective."[14] In practice, courts interpret this standard to require a rational relationship between the end sought to be accomplished and the means used to achieve that end.[15]

Although courts frequently apply the traditional minimum scrutiny standard in equal protection cases, the test is inappropriate in some situations. When the discrimination legitimized by the regulation adversely affects "fundamental"[16] constitutional rights, the applicable test is much more stringent. Under those circumstances, the court will uphold the statute only if the state demonstrates a compelling interest in maintaining the differencne in treatment between the classes.[17] Therefore, in applying strict scrutiny to residency requirements, the court will approve such ordinances only when a compelling governmental interest justifies the discrimination against nonresidents and the deprivation of employees' rights to travel freely.

Because of the significant difference in the two equal protection

14. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). For a discussion of the minimum scrutiny test of equal protection, see Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

15. In the residency context, courts frequently have explained the minimum scrutiny standard as a rational relationship test. *See, e.g.*, Cole v. Housing Auth., 435 F.2d 807, 813 (1st Cir. 1970); Ector v. City of Torrance, 28 Cal. App. 3d 293, 104 Cal. Rptr. 594 (Ct. App. 1972), *rev'd*, 10 Cal. 3d 129, 134, 514 P.2d 433, 436, 109 Cal. Rptr. 849, 852 (1973), *cert. denied*, 415 U.S. 935 (1974); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767, 771 (Miss. 1972); Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 522, 190 N.W.2d 97, 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972); Construction & General Laborers Local 563 v. City of St. Paul, 270 Minn. 427, 435, 134 N.W.2d 26, 31-32 (1965).

16. Among the rights that have been declared fundamental in equal protection analysis are the right to travel, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1972); equal access to voting, Dunn v. Blumstein, 405 U.S. 330 (1972); and procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942). *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30-36 nn.74-76 (1973); Note, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973).

Among the rights that have been declared fundamental in due process analysis are the right to be free of restrictive maternity leave regulations that burden "the freedom of personal choice in matters of marriage and family life," Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974); the right to terminate a pregnancy (encompassed within the right to privacy), Roe v. Wade, 410 U.S. 113 (1973); and the "rights to conceive and raise one's children," Stanley v. Illinois, 405 U.S. 645, 651 (1972).

17 The Supreme Court has applied the strict scrutiny test in various contexts. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage as an inherently suspect class); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise of religion); Bates v. City of Little Rock, 361 U.S. 516 (1960) (freedom of association).

tests, the threshold question is whether the Constitution affords the right to travel *fundamental* status. As is true with most of the issues involved in residency requirements, the courts have been unable to reach a consensus.[18]

## II. The Fundamental Nature of the Right to Travel

Historically, the right to travel was treated as a right derived from the commerce clause.[19] In a landmark case on residency requirements, *Shapiro v. Thompson*,[20] the Supreme Court in 1969 finally acknowledged that a right to travel exists independently of the commerce clause.[21] In *Shapiro*, the Court struck down a one-year durational residency period required for state welfare eligibility.[22] The Supreme Court, quoting from an earlier decision, stated "in any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."[23] Later, the *Shapiro* court noted, ". . . in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[24]

A cursory analysis of *Shapiro* suggests that the decision settled

18. Several lower federal and state decisions have used a fundamental constitutional right to travel to protect intrastate movement. *See, e.g.*, King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Auth., 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).

Nevertheless, the majority of courts have been unable to find a fundamental right of *intra*state travel. *E.g.*, Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976); Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Miller v. Krawczyk, 414 F. Supp. 998 (E.D. Wis. 1976); Pittsburgh Fed'n of Teachers v. Aaron, 417 F. Supp. 94 (W.D. Penn. 1976); Ector v. City of Torrance, 10 Cal. 3d 129, 109 Cal. Rptr. 849, 514 P.2d 433 (1973), *cert. denied*, 415 U.S. 935 (1974).

19. *See* note 2 and accompanying text *supra*.

20. 394 U.S. 618 (1969).

21. *Id.* at 630 n.8.

22. *Id.* at 641-42.

23. *Id.* at 631, quoting from United States v. Guest, 383 U.S. 745, 757-58 (1966).

24. 394 U.S. at 634 (emphasis in original).

both residency requirement issues. First, the court treated the right to travel as fundamental. Second, it examined the fundamental right to travel using strict scrutiny. A closer look reveals, however, that *Shapiro* held that strict scrutiny only protected *inter*-state travel as a fundamental right.[25] The question paramount in municipal residency requirements is whether the same determinations apply to *intra*-state travel.

Unfortunately, the courts are divided on this important issue. In the courts of appeals, the First and Second Circuits have concluded that intrastate travel is indeed fundamental.[26] Reaching the opposite result, the Sixth Circuit decided that the right exists only for interstate migration.[27] The federal district and state courts are also split over the distinction.[28]

Several courts avoid the intra/inter differentiation completely,[29] including the most recent Supreme Court case on residency, *McCarthy v. Philadelphia Civil Serv. Comm'n*.[30] In *McCarthy*, the Court upheld a Philadelphia ordinance that required residency as a condition of municipal employment. While the Court found no violation of the

25 The Supreme Court has never decided that the fundamental right to travel protected by the Constitution extends to movement entirely within a state. Most courts have therefore been hesitant in finding an intrastate right. *See, e.g.*, Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 436, 109 Cal. Rptr. 849 (1973), where the court stated: "[A]ppellant is claiming the right to 'travel' between his home and his place of employment . . . each working day—in other words, a 'right to commute.' We cannot discern such a right in the United States Supreme Court decisions." Nevertheless, recent dictum indicates that an intrastate right may exist. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256 n.9 (1974).

26. The First Circuit found a fundamental right of intrastate travel in Cole v. Housing Auth., 435 F.2d 807, 811 (1st Cir. 1970). One year later the Second Circuit chose to agree with *Cole* in King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

27. Wardwell v. Board of Educ., 529 F.2d 625, 627 (6th Cir. 1976).

28 The majority of lower courts have not recognized intrastate travel as a fundamental right. *See, e.g.*, Pittsburgh Fed'n of Teachers v. Aaron, 417 F. Supp. 94 (W.D. Penn. 1976); Miller v. Krawczyk, 414 F. Supp. 998 (E.D. Wis. 1976); Conway v. City of Kenosha, 409 F. Supp. 344 (E.D. Wis. 1975); Hattiesburg Firefighters Local 184 v City of Hattiesburg, 263 So. 2d 767 (Miss. 1972). *But see* 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).

29 *See, e.g.*, Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

30. 424 U.S. 645 (1976) (per curiam).

constitutionally protected right of interstate travel,[31] the opinion contains no discussion of intrastate travel or the applicable equal protection tests.

At the court of appeals level, the first two circuits to deal with intrastate migration concluded, in keeping with *Shapiro*, that the right is fundamental. The First Circuit in *Cole v. Housing Authority of Newport*[32] invalidated a two-year residence requirement imposed on applicants for admission to federally aided, low-rent public housing projects.[33] Finding a violation of equal protection, the court explained that the right to travel is a fundamental personal right which can be impinged[34] only when necessary to promote a compelling governmental interest.[35] The ordinance in *Cole* failed to reflect such an interest.[36] Interpreting *Shapiro* later in the opinion, the First Circuit stated, "The [Supreme] Court apparently uses 'travel' in the sense of migration with intent to settle and abide."[37] Since both inter- and intra-state migration would qualify as "travel" within this definition, the fundamental right must encompass both types of movement. Consequently, this court applies strict scrutiny to intrastate travel.

One year later in *King v. New Rochelle Municipal Housing Authority*,[38] the Second Circuit struck down a five-year durational residency requirement for admission to public housing as a violation of equal protection.[39] Although the logic in *King* is consistent with the *Cole* interpretation of *Shapiro*, the *King* court stated its position on the intra/inter dilemma more definitively:

> [W]e do not believe that the use of the term "interstate" in *Shapiro* was anything more than a reflection of the state-wide enactments involved in that case. Indeed, the Supreme Court specifically refused to ascribe the source of the right to travel to a particular constitutional provision but relied on "our constitutional concepts of personal liberty." It would be meaningless to

31. *Id.* at 647.

32. 435 F.2d 807 (1st Cir. 1970).

33. *Id.* at 814.

34. In this context, the court considered "impinged" to be a neutral term. The First Circuit stressed the dispute over the point when interference with travel necessarily impinges that right. *Id.* at 809 n.7.

35. *Id.* at 809.

36. *Id.* at 811-13.

37. *Id.* at 811.

38. 442 F.2d 646 (2d Cir. 1971).

39. *Id.* at 649.

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.[40]

From 1971 until 1976, the courts of appeals were silent on the question of intrastate travel as a fundamental right, though residency requirements were prompting extensive litigation. In *Wardwell v. Board of Education*[41] the Sixth Circuit broke the silence. A school teacher in Cincinnati challenged the constitutionality of a rule requiring all teachers hired after a given date to establish residence within the school district before ninety days elapsed.[42] Finding "no support for plaintiff's theory that the right to intrastate travel has been afforded federal constitutional protection,"[43] the court upheld the validity of the rule.[44] Further, the court explained that when dealing with a *continuing* employee residency requirement which will only affect the right of intrastate travel, the test for validity is minimum scrutiny/rational basis.[45] The court did not require a compelling state interest in this case to affirm the constitutionality of the residency requirement.

The district and state courts illustrate the same confusion experienced in the appeals courts. Lacking a definitive answer on the question of fundamental rights, the courts have rather arbitrarily chosen between minimum and strict scrutiny.[46] To date, the challenges evaluated with strict scrutiny have produced decisions going both ways.[47] Similarly, when courts apply the rationality test of min-

40 *Id* at 648 (citations and footnote omitted).

41 529 F.2d 625 (6th Cir. 1976).

42 *Id.* at 626-27.

43 *Id.* at 627.

44 *Id.* at 629.

45 *Id.* at 628. In this context, the court concluded that the compelling governmental interest test would be appropriate if the case involved a *durational* residency requirement infringing on the fundamental right of interstate travel. However, in the case of a *continuing* requirement affecting intrastate travel at the most, the less stringent standard is applicable. *See* notes 110-13 and accompanying text *infra*.

46. The courts that have used the rationality test of minimum scrutiny fall into two classifications: a) those that fail to see intrastate travel as a constitutionally protected fundamental right, *see* note 28 and accompanying text *supra*; and b) those that ignore the intrastate/interstate issue altogether, *see* note 29 and accompanying text *supra*. The courts that have applied the strict scrutiny test have found a fundamental right of intrastate travel. *E.g.*, 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).

47 In Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971), the Supreme Court of New Hampshire held that although no constitutional right to work

imum scrutiny, the decisions have been far from unanimous.[48]

## III. THE SEARCH FOR RATIONAL MUNICIPAL INTERESTS: MINIMUM SCRUTINY

Under either the minimum or strict scrutiny tests, courts must choose between the governmental and personal interests at stake. In the first case to fully explore the constitutional issues in residency, *Kennedy v. City of Newark,*[49] the New Jersey Supreme Court applied minimum scrutiny and upheld a continued employment residency requirement because of the city's legitimate interests.[50] Returning to an archaic argument that public employment is a "privilege" and not a "right,"[51] the New Jersey Supreme Court perceived a rational basis in the public policy advanced by the provisions. The court 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

for the city exists, the privilege of working for the municipality could not be conditioned upon the surrender of a citizen's fundamental right to live where he chooses. The ordinance failed to survive strict scrutiny. In Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972), however, a residency requirement for police and firemen passed the strict scrutiny of the district court of New Jersey.

48. Under the rationality test of minimum scrutiny, the majority of residency restrictions have been upheld. *See, e.g.*, Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767 (Miss. 1972); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Salt Lake City Firefighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1969).

Several residency requirements, however, have been unable to satisfy the rationality test. For example, in Construction & General Laborers Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965), a union sued the city because of an ordinance that forced all contractors working for the city to hire only county residents. The court found no rational explanation for the discrimination against nonresidents.

In another case, State, County & Municipal Employees Local 339 v. City of Highland Park, 363 Mich. 79, 108 N.W.2d 898 (1961), the court found unconstitutional a city residency requirement that applied to 163 nonresident employees for whom no living facilities were available within corporate limits. The municipality failed to demonstrate a sufficient justification for the ordinance under minimum scrutiny.

49. 29 N.J. 178, 148 A.2d 473 (1959).

50. *Id.* at 183-84, 148 A.2d at 476.

51. *Id.* For an excellent analysis of the right/privilege dichotomy both pre- and post-*Shapiro*, see Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?* 7 U.S.F. L. REV. 508, 523-26 (1973). *See also* Comment, *City Employment Residency Requirements*, 7 URBAN L. ANN. 414, 417-18 (1974).

the same time insist upon employment by government."[52] Although state courts articulated the right/privilege dichotomy for many years in this context, the *Shapiro* Court later completely discredited this theory.[53]

Ten years after the *Kennedy* decision, in 1969, another landmark residency case involved minimum scrutiny as applied to an equal protection dispute. The Utah Supreme Court, in *Salt Lake City Firefighters Local 1645 v. Salt Lake City*,[54] determined that the city had the power to require the residency of appointed officers and city employees.[55] In this case, the majority satisfied the rationality test by urging the soundness of geographical proximity arguments.[56] Additionally, the court agreed that the city was entitled to residential support and taxes in exchange for providing jobs, food and clothing for those same employees.[57] Today, most courts believe this argument,

52. 29 N.J. at 183-84, 148 A.2d at 476.

53. *Accord*, Elrod v. Burns, 427 U.S. 347, 361 (1976); Leger v. Sailer, 321 F. Supp. 250 (E.D. Pa. 1970), *aff'd sub nom.* Graham v. Richardson, 403 U.S. 365 (1971); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971). The New Jersey courts, however, continue to accept the contention that public employment is not a right, but a privilege which the government may bestow. *See, e.g.*, Mercadante v. City of Paterson, 111 N.J. Super. 35, 266 A.2d 611 (Chan. Div. 1970), *aff'd*, 58 N.J. 112, 275 A.2d 440 (1971); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959).

54. 22 Utah 2d 115, 449 P.2d 239 (1969).

55. *Id.* at 116-17, 449 P.2d at 239-40.

56. *Accord*, Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767 (Miss. 1972); Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972). When police and fire departments challenge the residency requirements, proximity to employment becomes an especially persuasive municipal argument. The emergency nature of the jobs, however, has not produced decisions that allow the employee to live closer to work yet outside city limits. For an argument that a time or radius computation would be more rational and efficient than arbitrary city limits, see Comment, *City Employment Residency Requirements*, 7 URBAN L. ANN. 414 (1974).

57. We have difficulty in concluding other than that any employer, including a city, should be able to draw from labor pool those who live within a reasonable distance from work, or, if you please, within the city limits. This not only for the city's convenience and economical operation, but conceivably to have those whom it helps clothe and feed participate in and contribute support and taxes for its benefit,—not for that of cities elsewhere.

It is conceded that there will be cases of hardship and inconvenience for some in order to continue their employment with the City, which is regrettable, but we cannot subscribe to the theory of counsel that place of residence is a God-given, constitutional right, determinable and enforceable by an employee against his employer who offers and gives the employee his job, unless such right contractually is protected.

commonly known as the "public coffer" theory, lacks merit in light of *Shapiro*.[58]

While municipalities assert the public coffer and familiarity with the city theories as defenses in almost all cases on residency requirements,[59] additional justifications abound when police and firemen challenge these provisions. The most noteworthy case, *Detroit Police Officers Association v. City of Detroit*,[60] again applied the minimum scrutiny test and upheld the ordinance.[61] Searching only for a reasonable relationship between the object of the legislation and the resident/nonresident classification, the court found that several legitimate interests would be advanced. The Michigan Supreme Court acknowledged that a special relationship exists between police officers and the community they patrol. Further, a policeman's presence in the city—both on- and off-duty—assures residents that a specially trained person would be available immediately if law enforcement proves necessary.[62]

As an additional governmental interest, the court recognized the

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22 Utah 2d at 117, 449 P.2d at 240.

58. The "public coffer" theory refers to the philosophy recognizing a mutual support obligation between a city and its employees. According to the court in Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972), *Shapiro* renders this theory constitutionally unsound. The court stated:

> The "public coffer" theory states that the salaries paid to civil servants ought to recirculate within the economy of the municipality that pays those salaries. In this way, municipal funds are preserved for a municipality's own residents. But this theory, as best expressed in People v. Crane (citation omitted), was sharply rejected by the Supreme Court in Shapiro v. Thompson, *supra*. Municipalities may not tie economic benefits in with contributions made to the municipal economy.

338 F. Supp. at 498-99 n.4. Other municipal residency cases have also rejected the public coffer theory. *See* Ector v. City of Torrance, 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).

59. *See, e.g.*, Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); Hanson v. United School Dist., 364 F. Supp. 330 (D. Kan. 1973); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Salt Lake City Firefighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, *cert. denied*, 395 U.S. 906 (1969).

60. 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972).

61. 385 Mich. at 536, 190 N.W.2d at 104-05.

62. Policemen are required by department order to be armed at all times, and why is this? Simply because by such requirement they are, no matter where they are or what they are doing, immediately prepared to perform their duties. They are charged with law enforcement in the city of Detroit, and obviously must be physically present to perform their duties. The police force is a semi-military

tenuous relationship between the black community in Detroit and the police force.[63] The city argued that an ordinance which increases daily contact between the citizenry and the police would promote its interest in establishing a more cooperative attitude. The majority agreed that a rational relationship existed.[64] While this legislation might increase the difficulty of recruiting and keeping police officers, it would "make recruitment of black officers more imperative."[65] Because the court recognized such recruitment as a positive goal, Detroit demonstrated a legitimate interest in police/community relations sufficient to justify infringement on the policeman's constitutional right to travel.

Beyond the familiarity, public coffer, and concern for the community contentions, courts have accepted many other arguments in support of the rational relationship. These municipal interests have not been accepted in all courts, however. In *Ector v. City of Torrance*,[66] a 1972 case subsequently reversed, the California Court of Appeals invalidated a city charter provision requiring all municipal employees to live within city limits.[67] The court applied minimum scrutiny to the ordinance and found a statutory violation of equal protection.[68] Following a New Hampshire Supreme Court case invalidating a sim-

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organization subject at all times to immediate mobilization, which distinguishes this type of employment from every other in the classified service.

*Id.* at 523, 190 N.W.2d at 98.

63. *Id.* at 524, 190 N.W.2d at 98.

64. "Special treatment of police residency puts them in the category [sic] of the judges and other elected officials of the city. That classification is at least debatably productive of proper municipal goals." *Id.* at 525, 190 N.W.2d at 98-99.

65. *Id.* at 524, 190 N.W.2d at 98. The question has often arisen as to the effect of the *Detroit Police Officers Ass'n* appeal dismissal "for want of a substantial federal question." Two courts have held the dismissal 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, 104 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S 935 (1974). Commentators, however, have suggested that such a dismissal should be considered 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).

66. 28 Cal. App. 3d 293, 104 Cal. Rptr. 594 (Dist. Ct. App. 1972).

67. *Id.* at 297, 104 Cal. Rptr. at 598.

68 *Id.* at 296, 104 Cal.Rptr. at 597-98. For a comment on this court of appeals decision that protected the employee's right to travel, see Comment, *City Employee Residency Requirements*, 7 URBAN L. ANN. 414 (1974).

ilar provision,[69] the favorable treatment of residency requirements under minimum scrutiny seemed threatened. Then, in the wake of success for the right to commute, the California Supreme Court reversed the court of appeals.[70] In its decision, the state supreme court adopted every municipal interest argument that the city offered. The residency requirement bore a rational relationship to many legitimate state interests: reduction of residents' unemployment, promotion of ethnic balance in the city, availability of trained manpower in emergencies, reduction in employee tardiness and absenteeism, increased quality of worker performance, and the city's economic benefit from local expenditure of employees' salaries.[71] Once again, however, not all courts have responded favorably to these justifications.[72]

## IV. The Search for Compelling Municipal Interests: Strict Scrutiny

While searching for legitimate municipal interests, courts in each of the minimum scrutiny decisions supporting residence have overcome two principal contentions by the challengers. First, the courts decide that the individual's interest in his right to travel or commute may be subordinated to the claims of the city.[73] Second, the courts determine that a municipality may choose to limit its labor pool, thereby risking employment of less qualified persons.[74] Because the

69. *See* Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971) in which the court invalidated that portion of the residency requirement for all classified city employees pertaining to teachers.

70. 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974).

71. *Id.* at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852.

72. *See, e.g.*, Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972); State, County, & Mun. Employees Local 339 v. City of Highland Park, 363 Mich. 79, 108 N.W.2d 898 (1961); Construction & General Laborers Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965).

73. Under the minimum scrutiny test, the surrender of the constitutional right must be rationally related to a legitimate state purpose. Once the court confirms municipal interests sufficient to justify the discrimination against nonresidents, the employee must live within city limits or risk losing his job.

74. Employees seeking relief from residency requirements generally claim that the limited labor pool will result in unqualified personnel. Nevertheless, many courts have found ways to justify residency in spite of such arguments. *See, e.g.*, Marabuto v. Town of Emeryville, 183 Cal. Ap. 2d 406, 6 Cal. Rptr. 690 (Dist. Ct. App. 1960) (the object of a civil service system is to secure employees on the basis of their ability to perform the duties of the job; an employee who cannot get to the job in time to perform, when performance is demanded, is not qualified); Williams v. Civil Serv.

courts applying minimum scrutiny do not confront resident/nonresident as a suspect classification impinging on fundamental individual rights, courts generally find the municipal interests articulated sufficient to justify the requirement. In cases that presume the fundamental nature of the right of intrastate travel, however, courts discard the rationality test in lieu of strict scrutiny. To uphold the constitutionality of residency under this standard, the municipal interests must be *compelling*.[75]

Only two courts have found infringement of a fundamental constitutional right in the bona fide continual residency requirement,[76] which is the type of provision applicable to most city employees. Due to this encroachment of a fundamental right, the courts subjected the ordinances to strict scrutiny.[77] In the first case, *Donnelly v. City of Manchester*,[78] the majority held that the statute violated the constitutional guarantee of equal protection.[79] Conversely, the court in *Krzewinski v. Kugler*[80] upheld a residency requirement despite the finding that intrastate travel qualified as a fundamental right.[81]

The Supreme Court of New Hampshire in *Donnelly* invalidated an ordinance requiring all classified city employees to become

Comm'n of Detroit, 383 Mich. 507, 176 N.W.2d 593 (1970) (stressed the fact that residency is completely irrelevant to taking the civil service exam initially); Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, *cert. denied*, 395 U.S. 906 (1969) (any employer, including a city, could limit its labor pool for convenience and economical operation).

75. Governmental action affecting fundamental rights does not enjoy a presumption of constitutionality; rather, the burden is upon government to show a compelling governmental interest justifying the intrusion. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (right to vote); Kramer v. Union Free School Dist., 395 U.S. 621, 627, 629 n 11, 633 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); De Gregory v. Attorney Gen. of N.H., 383 U.S. 825, 829 (1966) (right to associate); Sherbert v. Verner, 374 U.S. 398, 406-407 (1963) (right to practice religion), Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539, 546 (1963) (right to associate); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (right to associate); NAACP v. Alabama, 357 U.S. 449, 463 (1958) (right to associate).

76. The bona fide continual residency requirement prohibits employees from living outside city limits upon accepting employment with the municipality. By comparison, a "durational" residency requirement involves a waiting period before a person becomes eligible for a designated benefit.

77. *See* notes 16-17 and accompanying text *supra*.

78. 111 N.H. 50, 274 A.2d 789 (1971).

79. *Id.* at 54, 274 A.2d at 792 (1971).

80 338 F. Supp. 492 (D.N.J. 1972).

81. *Id.* at 497-501.

Manchester residents within twelve months of their employment.[82] Recognizing that each American has a fundamental right to travel freely within and across state borders and live where he chooses,[83] the court found no adequate justification. In this case, the court weighed *public* benefit from the residency requirements against the serious restriction on a *private* right.[84] Ultimately, all the municipal interests previously accepted under minimum scrutiny were insufficient to satisfy the stricter standard.[85]

In 1972, one year after *Donnelly*, the District Court of New Jersey in *Krzewinski v. Kugler*[86] upheld a city residence provision for police and firemen. At the outset, the majority recognized a fundamental right of intrastate travel in light of *Shapiro*.[87] Following a lengthy analysis, the *Krzewinski* court found a compelling governmental interest to justify the constitutional infringement.[88] However, the court refused to accept typical municipal interests as advanced in the minimum scrutiny cases. In the examination of the ordinance before it, the court set aside the public coffer and right/privilege arguments presented by the city.[89]

After discarding these doctrines, the court identified its perception of the issue in residency requirements: "whether the interests of a municipality in asking a policeman or fireman to surrender his constitutional right to travel and migrate in exchange for his job are suffi-

82. 111 N.H. at 52, 274 A.2d at 790. To obtain a permit for noncompliance with this ordinance, the employee was required to file a special request with the Board of Mayor and Aldermen, based on certain permissible excuses.

83. *Id.* at 53, 274 A.2d at 791.

84. It is true . . . that there is no constitutional right to work for the city, but this does not mean that the granting of this privilege may be conditioned upon a surrender of a fundamental constitutional right. The old right-privilege distinction is no longer valid, (citations omitted), and discrimination against some in public employment can no longer be practiced on the basis that the employment is a privilege which can be withheld from all.

*Id.* at 54, 274 A.2d at 791-92.

85. *Id.* at 54, 274 A.2d at 792.

86. 338 F. Supp. 492 (D.N.J. 1972).

87. *Id.* at 499-501.

88. The court here accepted the determinations of the First and Second Circuits that the right of intrastate travel was fundamental. *Id.* at 498. *See* note 26 and accompanying text *supra*. Further, the court said that the Supreme Court's refusal in *Shapiro* to link the right to travel with any specific clause of the Constitution (394 U.S. at 630 n.8) supports the finding of a fundamental right.

89. 338 F. Supp. at 498 n.4.

ciently compelling to justify the creation of a working class of immobiles."[90] To the surprise of courts and commentators, the opinion affirmatively answered the question.[91]

Within the framework of this issue, the *Krzewinski* court first examined the proximity argument. The majority admitted that the municipal interest in having police and firemen close to their places of employment would be adequate for the reasonableness standard. The court decided, however, that this contention was not sufficiently compelling.[92] Instead, the holding was based on a theory resembling the "community identity" doctrine in the minimum scrutiny cases.[93] Disregarding the familiar municipal arguments, the court presented what it considered to be the legitimate interest behind residence requirements, "the modern pattern of urban disruption and dissipation prevalent today."[94] This theory suggests that the public servant could develop an unconscious disdain for the city and its residents if permitted to live outside city limits. By spending his personal life in the suburbs and only returning to the city to work, the public employee could develop a strong resentment toward the city resulting from job-related tensions and emergencies. According to the New Jersey court, the municipal employer has a compelling interest in avoiding total disengagement between personal life and working hours, thereby justifying encroachment on a right to commute.[95]

## V. TREND: A NEW APPROACH TO EQUAL PROTECTION

Unfortunately, the District Court of New Jersey is the only court which treated intrastate travel as fundamental, applied strict scrutiny, and discovered a compelling governmental interest in support of mandatory residence. Immediately after *Krzewinski*, the courts returned to the minimum scrutiny approach after failing to perceive a fundamental right. In the last four years, however, the courts have chosen a new tactic for upholding residency post-*Shapiro*.[96]

90 *Id* at 499.

91. *Id.* at 501.

92 *Id.* at 499 n.6.

93 *See generally* Mercadante v. City of Paterson, 111 N.J. Super. 35, 40, 266 A.2d 611, 614 (Chan. Div. 1970), *aff'd*, 58 N.J. 112, 275 A.2d 440 (1971), *citing* State v. Benny, 20 N.J. 238, 252, 119 A.2d 155, 162 (1955).

94. 338 F. Supp. at 499.

95 *Id.* at 499-501.

96 *See, e.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976)

The most recent decisions in this area simply stress the distinction between "continuing" and "durational" residency.[97] In contrast to continuing requirements that prohibit employees from living outside city limits while working for that municipality,[98] durational requirements involve a "waiting period" before a person is eligible for some benefit or right.[99] The most common examples of the latter include ordinances for medical and welfare benefits,[100] various licenses,[101]

(per curiam); Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

97. *See generally* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (per curiam); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Wardwell v. Board of Educ. of City School Dist., 529 F.2d 625 (6th Cir. 1976); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

98. Consider a typical example of a bona fide continuing residence requirement:

> AN ORDINANCE REQUIRING ALL CITY EMPLOYEES UNDER CIVIL SERVICE REGULATIONS TO MAINTAIN THEIR RESIDENCE WITHIN THE CITY OF JACKSON.
>
> BE IT ORDAINED BY THE MAYOR AND COMMISSIONERS OF THE CITY OF JACKSON, MISSISSIPPI:
>
> SECTION 1: All employees of the City of Jackson, Mississippi, qualified under the rules and regulations of the Civil Service Commission, shall maintain their domicile and principal place of residence within the corporate limits of said City during the period of their employment with the City.
>
> SECTION 2: Any person affected by the terms of this Ordinance who does not now maintain his domicile and principal residence within the corporate limits of the City of Jackson, Mississippi, shall move his domicile and principal place of residence within the corporate limits of said City within a period of twelve (12) months from the date of this Ordinance; and in the absence of such compliance, said employee shall be immediately discharged and terminated in his employment with the City of Jackson, Mississippi.

Jackson, Miss., Ordinance No. 3D (March 20, 1973).

99. Consider an example of a durational residency requirement:

> Except in emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb no person shall be provided hospitalization, medical care or outpatient relief under the provisions of this article without first filing . . . that he is an indigent as shall be defined by rules and regulations of the state department of economic security, an unemployable totally dependent upon the state or county government for financial support, or an employable of sworn low income without sufficient funds to provide himself necessary hospitalization and medical care, *and that he has been a resident of the county for the preceding twelve months.*

ARIZ. REV. STAT. ANN. § 11-297A (Supp. 1978-79) (emphasis added).

100. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Valen-

voting,[102] state bar admissions,[103] and free or reduced tuition rates.[104] Under the new approach, the Fifth,[105] Sixth,[106] Seventh,[107] and

ciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); Arnold v. Halifax Hosp. Dist., 314 F. Supp. 277 (M.D. Fla. 1970); Crapps v. Duval County Hosp. Auth., 314 F. Supp. 181 (M.D. Fla. 1970).

101. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

102. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970).

103. *See, e.g.*, Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D. N.C. 1970); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970).

104. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 452 (1973); Arizona Bd. of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972).

105. In Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975), nonresident firemen brought an action contesting the constitutionality of a Civil Service rule that required all municipal employees to maintain their domicile and principal residence within the corporate limits of the city during their employment. The court held that the ordinance infringed on no constitutional right to intrastate travel and that the city was not required to satisfy the compelling state interest standard. Emphasizing the durational/continual distinction, the court required only rational interests here. The Fifth Circuit stated, "We agree with the Supreme Court of California's analysis in *Ector v. City of Torrance*, that nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental constitutional 'right to commute' which would cause the compelling governmental purpose test enunciated in *Shapiro* to apply." *Id.* at 902.

106. In Wardwell v. Board of Educ. of City School Dist., 529 F.2d 625 (6th Cir. 1976), a school teacher challenged a Board of Education rule requiring newly hired teachers to establish residency in the school district within 90 days. Requiring only a rational basis for the school board's residency requirement, the court held that the right of intrastate travel is not protected by the federal Constitution. Further, the court stated that the compelling state interest was applicable only in cases involving the infringement of the right to interstate travel by *durational* residency requirements. *Id.* at 627-28.

107. In Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), employees contested the validity of a village ordinance requiring residency by a specified date. The court found that the provision satisfied the rationality test and upheld the ordinance. Referring to earlier Supreme Court cases on durational residency requirements, the Seventh Circuit justified its choice of equal protection tests:

> The fact of residency itself was noted to be distinct from durational (or "waiting period") residency in *Shapiro* (citations omitted) and only the latter was found to be unconstitutional. *Dunn* "emphasize[d] again the difference between bona fide residence requirements and durational residence requirements." (citations omitted). In *Memorial Hospital*, quoting *Dunn*, the court cautioned that its decision was not intended to "cast doubt on the appropriately defined and uniformly applied bona fide residence requirements" (citations omitted).

*Id.* at 52-53.

Tenth[108] Circuits confine the holding of *Shapiro*, which requires a compelling governmental interest, to durational residency only.[109]

According to this developing trend, the fundamental right of intrastate travel does not exist in the context of continuing residency.[110] The constitutionally protected right of intrastate migration must be limited to durational residency only.[111] Since a continuing residency ordinance fails to impinge on a fundamental right, the courts apply minimum scrutiny to the legislative determination.[112] To the cities' advantage, the most recent federal cases have found municipal interests to satisfy the less stringent equal protection test.[113]

At this time, then, the prospects for maintaining the legitimacy of residency requirements seem bright. Although this trend may disappoint constitutional rights advocates with illusions of a fundamental right to commute, older American cities desperately need judicial support of these provisions. For municipal well-being, incentives such as public employment must be preserved to halt or reverse the flight from the central cities. Residency requirements can no longer be examined in a narrow constitutional context alone; their significance in the "urban crisis" cannot be ignored.

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108. In Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), a school counselor challenged a school district's residency requirement. Using the rationality test, the court decided that the reasons given for residency were related to the counselor's role and were not wholly insubstantial. According to this court, the general rule is that durational requirements are to be tested under strict scrutiny and continuing residency under minimum scrutiny. *Id.* at 483.

109. *See* Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Wardwell v. Board of Educ. of City School Dist., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

110. *Contra*, 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).

111. *See generally* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618, 636 (1969).

112. *See* notes 105-108 and accompanying text *supra*.

113. *See, e.g.*, Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

## VI. RESIDENCY REQUIREMENTS AND CONTROL OF URBAN GROWTH

Courts have examined the right to travel in many growth control cases.[114] Yet in each of the decisions dealing with time development ordinances and exclusionary zoning, the challenged regulation attempted to prevent population *increases* in a given municipality.[115] By comparison, the residency issue focuses on the constitutionality of ordinances which may deter *decreases* in population.

Legal commentators unanimously support the invalidation of residency requirements, contending that such ordinances penalize an individual's exercise of his right to travel.[116] Examining the employment relationship in isolation, commentators argue that municipalities do not have the authority to impose conditions on employment which courts would not tolerate in the private sector. Further, no municipal interest justifies interference with a nonresident's constitutional right to live and work where he chooses. Highly qualified persons may prefer to live outside city limits; discrimination against nonresidents and reduction of the labor pool may therefore

114. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir 1975), *cert. denied*, 424 U.S. 934 (1976); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *See generally* Amano, Selinger, Tekenaka, Van Dyke & Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978); Durkee & Hayford, *Residency Requirements in Local Government Employment: The Impact of the Public Employer's Duty to Bargain*, 29 LAB. L.J. 343 (1978); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?* 17 ARIZ. L. REV. 145 (1975); Note, *Can an "Inclusionary" Land Use Plan Withstand a Right to Travel Challenge?* 10 SUFFOLK L. REV 623 (1976); Note, *The Right to Travel and Municipal Land Use Planning for Limitation of Residential Development*, 1975 WASH. U.L.Q. 234; Note, *Tempo and Sequential Controls: The Validity of Attempts to Combat Urban Sprawl Through Local Land Use Regulations*, 11 WILLAMETTE L.J. 217 (1975).

115. *See generally* D. BROWER, D. GODSCHALK, L. MCBENNETT & B. VESTAL, DEFINING THE CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1976); Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Comment, *Exclusionary Use of the Planned Unit Development: Standards for Judicial Scrutiny*, 8 HARV. C.R.-C.L. L. REV. 394 (1973).

116. *See* note 6 and accompanying text *supra*.

be detrimental to the municipality's interests as an employer. Finally, regardless of a public employee's residence, he contributes to the city through performance of his duties.[117]

In light of the decay of urban centers, the approach taken by the commentators cannot stand. Commuting strains the city economically and culturally. Salaries earned in the city do not recirculate there. Instead, commuters bestow financial benefits on surrounding areas when satisfying their social and entertainment needs in their own communities.[118] Each of these factors has contributed to the decline of the cities.

Since 1970, metropolitan areas have grown more slowly than the nation as a whole, and substantially less rapidly than nonmetropolitan America.[119] This development is contrary to all previously existing patterns of metropolitan growth since the 1800's. Additionally, both the largest metropolitan areas and the most distant peripheral counties have experienced reversals in migration trends. The metropolitan regions with populations in excess of three million gained migrants between 1960 and 1970 but have lost since 1970;[120] the peripheral nonmetropolitan counties lost migrants between 1960 and 1970 but have gained since 1970.[121] At present, there is no indication that this most recent urban pattern of rapid out-migration will reverse itself.

From a practical standpoint, the chances of the city healing itself seem nonexistent. The upper- and middle-class exodus[122] from the urban areas has resulted in a significant change in the socioeconomic

117. *See generally* Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute*? 7 U.S.F. L. REV. 508 (1973); Comment, *City Employment Residency Requirements*, 7 URBAN L. ANN. 414 (1974).

118. *See generally* URBAN AFFAIRS ANNUAL REVIEWS, URBANIZATION AND COUNTER-URBANIZATION (B. Berry ed. 1976).

119. Berry, *The Counterurbanization Process: Urban America Since 1970*, in URBANIZATION AND COUNTERURBANIZATION 19, 21 (B. Berry ed. 1976).

120. *Id.*

121. *Id.*

122. St. Louis exemplifies the out-migration of middle- and upper-class city residents. Primarily young families with middle-level incomes from steady well-paid jobs changed residences to the suburbs. Older persons tended to stay within the city limits. In the meantime, the poor and unskilled, white and black alike, came to the city from the South. For a general discussion of the changes in St. Louis' population characteristics, see CITY PLAN COMMISSION, SAINT LOUIS DEVELOPMENT PROGRAM 30-35 (1973). *See generally* Zelinsky, *Cities & the Middle Class: Another Look at the Urban Crisis*, 1975 WIS. L. REV. 1081.

profile of the typical city dweller.[123] In addition, substantial business relocation to suburban areas has led to the precarious condition of the cities.[124] The once vibrant centers of metropolitan living have become pockets of self-perpetuating poverty. For whatever reasons, Americans are abandoning city residences, preferring to commute from outlying areas.[125] Incentives must be provided to facilitate their

123. Again using St. Louis as an illustration, between 1960 and 1970, the population decreased by 17%. At the same time, the percentage of blacks rose from 29% to 41%. Additionally, the city now has a high percentage of households with female heads, 21% city-wide; an unusually high proportion of elderly residents (65 and over), 14.7% as contrasted to a national average of 9.8%; and a relatively high proportion of households living in poverty, 26.5% as contrasted to a national average of 19.1%. Further, the city has experienced a massive out-migration of family heads in the "productive years" of 19 to 54. CITY PLAN COMMISSION, SAINT LOUIS DEVELOPMENT PROGRAM at 32-33 (1973). *See generally* Note, *So You Want to Move to the Suburbs: Policy Formulation and the Constitutionality of Municipal Growth-Restricting Plans*, 3 HASTINGS CONST. L.Q. 803 (1976).

124. *See generally* Langsdorf, *Urban Decay, Property Tax Delinquency: A Solution in St. Louis*, 5 URB. LAW 729 (1973); Marshall, *Flight of the Thrift Institution: One More Invitation to Inner City Disaster*, 28 RUTGERS L. REV. 113 (1974); *Financial Institutions, Municipal Finance & Community Development: Special Symposium Issue*, 29 VAND. L. REV. 901 (1976); Note, *Urban Redevelopment & the Fiscal Crisis of the Central City*, 21 ST. LOUIS U.L.J. 820 (1978).

125. St. Louis exemplifies the out-migration of middle- and upper-class city residents. Primarily young families with middle income from steady well-paying jobs changed residences to the suburbs. Older persons tended to stay within the city limits. Poor and unskilled whites and blacks came to the city from the South. For a general discussion of the changes in St. Louis' population characteristics, see CITY PLAN COMMISSION, SAINT LOUIS DEVELOPMENT PROGRAM, 30-35 (1973). *See generally* Zelinsky, *Cities & the Middle Class: Another Look at the Urban Crisis*, 1975 WIS. L. REV. 1081.

Preliminary reports by the United States Bureau of the Census indicate that 2,385,500 persons were living in the metropolitan area as of July 1, 1979. *See* Kester, *Population Drop Continues Here*, St. L. Post-Dispatch, June 13, 1979, at 8b, col. 3. The St. Louis metropolitan area has experienced a net population decline of one percent in the last eight years. Since 1970, approximately 142,600 persons moved out of the area. This figure is somewhat misleading, however, for it includes a natural increase of 117,300 (306,100 births and 188,800 deaths of area residents) to produce the one percent loss.

From 1970 to 1977, St. Louis City's population declined 17% compared to the 4.6% decline for all central cities in metropolitan areas in America. St. Louis County also experienced a decline in the last eight years with 21,600 more persons moving out of rather than into the County. *Id.* at col. 6. This net out-migration in the St. Louis area is partially attributed to the slow growth of jobs. "From 1970 to [1976], employment in the area increased only 7 percent, compared with a national gain of 20 percent." *Id.* at col. 3. Another cause cited is the movement of retired workers to areas with lower costs of living and more attractive climates. *Id.*

return.[126]

Consistent with urban redevelopment attempts to bring new families, new or renewed loyalties, and new financial resources to the cities, courts must uphold municipal residency requirements. Public employment continues to be a valuable deterrent to those who wish to leave the city and a stimulus for those contemplating a move within city limits.[127] Both urban and suburban dwellers must recognize that the effects of a declining city tax base, increased welfare burdens, inadequate housing, poor-quality schools, the threat of municipal insolvency and increasing crime rates do not stop at the city limits.[128] Indeed, when examining residency under equal protection challenges, the courts should now look to the decline in city population and economic indicators for the requisite rational relationship. In those courts that accept the right of intrastate travel as fundamental, urban decay should now satisfy the search for a compelling governmental interest.

Judicial acceptance of controlling the cities' decline as a compelling governmental interest is critical in the success of public employment as an incentive to live in the city. Courts confronted with residency will no longer be required to sidestep the holding of *Shapiro* by confining the fundamental right to travel to durational residence only. Even if courts expand the ill-defined right to travel to encompass intrastate migration, these compelling interests will justify municipal residency requirements.

## VII. CONCLUSION

Many municipal governments enacted residency requirements long before rapid out-migration and decay crippled the urban centers.[129] As a consequence, the motives of the municipality in establishing

126. *See generally* Note, *From Plows to Pliers: Urban Homesteading in America*, 2 FORDHAM URB. L.J. 273 (1974); Note, *Urban Homesteading in the Frontier of the American City*, 36 LA. L. REV. 233 (1975).

127. In St. Louis, for example, more than 50% of the Civil Service applicants in 1976 were county residents at the time of their examinations. As a condition of their employment, they must relocate into the city. Interview with G. Fox, Assistant Personnel Director for the City of St. Louis, Missouri (Feb. 14, 1978).

128. *See generally* NATIONAL URBAN COALITION, THE STATE OF THE CITIES 65-90 (1972).

129. For an excellent survey of the 50 largest cities as well as when and why they enacted residence requirements, see Note, *Municipal Employee Residence Requirements and Equal Protection*, 84 YALE L.J. 1684, 1684-89 (1974).

these provisions may bear little resemblance to the rationale available today to justify these requirements.[130] For example, at one time municipalities could persuasively argue that forcing police and firemen to live within city limits was necessary due to the emergency nature of their work.[131] Today, however, this geographical proximity theory has less merit. With modern transportation systems, commuting from suburb to city may actually consume less time than intra-city travel alone.

This same evolution of interests actually increases the legitimacy of residency provisions. When searching for a compelling interest to sustain any law, courts limit their inquiries to present interests, not those which may or may not have surrounded the law initially.[132] Upon challenge of these ordinances, then, the city could urge "urban health" as a compelling state interest which would satisfy either equal protection test. This municipal philosophy clearly incorporates all of the earlier contentions: city familiarity, proximity, mutual financial support, psychological disengagement per *Krzewinski*, and reduction of residents' unemployment.

Many other concerns, however, exist in this urban decay framework that emphasize the "compelling" nature of mandatory residence. First, many intangible interests are at stake as a city deteriorates; the urban core experiences cultural and historic ramifications.[133] Second, there is a probability that the central cities will become densely populated with persons dependent on public assistance.[134] Additionally, as residential blight and unemployment in-

130 Some courts believe that the earliest residency requirements were designed to legitimize the patronage already inherent in civil service. *See, e.g.*, Krzewinski v. Kugler, 338 F. Supp. 492, 502 (D.N.J. 1972).

131 *See, e.g.*, Detroit Police Officers' Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for lack of substantial federal question*, 405 U.S. 950 (1972), Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767 (Miss. 1972); Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, *cert. denied*, 395 U.S. 906 (1969).

132 For example, Sunday closing laws have been upheld when the legitimate objective of providing a uniform day of rest was not initially the aim of the law, and when in fact the objective at the time of enactment was proscribed by the establishment and free exercise clauses of the Constitution. *See* Braunfield v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

133 *See generally* A. DOWNS, URBAN PROBLEMS AND PROSPECTS (2d ed. 1976); D. ROGERS, MANAGEMENT OF BIG CITIES: INTERESTS GROUPS AND SOCIAL CHANGE STRATEGIES (1971).

134 For an excellent summary and survey of welfare recipients in the central cities, see J. PRESSMAN, FEDERAL PROGRAMS AND CITY POLITICS (1975).

crease, crime rates may rise.[135] Inevitable problems with education and other public services also arise.[136] Surely, all these factors could convince a court that compelling governmental interests support public employment as an incentive to live in the city.

Too often it seems that municipal employees asking the court to protect the constitutional right they voluntarily relinquished are not being truthful in their objections to mandatory residence. Instead, many are reacting to the fear of nearby poverty, minority neighbors, and the stigma attached to being a city dweller when upward mobility demands suburban residence. Fortunately for the cities, the courts need never defend these self-centered interests. Constitutional rights that have been contractually surrendered for the mutual benefit of employer and employee should no longer result in a successful challenge to residency.

135. Professor Downs suggests a direct correlation between rising crime rates and urban blight. A. DOWNS, URBAN PROBLEMS AND PROSPECTS (2d ed. 1976). *See also* A. BRANDSTETTER & L. RADELET, POLICE AND COMMUNITY RELATIONS: A SOURCEBOOK (1968).

136. *See generally* C. ADRIAN & C. PRESS, HUMAN SERVICES IN CITIES (1977).