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The Constitutionality of Continuing Residency Requirements for Local Government Employees: A Second Look

ROSS S. MYERS*

INTRODUCTION

Municipal, county, state, school district and other local government employees constitute a large percentage of the nation's workforce. Approximately 3,984,000 persons are employed by state governments and 10,144,000 persons are employed by other local governmental units.[1] Of these employees, 1,634,700 work in state education and 5,766,500 are employed by local educational systems.[2] State and local governments often compel these employees through continuing residency requirements to live within the governmental unit employing them.

Governmental units advance a number of reasons to justify these requirements, including greater job efficiency, a return of the employees' salaries to the governmental unit through an increased tax base, benefits to the local economy and an increase in the number of homeowners in the local community.

Durational residency requirements are distinguished from continuing residency requirements. The former require that a prospective employee prove he has lived in the community for a prescribed period of time to be eligible for employment.[3] They have further been held to impinge on the fundamental right to travel, forcing a governmental unit to show a compelling interest to justify them.[4] In contrast, continuing residency requirements demand only that governmental employees live in the community during the term of their employment.

Durational residency requirements will not be analyzed here. The imposition of continuing residency requirements on policemen and firemen also will not be analyzed here. Governments have

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1. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 88 (July, 1986).
2. *Id.*
3. Andre v. Bd. of Trustees, 561 F.2d 48, 52 (7th Cir. 1977).
4. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Comment, *Durational Residency Requirements for Public Employment*, 67 CALIF. L. REV. 386 (1979).

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been justified in imposing these requirements on policemen and firemen because of the compelling interest in providing the community with day and night police and fire protection.[5] Rather, this Article will focus on continuing residency requirements and their conflict with the equal protection and privileges and immunities clauses of the United States Constitution.

I. Governmental Justifications

In *Ector v. City of Torrance*,[6] the California Supreme Court recited a number of justifications commonly advanced by local governments as rational reasons for the imposition of continuing residency requirements. The *Ector* court found that the reduction of local unemployment, benefits to the local economy and increases in the tax base were often asserted as justifying these rules. These rationalizations taken together are known as the "public coffer theory."[7] Another justification often used is the goal of ethnic balance. Further, the availability of manpower for emergencies such as snowplowing in blizzards, fixing broken water mains and correcting malfunctioning traffic lights often is advanced to justify continuing residency requirements for public works employees. Job efficiency theoretically is advanced by such a requirement since employees become familiar with the problems and needs of the community they live in and acquire a personal stake in its fortunes. Employee tardiness and absenteeism arguably are reduced when employees live near their job sites. Moreover, citizens' confidence in the local government is increased when it is managed by its own residents.

Although courts have adopted many arguments to support residency requirements, the "public coffer theory" is widely believed to be constitutionally unacceptable. Thus, the United States Supreme Court in *Shapiro v. Thompson*[8] held that the equal protection clause of the fourteenth amendment prohibits government from apportioning its benefits and services according to an individual's tax contribution.[9] Also, the Supreme Court held in *Memo-*

5. Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708, 717 (1975); Annotation, *Policemen—Firemen Residency Requirements*, 4 A.L.R. 4TH 830 (1981).

6. 10 Cal. 3d 129, 514 P.2d 433, 104 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974).

7. Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197, 207 (1980).

8. 394 U.S. 618, 631-34 (1969).

9. *See* Krzewinski v. Kugler, 338 F. Supp. 492, 498 (D.N.J. 1972); Hager, *supra* note 7, at 207.

rial Hospital v. Maricopa County[10] that "a state may not protect the public fisc by drawing an invidious distinction between classes of its citizens. . . ."[11] Similarly, restricting public jobs for the area's unemployed is not a permissible public purpose.[12]

Using public employment residency requirements to change the racial and ethnic balance in the community is patently unconstitutional when it involves discriminatory hiring. Such a purpose implies that a local government will hire members of a racial or ethnic group from outside its borders disproportionally to the group's presence within the governmental unit. In *Fullilove v. Klutznick*,[13] the Supreme Court discussed racial preference in hiring. *Fullilove* involved mandatory minority participation in a federal public works program. The Supreme Court stated: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[14]

Thus, such an action by local governments would surely invoke strict scrutiny because a suspect classification is involved. A compelling governmental interest would be required to justify such action. In *Regents of University of California v. Bakke*,[15] a landmark case construing the constitutionality of a unversity's minority acceptance program, Justice Powell in his swing vote wrote:

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.[16]

Such a hiring practice by local governments arguably furthers the goal of an economically healthy and desirable community. However, the Supreme Court in *Fullilove* held that any goal, other than a remedial objective in correcting past discrimination, is suspect.[17] The Sixth Circuit's analysis of these Supreme Court cases indicates that in order to justify an ethnically or racially biased hiring program, (1) some legitimate governmental interest

10. 415 U.S. 250 (1974).
11. *Id.* at 263.
12. Ward v. Bd. of Examiners, 409 F. Supp. 1258, 1260 (D.P.R. 1975), *aff'd* 429 U.S. 801 (1976).
13. 448 U.S. 448 (1980).
14. *Id.* at 491.
15. 438 U.S. 265 (1978).
16. *Id.* at 307. The *Bakke* decision did not result in a consensus opinion; what seems to have emerged is that a university may give weight to an applicant's race, but may not establish a quota based on race.
17. *Fullilove*, 448 U.S. at 486-87.

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must be served and (2) the program must be directed to that interest.[18] The governmental interest served must be compelling since strict scrutiny will be used by courts reviewing the program.[19] Local governments will probably be unable to demonstrate successfully that a racially or ethnically biased hiring program can be sufficiently "directed" towards the goal of an economically healthy and desirable community. Such a goal, when it is furthered only indirectly by such a hiring program, likely will be held insufficiently compelling to justify such discrimination. Local governments will encounter further difficulty in demonstrating that other, more constitutionally acceptable methods are not available and are not more likely to succeed. Aside from the constitutional problems, the local constituency would likely oppose such a program since its own opportunities for public employment would be so reduced.

Job efficiency has been the most successful reason advanced by local governments for imposing continuing residency requirements. However, this reason seems artificial and contrived when analyzed. The erratic borders of modern-day cities and other governmental units often result in an employee being closer to his work site if he lives outside the governmental unit that employs him than if he was living within the unit.[20] To mandate where one is to live and raise a family arguably has a deleterious effect on an employee's morale, especially where attractive suburban areas lie near, although outside, the governmental unit.

Courts have thus far been willing to uphold continuing residence requirements. However, two cogent bases can be used to argue against such rules: The equal protection and the privileges and immunities clauses of the United States Constitution.[21]

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18. Bratton v. City of Detroit, 704 F.2d 878, 885 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), *reh'g denied*, 465 U.S. 1074 (1984), *modified*, 712 F.2d 222 (6th Cir. 1983). Legitimate governmental interests could arguably include eliminating the effects of past discrimination and obtaining people for jobs which require unique racial or ethnic background.

19. *Id.* at 886.

20. Hanson v. Unified School Dist. No. 500, Wyandotte County, Kan., 364 F. Supp. 330, 334 (D. Kan. 1973).

21. Another constitutional argument against continuing residency requirements is based on the due process clauses of the fifth and fourteenth amendments. When a government infringes on an individual's due process interest, "the established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competence of the state to effect." Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). However, courts have held in numerous cases that due process is not violated by continuing residency requirements. *See, e.g.*, Cook County Teachers' Union Local 1600 v. Taylor, 432 F. Supp. 270 (N.D. Ill. 1977).

II. THE EQUAL PROTECTION CLAUSE

In applying the equal protection clause to particular cases, courts must initially determine how closely to scrutinize the impact of these requirements. The Supreme Court has stated: "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[22]

Thus, in the absence of the creation of a suspect class or any infringement on a fundamental right, the traditional or "minimum scrutiny" test is used to analyze the questioned state action.[23] The courts will use "strict scrutiny" in analyzing state action when an invidious class is created or fundamental rights are violated. Under the strict scrutiny test, the state must justify its actions with a "compelling interest."[24] In addition, legislation affecting constitutional rights must meet an "exacting standard of precision."[25] Legislation cannot be overly broad in its impact.

A. Suspect Classes

It has been held that a suspect class is not created by the imposition of continuing residency requirements on public service employees.[26] Nonetheless, the argument can be made in some situations that a suspect class is created by a local government because of these requirements. Suspect classifications triggering strict scrutiny include race, nationality, alienage, gender and indigency.[27]

Whether a suspect or invidious class of persons has been singled out for different treatment because its members share a particular characteristic "may be indicated by numerical compilations showing that a disproportionate number of that group are affected."[28] But this alone is not enough. "State action which affects a greater proportion of one group more than another, standing alone, is not invalid under the Equal Protection Clause."[29] The proponent of the particular law must also show that the facially neutral legisla-

22. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).
23. Hager, *supra* note 7, at 200.
24. *Id.* at 201.
25. Dunn v. Blumstein, 405 U.S. 330, 360 (1972).
26. Mogle v. Sevin County School Dist., 540 F.2d 478, 483 (10th Cir. 1976). *See also* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).
27. Benson v. Arizona Bd. of Dental Examiners, 673 F.2d 272, 277 (9th Cir. 1982).
28. Valadez v. Graham, 474 F. Supp. 149, 155 (N.D. Tex. 1979).
29. *Id.*

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tion "has the purpose and intent to invidiously discriminate against the disproportionately affected group."[30] To determine discriminatory intent, a court may look to statistical application, historical development, sequential events, and legislative history.[31]

Courts have not been inclined to strictly scrutinize continuing residency legislation based solely on the argument that it creates a suspect class. The Michigan Supreme Court in *Detroit Police Officers' Association v. City of Detroit*[32] held that there was nothing invidious or suspect in such a classification. The United States Supreme Court declined to review that decision for want of a substantial federal question.[33] Indeed, the United States Supreme Court referred favorably to the ruling of *Detroit Police Officers Association* in *McCarthy v. Philadelphia Civil Service Commission.*[34]

In *Massachusetts Board of Retirement v. Murgia,*[35] the Supreme Court stated that "a suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[36] The Michigan Supreme Court and the United States Supreme Court in the above cases have held that, at least in the situations encountered there, governmental employees do not yet meet this description. In circumstances where governmental employees all share some indicia of a suspect class, for example, race, nationality, alienage or gender, and the purpose of the residency requirement is to restrict the rights of the class, then a suspect class will exist such that strict scrutiny will be applied.[37]

B. Right to Travel

Since courts have been unwilling to overturn continuing residency requirements solely on an argument that a suspect class has been created, litigants have turned to the contention that this type of legislation infringes on a fundamental right. In recent years,

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30. *Id.*
31. *Id.* at 155-56.
32. 385 Mich. 519, 190 N.W.2d 97 (1971), *cert. denied*, 404 U.S. 950 (1972).
33. 405 U.S. 950 (1972).
34. 424 U.S. 645 (1976) (per curiam).
35. 427 U.S. 307 (1976).
36. *Id.* at 315.
37. For example, a suspect class may exist when officials of one political subdivision, in cooperation with residents of neighboring subdivisions, impose a continuing residency requirement to ensure minority group employees will not reside in neighboring political subdivisions.

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parties have tried to use the fundamental right to travel to invoke the strict scrutiny test in analyzing continuing residency requirements. Unfortunately, most courts hold that this right is not affected at all by such requirements.[38]

The right to travel was recognized as basic and fundamental in *United States v. Guest.*[39] This was reaffirmed in *Shapiro v. Thompson,*[40] where the Supreme Court stated that the right to travel "is a right that has been firmly established and repeatedly recognized."[41] The right to travel has been held to include the right to migrate from place to place, the right to find a new job, and the right to start a new life.[42] *Shapiro* involved a durational residency requirement that had to be met before individuals were eligible to receive welfare benefits. The Court invoked strict scrutiny because certain individuals, those who chose to move, were in effect penalized by the requirement while others, those who chose to stay in one county, were not. This classification of individuals impaired the right to travel and invoked strict scrutiny. The Court, therefore, required a compelling state interest to justify the classification.[43]

The Supreme Court, in a brief and summary opinion, dismissed a fireman's challenge to a city's continuing residency requirement in *McCarthy v. Philadelphia Civil Service Commission.*[44] A fireman claimed an impairment of his fundamental right to travel. In reference to the continuing residency requirement, the Court stated: "We have therefore held that this kind of ordinance is not irrational."[45] This statement indicates that the Court used the rational relationship test in analyzing the ordinance. The Court in the rest of the opinion distinguished between its prior decisions striking down *durational* residency requirements and the situation in *McCarthy.* The Court then noted that in its earlier decisions, which addressed durational residency requirements, it did not question " ' "the validity of appropriately defined and uniformly applied bona fide residence requirements." ' "[46] In dismissing the fireman's claim, however, the Court did not explain whether the right to travel was indeed infringed in a situation involving a continuing residency requirement.

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38. *See, e.g.,* Andre v. Bd. of Trustees, 561 F.2d 48, 52 (7th Cir. 1977).
39. 383 U.S. 745 (1968).
40. 394 U.S. 618 (1969).
41. *Id.* at 630.
42. *Id.* at 629.
43. *Id.* at 638.
44. 424 U.S. 645 (1976) (per curiam).
45. *Id.* at 646.
46. *Id.* at 647 (quoting Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974) (quoting Dunn v. Blumstein, 405 U.S. 330, 342 (1972))).

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The question of whether the right to travel extends to intrastate travel as well as interstate travel is significant since state borders may not be involved in a significant number of cases where public employees contest residency requirements. The Supreme Court recognized this question and then pointedly declined to resolve it in *Memorial Hospital v. Maricopa County.*[47] There, the Court held that an Arizona statute imposing a one year durational residency requirement in the county prior to becoming eligible for emergency hospital or medical care at the county's expense created a suspect classification and impinged on the right of interstate travel. The statute deprived newly arrived residents of basic necessities of life but had no effect on established residents. Since there was no compelling state interest justifying such a classification, the statute was held to be violative of the equal protection clause.

Several other courts have held that there is no right of intrastate travel.[48] With regard to continuous residency requirements, this question usually is held to be moot since most courts hold that only durational, and not continuing, residency requirements have an unconstitutional impact on the right to travel, regardless of the right being only interstate or including intrastate travel.[49]

It seems absurd that the fundamental right to travel only exists when one crosses state lines. The only basis for this result would be the assumption that this right is solely based upon the commerce clause of Article I, section 8 of the Constitution and the privileges and immunities clause of the fourteenth amendment. Past opinions of the Supreme Court, however, establish that the right to travel rests on no one source. *Jones v. Helms*[50] and *Shapiro v. Thompson*[51] point out that this right is not dependent on any one clause and indeed is an aspect of the liberty interest of the due process clause of both the fifth and the fourteenth amendments, the privileges and immunities clauses of both Article 4, section 2 and the fourteenth amendment, and the commerce clause. *Jones v. Helms* was a habeas corpus action where the Court gave constitutional approval to a Georgia statute that made it a misdemeanor for parents to willfully abandon their children and a felony for parents to then leave the state. The Court held that the fundamental right to travel was not violated by the differ-

47. 415 U.S. 250, 255-56 (1974).
48. *Andre*, 561 F.2d at 53; Wardell v. Bd. of Educ., 529 F.2d 625, 627 (6th Cir. 1976). *See also* Hager, *supra* note 7, at 203.
49. *Andre*, 561 F.2d at 52; Hager, *supra* note 7, at 215.
50. 452 U.S. 412, (1981) (White, J., concurring).
51. 394 U.S. 618 (1969).

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ent levels of punishment.[52]

Helms is important in another respect: Although it did not involve a continuing or durational residency requirement, the Supreme Court again emphasized that the right to travel is fundamental, but found that the statute "did not penalize the exercise of the constitutional right to travel and did not deny . . . the equal protection of the laws . . . . "[53] because of the state's interest in preventing parents from fleeing after abandoning their children. Hence, the Court declined to apply strict scrutiny. In his concurring opinion, Justice White stated that he understood the Court to have used essentially a rational relationship test, regardless of what was stated in the majority opinion, and regardless of the fundamental nature of the right to travel.[54]

In *Joseph v. City of Birmingham*,[55] a federal district court explained this paradox by finding that an intermediate standard is used by the Supreme Court now in these kinds of cases. In *Joseph*, the court determined that where a fundamental right is involved, the state need not show a compelling interest, but must show only that the questioned statute, ordinance, or regulation is " 'reasonably necessary to the accomplishment of legitimate [governmental] interests.' "[56] The plaintiff in *Joseph* was a candidate running for Birmingham, Michigan, city commissioner. He challenged the constitutionality of a city charter provision disqualifying any person from becoming a candidate for the office unless that person had been a city resident for at least one year prior to the general election. The district court in *Joseph* used an intermediate level of review and held that the residency requirement had a "real and substantial relationship"[57] to legitimate governmental objectives and thus did not violate the fourteenth amendment.

Justice White, in the more recent case of *City of Cleburne, Texas v. Cleburne Living Center*,[58] again noted that three levels of review exist.[59] In a concurring opinion, Justice Stevens perhaps better explains the Court's true method of dealing with standards of review:

> [O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions

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52. *Helms*, 452 U.S. at 423.
53. *Id.* at 426.
54. *Id.* at 426-27.
55. 510 F. Supp. 1319 (E.D. Mich. 1981).
56. *Id.* at 1334-35 (quoting Lubin v. Panish, 415 U.S. 709, 718 (1974)). *See generally Symposium on Equal Protection, the Standards of Review: The Path Taken and the Road Beyond*, 57 U. DET. J. URB. L. 701, 1089 (1980).
57. *Joseph*, 510 F. Supp. at 1337.
58. ___ U.S. ___, 105 S. Ct. 3249 (1985) (Stevens, J., concurring).
59. *Id.* at ___, 105 St. Ct. at 3254-55.

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> ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so called "standards" adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.[60]

Justice Stevens continued that the Court actually is using a "rational basis" analysis in dealing with every case coming before it and then is trying to explain the results in the framework of the three tiered analysis of equal protection claims.[61] Thus, even if it is conceded that the right to travel is infringed by continuous residency requirements, the violation of this fundamental right still may fail to result in heightened scrutiny under recent equal protection analysis. The infringement of the right to travel in residency cases, however, is by no means conceded. As the Seventh Circuit Court of Appeals noted in the leading case of *Andre v. Board of Trustees*,[62] most courts decline to find that continuous residency requirements, as distinguished from durational residency requirements, infringe on the right to travel at all. Thus, heightened scrutiny need not be applied to the state action.[63] Moreover, a significant number of courts have held that no right to intrastate travel exists.[64] *Andre* involved a challenge by Maywood, Illinois, public employees of the constitutionality of an ordinance imposing a continuous residency requirement on the employees. The court rejected a number of arguments by the employees and concluded that there was no vested contractual right to live outside Maywood village limits,[65] that the village's actions did not create an estoppel[66] and that there was no violation of the right to travel because of the ordinance.[67]

Regardless of decisions such as *Andre*, continuous residency requirements clearly do have a constitutionally significant impact on the right to travel. In *Shapiro v. Thompson*, which invalidated a durational residency requirement, the Court held that an indigent's right to travel was unconstitutionally infringed because he would hesitate to move if he knew that he would risk losing wel-

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60. *Id.* at ___, 105, S. Ct. at 3260-61.
61. *Id.* at ___, 105 S. Ct. at 3261.
62. 561 F.2d 48 (7th Cir. 1977).
63. *Id.* at 53.
64. *Id.* at 53 (citing Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1975); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); and 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)).
65. *Andre*, 561 F.2d at 51-52.
66. *Id.* at 50-51.
67. *Id.* at 52-53.

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fare benefits by doing so.[68] This logic is equally applicable when an employee of a local government decides not to move out of the city or school district that employs him because he would risk losing his job in doing so by violating a continuous residency requirement. Most courts, taking their cue from *McCarthy*, ignore this logic though and find that the right to travel has not been violated by continuing residency requirements.[69]

At least two cases have found that continuing residency requirements do infringe on the right to travel.[70] These two cases further found no corresponding compelling state interest to justify the imposition of a continuing residency requirement upon governmental employees who are neither policemen nor firemen. *Donnelly v. City of Manchester*[71] and another case, *Angwin v. City of Manchester*,[72] also stand for the proposition that states may grant more rights under their state constitutions than are available under the federal constitution. In *Hanson v. Unified School District Number 500, Wyandotte County, Kansas*,[73] the court found that the reasons advanced by a school district to justify its continuing residency requirement did not even meet the rational relationship test. The court there did not reach the question of whether a fundamental right was violated. However, these decisions which hold that continuing residency requirements do infringe on a fundamental right are in the extreme minority of cases.[74]

C. Other Fundamental Rights

When a continuous residency requirement is adopted and imposed on governmental employees who, under state law, already have a vested property interest in their jobs, then a more successful challenge may be made. Retroactive legislation changing this legal relationship could be a deprivation of property without due process of law.[75] The United States Constitution states that "[n]o

68. 394 U.S. 618, 628-31 (1969).
69. *See, e.g., Andre*, 561 F.2d at 52.
70. Fraternal Order of Police v. Hunter, 49 Ohio App. 2d 185, 201, 360 N.E.2d 708, 718 (1975), *cert. denied*, 424 U.S. 977 (1976), and Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971).
71. 111 N.H. 50, 274 A.2d 789 (1971).
72. 118 N.H. 336, 386 A.2d 1272 (1978).
73. 364 F. Supp. 330, 334 (D. Kan. 1973).
74. For contrary holdings, *see, e.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (per curiam); Wardell v. Bd. of Educ., 522 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, Miss., 506 F.2d 900 (5th Cir. 1975); and Cook County Teachers' Union Local 1600 v. Taylor, 432 F. Supp. 270 (N.D. Ill. 1977).
75. Fraternal Order of Police v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708, 712-13 (1975).

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state shall . . . pass any . . . law impairing the obligation of contracts.[76] In *Fraternal Order of Police v. Hunter*,[77] the court, noting that this prohibition also applies to administrative regulations, held that the state had a compelling interest in imposing a continuous residency requirement on policemen and firemen, but that imposing such a requirement on other civil service employees violated due process.[78]

In *Ector v. City of Torrance*,[79] a city librarian's attempt to avoid a continuing residency requirement by invoking the fundamental right of privacy, the right to marry and establish a home, the right to raise and educate one's children and the fundamental right to associate with neighbors of one's choice was harshly rejected by Justice Mosk of the California Supreme Court. Describing the librarian's arguments as "esoteric" and "Thoreauvian," Justice Mosk stated that the appellant was able to cite no authority supporting her claims.[80] Finding no violation of fundamental rights, Justice Mosk used the rational relationship test in analyzing the city's continuing residency requirements. A series of governmental purposes was listed by the court to justify the residency requirement.[81] The rights that the librarian claimed were violated were not proven to be actually and significantly impaired. Justice Mosk held that whether a legislative act is to be denied a presumption of validity and be subjected to strict judicial scrutiny "does not turn on the ingenuity of counsel in conceiving remotely possible ways in which the act might affect those rights."[82]

These arguments, unfortunately, seem to have lain dormant since *Ector*. The above noted rights, strongly associated with the liberty interest protected by the due process clauses, arguably are both fundamental and significantly impaired by continuing residency requirements. In *Prince v. Massachusetts*,[83] the United States Supreme Court emphasized that one of the freedoms of a parent is the freedom to educate his child as he chooses.[84] Justice Douglas stated that the right to educate one's child in the school of one's choice, whether public or private, is protected by the first and fourteenth amendment.[85] The Supreme Court noted in *San*

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76. U.S. CONST. art. I, sec. 10.
77. 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975).
78. *Fraternal Order of Police*, 49 Ohio App. 2d at 200, 360 N.E.2d at 717.
79. 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974).
80. *Id.* at 136-37, 514 P.2d at 437, 109 Cal. Rptr. at 853-54.
81. *Id.* at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852.
82. *Id.* at 136, 514 P.2d at 437, 109 Cal. Rptr. at 853.
83. 321 U.S. 158 (1943).
84. *See also* Pierce v. Society of the Sisters, 268 U.S. 510 (1925).
85. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Goldberg, J., concurring).

Antonio Independent School District v. Rodriguez,[86] however, that the actual right to be educated is not fundamental.[87]

The imposition of a continuing residency requirement on a spouse creates a number of dilemmas. The spouse is forced to choose between the breakup of the marital home due to living separately from his or her family, taking up the family roots and moving into the political subdivision which imposed the requirement, or losing perhaps the only employment available in today's economy. This situation should require a compelling interest on the behalf of the local government. Justice Harlan in 1961 stated that "[t]he home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[88]

In *Meyer v. Nebraska*,[89] the Supreme Court held that the due process liberty interest "[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children. . . ."[90] Justice Goldberg stated in *Griswold v. Connecticut* that "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[91]

Given the above, the librarian's claim in *Ector* can hardly be termed "esoteric," Thoreauvian," or without any authority. Rather, substantial Supreme Court authority supports the proposition that continuing residency requirements infringe on the right to privacy, the right to marry and establish a home, the right to raise and educate one's children and the right to associate with neighbors of one's choice, all of which arguably are fundamental rights.

It is poignant to note that one of the reasons for the adoption of the fourteenth amendment was that in some Southern states after the Civil War, former slaves were forced by law to reside on the land they cultivated. Continuing residency requirements are remarkably similar to the badges and incidents of slavery prohibited by the thirteenth amendment.[92]

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86. 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).
87. *Id.* at 35.
88. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J. dissenting).
89. 262 U.S. 390 (1923).
90. *Id.* at 377. *See also* Korematsu v. United States, 323 U.S. 214, 219-220 (1944).
91. *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring).
92. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). *See also Civil Rights Cases*, 109 U.S. 3 (1883); Jones V. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Significantly, the Supreme Court has not passed upon a continuing residency requirement case that did not involve policemen or firemen. Justice Brennan has stated:

> There will always be the puzzling problem of how to deal with cases that are similar, but not identical, to some case that has been summarily disposed of in this Court. Courts should, of course, not feel bound to treat a summary disposition as binding beyond those situations in which the issues are the same.[93]

McCarthy v. Philadelphia Civil Service Commission[94] is the Supreme Court case lower courts consistently cite in upholding continuing residency requirements. While *McCarthy* was not a summary disposition, it was unnecessarily brief and nonexplanatory and only dealt with a fireman's claim. Public employees who are neither policemen nor firemen, therefore, should question its effect upon their rights.[95]

III. The Privileges and Immunities Clause

Other arguments have been sought because nonresidents have not in themselves been held to be a suspect class and since a fundamental right, specifically the right to travel, has not consistently been held to be violated by continuing residency requirements. The most persuasive contention perhaps can be based on the privileges and immunities clause of Article 4, section 2 of the United States Constitution. This clause provides that the "Citizens of each State shall be entitled to all Privileges, and Immunities of Citizens in the several States."[96]

In *White v. Massachusetts Council of Construction Employers, Inc.*,[97] the Supreme Court stated that if local government workers are paid with federal funds, then residency requirements may not be imposed unless permitted by Congress. *White* held, however, that the commerce clause does not prevent a city from imposing residency requirements on employees of construction companies working on city funded projects. The Court reasoned that since it expended only its own funds on these projects, the city was only a "market participant" and thus, did not regulate interstate

93. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 920 (1976) (mem., Brennan, J., dissenting).

94. 424 U.S. 645 (1976) (per curiam).

95. *See, e.g.*, Hanson v. United School Dist. No. 500, Wyandotte County, Kan., 364 F. Supp. 330, 334 (D. Kan. 1973).

96. U.S. Const. art. IV, § 2. The privileges and immunities clause of the fourteenth amendment bars a state from violating national rights obtained by citizenship rather than state rights secured by residency. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

97. 460 U.S. 204 (1983).

commerce.[98]

White, however, failed to discuss the impact of the privileges and immunities clause. In contrast, in *United Building and Construction Trades Council of Camden County v. Mayor and Council of Camden*,[99] the Supreme Court did address the privileges and immunities clause and held that it is as applicable to municipal ordinances as it is to state statutes.[100] The Court justified this position by stating that (1) a municipality is a mere subdivision of the state,[101] and (2) "[a] person who is not residing in a given State is *ipso facto* not residing in a city within that State."[102] The Court then held that the city, by use of the challenged ordinance, could not impose a city residency requirement upon employees of construction companies working on city funded projects unless the city's ordinance met the requirements imposed by the privileges and immunities clause.[103] The privileges and immunities clause precludes discrimination against nonresidents unless (1) there is a substantial reason for the difference in treatment and (2) the discrimination practiced against nonresidents bears a substantial relationship to the state's objective.[104] The Court held that the privileges and immunites analysis is not invoked unless the challenged ordinance affects one of the privileges or immunities bearing upon the nation as a single entity.[105] The Court held that the pursuit of a common calling, the right to be employed, is covered under this clause.[106] However, the Court then noted that public employment is "qualitatively different," and is certainly not a fundamental right for purposes of the equal protection clause.[107]

The question of whether public employment is a fundamental right entitled to the protection of the privileges and immunities clause was simply left open by the Court.[108] The Court held that the employees of construction companies working on projects partially or fully funded by the city of Camden were entitled to the protection afforded by the clause.[109] In order to satisfy the clause, Camden had to show a "substantial reason" for the difference in

98. *Id.* at 214-15.
99. 465 U.S. 208 (1984).
100. *Id.* at 214.
101. *Id.* at 215.
102. *Id.* at 216-17.
103. *Id.* at 221.
104. *Id.* at 222.
105. *Id.* at 218 (quoting Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978)).
106. *United Bldg.*, 465 U.S. at 219.
107. *Id.*
108. *Id.*
109. *Id.* at 221-22.

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treatment and show that the nonresident construction workers constituted a "peculiar source of the evil at which the statute is aimed."[110]

For public employees to be entitled to the clause's protection, the Court seems to hold that the fact that the employment is public in nature is immaterial; instead, what is critical is that the Court is shown that the opportunity to seek employment "is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause. . . ."[111] This may be surprisingly easy to prove when there are 14,128,000 local government employees in the United States, and a large, perhaps overwhelming, percentage of these employees are burdened by residency requirements.[112]

In *Supreme Court of New Hampshire v. Piper*,[113] the United States Supreme Court held that the privileges and immunities clause was violated by a New Hampshire Supreme Court rule limiting bar admission to attorneys residing within the state.[114] Piper, a Vermont resident, was denied admission to the New Hampshire state bar because of the rule and challenged it successfully. The United States Supreme Court followed the analysis used in *United Building and Construction Trades Council* and found the rule invalid. In *Piper*, the Court found that the practice of law was a "fundamental right" that was "important to the national economy."[115] The New Hampshire Supreme Court did not advance any substantial reasons for barring nonresident attorneys. It was held "that the means chosen [did] not bear the necessary relationship to the State's objectives."[116] The state argued that a lawyer is an " 'officer of the court,' who 'exercises state power on a daily basis.' "[117] However, the United States Supreme Court ruled that "a lawyer is not an 'officer' of the State in any political sense"[118] and that the practice of law does not involve an " 'exercise of state power' justifying New Hampshire's residency requirement."[119] The holding in *Piper* may not directly bear on public employee residency requirements since lawyers are not public employees. Nonetheless, the Court's opinion strengthens the argument that governmental employees who do not exercise "state

110. *Id.* at 222 (quoting *Baldwin*, 436 U.S. at 398).
111. *United Bldg.*, 465 U.S. at 221 (quoting *Baldwin*, 436 U.S. at 388).
112. *See supra* note 1.
113. 470 U.S. 274 (1985).
114. *Id.* at 288.
115. *Id.* at 281.
116. *Id.* at 285.
117. *Id.* at 282.
118. *Id.* at 283.
119. *Id.* at 282.

power" or make decisions involving "matters of state policy" are protected by the privileges and immunities clause from continuing residency requirements.[120] The Court's analysis in *United Building and Construction Trades Council* of the privileges and immunities clause does not necessarily rule out such a conclusion because of the emphasis that the Court placed on the opportunity for, rather than the nature of, the work.[121]

IV. SUMMARY

It seems clear that fundamental rights are violated by continuing residency requirements. Local governments, for political or other reasons, will continue to impose these requirements on their employees. Courts should ensure that local governments at least fully justify these requirements with legitimate, fair and substantial reasons as required by the Supreme Court. Local governments should be required to demonstrate both that their residency requirements are not overly broad in the categories of the public servants they burden and that alternative solutions such as residency within a certain radius of the local governmental unit will not suffice.

The rational relationship test that courts apply requires more than just a perfunctory justification. The reasons advanced by government must be at least " 'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .' "[122] This is more than a spurious, nebulous requirement. *Joseph v. City of Birmingham*[123] and *City of Cleburne, Texas v. Cleburne Living Center*[124] indicate a growing trend to apply a heightened standard of review to statutes creating classifications, either using an intermediate standard of review or a rational basis analysis rigorously and consistently applied. When this is done, the clear violation of the right of interstate and intrastate travel should not be ignored. The privileges and immunities clause of Article 4, section 2 should be asserted by local government employees who do not exercise state power or make decisions involving matters of state policy. Such assertions again will require local governments to justify their continuing residency requirements with substantial reasons.

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120. *Id.* at 282-83.
121. *See supra* notes 109-13 and accompanying text.
122. Stanton v. Stanton, 421 U.S. 7, 14 (1975) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
123. 510 F. Supp. 1319, 1335 (E.D. Mich. 1981).
124. ___ U.S. ___, ___, 105 S. Ct. 3249, 3254-55 (1985) (Stevens, J., concurring).

Over a decade ago, *Elrod v. Burns*[125] emphasized that the " 'theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' "[126] To so impair the fundamental rights of public servants by telling them where to buy their homes, where to raise their families and where to send their children to school surely seems too "Orwellian" a method to accomplish the legitimate goals that are sought by government.

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125. 427 U.S. 347 (1976).
126. *Id.* at 361 (1976) (quoting Keyishian v. Bd. of Regents, 385 U.S. at 605-06 (1967)).