NOTES

ALASKA PACIFIC ASSURANCE CO. V. BROWN: THE RIGHT TO TRAVEL AND THE CONSTITUTIONALITY OF CONTINUOUS RESIDENCY REQUIREMENTS

I. INTRODUCTION

"[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[1]

With the words quoted above, the United States Supreme Court in *Shapiro v. Thompson*[2] recognized the constitutionally protected right to travel, and invoked that right to invalidate a state statute that required an otherwise eligible welfare recipient to reside within the state for one year before collecting benefits. In striking down the statute, the Court articulated two important elements of the right to travel. First, the right to travel was equated with a right to migrate. The Court was concerned with the privilege to move from one state to settle in another, and not simply with the privilege to cross state borders free of direct barriers.[3] Second, the Court established the applicable standard of review in right to travel cases by holding that any regulation that *penalized* the exercise of the right must be justified as necessary to promote a compelling state interest.[4]

Since its holding in *Shapiro* only applied to benefits withheld from incoming residents, the court's decision failed to resolve all ambiguities in the right to travel area. Both the scope of the right to migrate

1. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

2. *Id.* at 642.

3. Prior to *Shapiro,* right to travel cases had involved only direct burdens on movement such as emigration taxes. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (declaring unconstitutional a one dollar tax imposed on each person leaving the state by railroad, stagecoach, or other vehicle carrying passengers for hire); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution,* 44 N.Y.U. L. REV. 989, 997 (1969).

4. *Shapiro,* 394 U.S. at 634.

and the severity of the infringement necessary to constitute a penalty on travel still remained unclear after *Shapiro.*[5]

In *Alaska Pacific Assurance Co. v. Brown,*[6] the Alaska Supreme Court declared a provision of the state's Workers' Compensation Act[7] an unconstitutional infringement on the right to travel under the state constitution's equal protection clause. The challenged provision reduced compensation benefits for injured workers who left the state during their periods of disability. The purpose of the provision was to adjust the benefits to reflect the substantial differences between economic circumstances in other states and the high cost of living and correspondingly high workers' compensation grants in Alaska. Unfortunately, the Alaska Supreme Court in *Brown* significantly expanded the guarantee of the right to travel beyond federal constitutional precedent without resolving any of the ambiguities found in decisions of the federal courts.

Because *Brown* was ultimately decided on state rather than federal constitutional grounds, Alaska courts encountering right to travel claims continue to be confused by the ambiguities in federal law. Any reviewing court facing a right to travel claim must first determine whether or not a challenged statute exacts a "penalty" on travel as articulated by federal courts. This initial determination is crucial, as it defines the appropriate level of judicial scrutiny. In the federal system, if a statutory classification penalizes travel, it is subject to strict judicial scrutiny and the state must then demonstrate that the classification is necessary to promote a compelling state interest. If the court initially finds the statute does not exact a penalty on travelers, the state need only prove that the classification has some rational relation to a permissible state goal.

In practical effect, a federal court's initial finding that a particular statute does or does not penalize travel essentially determines the validity of the provision. As Chief Justice Burger noted in his dissent in *Dunn v. Blumstein,*[8] no state statute has ever satisfied the "seemingly insurmountable" compelling state interest standard. In contrast, a state is rarely unable to demonstrate that a questioned provision is at

5. Not all state actions that interfere with the freedom of migration violate the right to travel. Many consequences of moving do not rise to the level of a constitutional *penalty* on the right to travel. Ambiguity in the degree or severity of the deprivation necessary to constitute a constitutionally impermissible infringement on the right to travel often causes significant problems for reviewing courts, because in practical terms, an initial finding that a statute exacts a penalty determines the validity of the statute as well. *See infra* text accompanying note 8.

6. 687 P.2d 264 (Alaska 1984).

7. ALASKA STAT. § 23.30.175(d) (repealed and reenacted as ALASKA STAT. § 23.30.175(c) (1982)).

8. 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

least rationally related to a legitimate state goal. Thus, the present ambiguity in the definition of penalty is disturbing — constitutional decisions are being based on a term which lacks clear meaning.

While the Alaska courts do not adhere to this rigid two-tiered federal analysis, a finding by an Alaska court that a statute penalizes travel still significantly affects the court's ultimate decision on the validity of the statute under the state's equal protection clause. First, the Alaska Supreme Court has recognized that if the federal courts evaluate a classification under strict scrutiny, then the Alaska courts must do so as well.[9] Accordingly, every statute invalid under federal analysis would also not survive review in the Alaska courts.

Even if an Alaska court were to find that a challenged statute did not impermissibly infringe on travel to an extent requiring strict scrutiny, the degree of impermissible infringement would still remain important. In such circumstances, the court must weigh the "nature and extent of the infringement" on the right against the fairness and substantiality of the state's purpose in enacting the statute.[10] The strength of the relationship between the purpose of the law and the means chosen to effect that purpose, which the government must demonstrate to support the law, will vary with the degree of infringement on the right. In order to balance the competing factors appropriately, courts need a clear standard for determining when a state-imposed burden on travel rises to the level of a constitutionally impermissible penalty.

The State of Alaska has a particular need for a clear standard with which to evaluate potential penalties on the right to travel. As a relatively unpopulated state, Alaska has a strong incentive to provide attractive benefits to its citizens to the greatest extent constitutionally permissible. Generous state-funded benefit programs should tend to encourage more people to travel into the state and establish permanent residency. In addition, the state must work to counteract the traditional migratory practices of much of the state's population, both by affirmatively enticing the transitory workers to remain in the state, and by relieving the state of the burden of providing benefits to those who choose to leave. The right to travel and the Alaska Supreme Court's recent decision in *Brown* will almost certainly have a profound effect on Alaska's continuing efforts to address these population concerns with legislation, and on the Alaska courts' views of such efforts.

9. Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds,* 457 U.S. 55 (1982).

10. *Id.*

A. *Alaska Pacific Assurance Company v. Brown*[11]

In *Brown* the Alaska Supreme Court confronted two issues left unresolved by the standard for identifying impermissible burdens on travel. First, does the right to migrate *into* a state and receive state benefits encompass an equal right to emigrate *from* the state without losing benefits? In other words, may a state condition the receipt of benefits acquired while a state resident on an individual's continued residency? Second, if the right to emigrate without losing benefits is not absolute, when does the adjustment of a former resident's benefits to reflect a change in residency to another state amount to a penalty on that individual's exercise of his right to travel?

Before the decision in *Brown,* a provision of the Alaska Workers' Compensation Act supplied a formula for adjusting an injured workers' benefits when he moved out of the state for other than medical reasons.[12] The statute realigned a recipient's compensation to reflect the difference between the economic conditions in Alaska and those in the recipient's new state of residence. Under this scheme a recipient recovering from his injury outside of Alaska remained in an economic position comparable to the one which he would have maintained in Alaska had he not decided to leave the state. Without the adjustment, the high cost of living and the correspondingly high workers' compensation benefits in Alaska meant that any worker who moved out of the state while collecting benefits received a windfall in real economic terms, since his workers' compensation grant was worth considerably more outside the state. Because the statute treated non-resident claimants differently from resident claimants, the Alaska Supreme Court invalidated the provision as a prohibited infringement on the worker's constitutional right to interstate travel protected by the Alaska Constitution's Equal Protection clause.[13]

The court's analysis in *Brown* diverges from the analysis in earlier federal and Alaska case law. Until the supreme court's decision in *Brown,* Alaska courts had never expanded the scope of the right to travel beyond that given it by the federal courts. This departure from the federal approach is therefore disturbing because it ignores both the rationale underlying the federal boundaries on the right to travel and prior Alaska cases recognizing those boundaries.

The right to travel has never been interpreted to require that a state continue to provide monetary benefits of citizenship to former residents.[14] Consequently, a state may permissibly condition receipt

11. 687 P.2d 264 (Alaska 1984).

12. ALASKA STAT. § 23.30.175(d); *see also Brown,* 687 P.2d at 274.

13. ALASKA CONST. art. I, § 1 (1980).

14. Califano v. Torres, 435 U.S. 1, 4 (1978) (per curiam) ("This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline

of some governmental benefits on continued residency within the state.[15] Still, the court in *Brown* held that the state must continue to pay Mr. Brown full state compensation benefits after he had moved from the state. Additionally, the United States Supreme Court has ruled that only when a potential recipient of government benefits has suffered a "significant deprivation" as a result of exercising his right to travel has the deprivation risen to the level of an unconstitutional penalty on the right to travel.[16] The minimal, if existent, deprivation of benefits a transitory worker such as Mr. Brown may suffer upon moving out of Alaska does not fall within any previous definition of a penalty on the right to travel.

II. THE MEANING OF THE RIGHT TO TRAVEL

Because the right to travel has its genesis in the federal constitution, the federal analysis remains important to the resolution of Alaska state right to travel issues. The rationales underlying the boundaries on the federal right apply with equal strength to right to travel claims brought under the equal protection clause of the Alaska Constitution.

A. The Right to Migrate

The right to travel does not guarantee absolute, unburdened physical movement between states. If it did, then *any* direct burden a state placed on traveling would violate the guarantee. Tolls collected on state highways would be unconstitutional. As one court noted, "[A] resident of Maine vacationing for a month in New Hampshire might be penalized for traveling if he could not obtain the benefits of a library card in New Hampshire during his vacation."[17] Furthermore, a simple guarantee of free movement would only invalidate consequences that flowed *directly* from an imposition on the act of traveling

to do so now."); Fisher v. Reiser, 610 F.2d 629, 634 (9th Cir. 1979), *cert. denied,* 447 U.S. 930 (1980) ("[T]he obligation to grant immediate or reasonably prompt recognition to a newly arrived citizen, cannot be the basis for automatically imposing a reverse obligation on the former state to continue to care for the former resident.").

15. *See, e.g.,* McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (per curiam) (permissible to condition municipal employment upon residence within the city); Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) ("We fully recognize that a State has a legitimate interest in protecting . . . the right of its own bona fide residents to attend . . . [colleges and universities] . . . on a preferential tuition basis.").

16. *See, e.g.,* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a one year state residency requirement for access to divorce courts); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256 (1974) (noting that some waiting periods or residence requirements may be constitutional).

17. Cole v. Housing Authority of Newport, 435 F.2d 807, 811 (1st Cir. 1970) (noting a residency requirement penalizing "that kind of travel is probably permissible under *Shapiro.*").

itself.[18] Nevertheless, the *Shapiro* Court struck down the denial of welfare benefits as a violation of the right to travel even though that denial did not directly limit the claimant's ability to move into the state. Thus, the right to travel guarantees a citizen both more and less than a literal interpretation of the right would initially suggest. While the right does not prohibit a state from imposing some direct impediments to travel, its guarantees are not limited to direct impositions on an individual's physical movement. A state to which an individual moves may not *indirectly* impede that individual's right to travel by conditioning his receipt of significant state benefits on the duration of his residency in that state.

Instead of guaranteeing freedom of movement, the federal constitutional right to travel embraces the right "to migrate, resettle, find a new job, and start a new life . . . ."[19] It is essentially the right to migrate to a new state and be treated as an equal citizen.[20] As the Court in *Memorial Hospital v. Maricopa County* explained, "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."[21]

Inherent in the meaning of migration and, thus, in the Supreme Court's construction of protected travel is a permanent change of residence or travel with intent to resettle. Migration does not embrace travel to a state solely for the purpose of obtaining state benefits, without any intention of remaining in the state.[22] Thus, "[L]aws that comparatively disadvantage persons traveling to take advantage of state benefits and then leaving are permissible under *Shapiro.*"[23] The Supreme Court's previous formulations of the right to travel do not protect every visitor to a state, but instead have insured that travelers who move into a state with the purpose of making that state their new home are immediately accorded the full privileges of all other state residents.

While demanding that a state treat its old and new residents equally, the courts have also recognized that a state may constitutionally make residence within its borders more attractive by offering benefits to its citizens in the form of public services or "distributions of its munificence."[24] The Court in *Shapiro* strongly implied that residency

18. *See* Note, *supra* note 3, at 997.

19. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

20. *See* Note, *supra* note 3, at 1012 n.188.

21. 415 U.S. 250, 261 (1974).

22. *See Shapiro,* 394 U.S. at 636 (the "residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance . . . .").

23. *Cole,* 435 F.2d at 811.

24. Zobel v. Williams, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring).

was a valid prerequisite to obtaining welfare benefits.[25] Furthermore, no new resident could complain that his right to travel was infringed if his state of former residence offered greater welfare benefits than those offered in his new residence. Under *Shapiro,* what a state may not do is offer welfare aid only to those citizens who have resided in the state for a specified period of time that is longer than necessary to establish bona fide residence. The use of arbitrary distinctions among residents based on the amount of time they have spent in the state is unconstitutional because the distinctions deny benefits to otherwise eligible recipients solely because they have recently exercised their constitutional right to travel.

B. Penalty

According to the *Shapiro* Court, any classification that penalizes the exercise of the constitutional right to travel must be justified as necessary to promote a compelling state interest.[26] Unfortunately, the *Shapiro* Court did not articulate a clear standard for determining when a state's actions sufficiently inhibit travel so as to *penalize* the right and thus trigger the compelling state interest test.[27] The standard for identifying an impermissible infringement remains a source of confusion. The *Shapiro* Court compounded the confusion surrounding the definition of penalty in a caveat to its opinion which indicated that some waiting periods or residency requirements "may promote compelling state interests . . . or . . . may not be penalties upon the exercise of the constitutional right of interstate travel."[28]

The Supreme Court has applied its penalty analysis to determine the constitutionality of state residency requirements for access to only five types of benefits: welfare, voting privileges, non-emergency medical care, decreased school tuition rates, and access to divorce courts. In each case, eligibility for the privilege was dependent on length of residency, not the mere fact of residency.[29] The Court found that the

25. 394 U.S. at 633 ("We recognize that a state has a valid interest in preserving the fiscal integrity of its programs."); *id.* at 636 ("The residence requirement and the one-year waiting-period requirement are distinct" prerequisites and each is examined separately.).

26. *Id.* at 634.

27. *See Maricopa County,* 415 U.S. at 256-57.

28. *Shapiro,* 394 U.S. at 638 n.21.

29. A durational residency requirement demands that a bona fide resident have lived within the state for a specified length of time before becoming eligible for benefits. A simple residency provision requires only that a claimant be a bona fide state resident. The Supreme Court has consistently recognized the distinction between the two, and has upheld simple residency requirements. *See* McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (per curiam) (upholding ordinance requiring all municipal employees to reside in the city); Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972) (cautioning that nothing in its decision was intended to "cast doubt on

waiting period imposed on residents before they could qualify for welfare benefits, voting privileges, and non-emergency medical care penalized travel, but that similar residency requirements imposed for decreased tuition rates and access to divorce courts did not penalize the right.[30] In determining whether each of the challenged statutes violated the right to travel, the Court evaluated two potentially penalizing aspects of each provision: the extent to which the statute might deter prospective travelers from changing residences and the importance of the benefit denied those persons who did travel.

1. *Deterrence.* In its struggle to define an impermissible level of state infringement on the right to travel, the Supreme Court has never held that the potential deterrent effect of a statute alone rendered the statute unconstitutional.[31] Indeed, the Court in *Dunn v. Blumstein* noted that while the *Shapiro* Court had considered whether the imposed waiting period would deter travel and thus penalize those who exercised the right, *Shapiro* had not rested on any finding that denial of welfare actually deterred potential recipients from travel.[32] Rather than search for evidence that the statute had deterred travel, the Court had simply presumed that it did so because of its penalizing effect.[33]

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the validity of appropriately defined and uniformly applied bona fide residence requirements"); *Shapiro,* 394 U.S. at 636 (residency requirements and the one-year waiting periods imposed by the statutes were distinct and independent prerequisites).

Controversy now exists as to whether a bona fide residency requirement may ever violate the right to travel. *See* Martinez v. Bynum, 461 U.S. 321, 328-29 (1983) (a bona fide residency requirement cannot burden the right to travel as anyone is free to move into the state and to establish residency there); Note, *Residence Requirements and the Former Resident's Right to Travel — Fisher v. Reiser,* 11 GOLDEN GATE L. REV. 116, 119 (1981) (questioning whether a bona fide residency requirement for a governmental monetary benefit ever unduly impinges on the right to travel).

30. *Sosna,* 419 U.S. 393 (1975) (upholding one-year residency requirement for access to divorce courts); *Maricopa County,* 415 U.S. at 269 (invalidating one-year residency requirement for free non-emergency health care); *Dunn,* 405 U.S. at 354 (one year residency requirement for voting eligibility invalid); *Shapiro,* 394 U.S. at 642 (invalidating one year residency requirement for welfare benefits); Starns v. Malkerson, 326 F. Supp. 234 (N.D. Minn. 1970) (three-judge court) (durational residency requirement of one year to qualify for in-state tuition rates does not penalize right to travel), *aff'd mem.,* 401 U.S. 985 (1971).

31. Although the Supreme Court has never held that the deterrent effect of a statute alone rendered the provision unconstitutional, the Supreme Court might employ strict scrutiny if it encountered a statute which would clearly deter potential migrants from moving. *See* Comment, *A Strict Scrutiny of the Right to Travel,* 22 UCLA L. REV. 1129, 1151 n.127 (1975) (explaining that a criminal penalty imposed on one bringing an indigent into the state might be a sufficient showing of deterrence to itself invoke strict scrutiny without further penalty analysis). A statute imposing such a penalty was invalidated in Edwards v. California, 314 U.S. 160 (1941).

32. 405 U.S. at 339-40.

33. *Id.* In *Dunn,* the Court noted that:

Shapiro did not rest upon a finding that denial of welfare actually deterred

Instead of facing the practical difficulties inherent in determining whether a statute actually "deters" travel, courts have followed the reasoning of *Shapiro* and simply assumed a deterrent effect if a statute penalizes travel.[34] In practical terms, deterrence can only be *proved* when its impact can be measured, as when a statute has clearly dissuaded an identifiable group of people from changing residences. Most travel claims, however, are asserted by new state residents who have been denied state privileges *after* moving. Since the statute did not deter them from moving, the new state residents are hardly representative of those who have been deterred by the statute and have not moved.

The Court has further diminished the usefulness of deterrence as an indicator of a statute's constitutionality in right to travel cases by refusing to quantify the term. The Court has never made clear whether a statute "deters" travel if it merely dissuades one individual from moving, or whether it must discourage substantially an entire class of potential movers from changing residences.[35] Furthermore, the Court has not articulated whether a statute must have been the deciding factor in deterring an individual from moving, or whether the statute need be only one of many factors that combine to discourage him from moving. Since the Court does not demand a showing of any specific degree of deterrence, state and lower federal courts would be engaging in unwarranted speculation in ruling, for instance, that withholding voting privileges from an indigent family would be more likely to deter them from moving, and therefore violate their right to travel,

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> travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro,* we explicitly stated that the compelling state interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right' [to travel] . . . .

Id. (emphasis in original; footnote omitted).

In *Maricopa County,* 415 U.S. at 258 n.11, the Court confirmed that a showing of deterrent effect is not a prerequisite to finding that travel has been penalized by affirming the invalidation of an Arizona statute concerning the hospitalization of mental patients. *See* Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.), *aff'd mem.,* 400 U.S. 884 (1970). The Arizona statute had permitted the director of a mental hospital to force any hospitalized patient who had not been a resident of Arizona for one year prior to hospitalization to return to his prior state of residence. The *Maricopa County* Court noted that since few people consider the likelihood of being committed to a mental hospital when deciding whether or not to take up residence in a new state, the provision could have had little deterrent effect. Still, the Court agreed that the statute violated the constitutional protection of travel. *Maricopa County,* 415 U.S. at 258 n.11.

34. *See, e.g., Cole,* 435 F.2d at 810 n.9 (adopting "Court's suggestion that restrictions which penalize travel require a compelling state interest," and noting that if deterrence is held to mean that at least one person was persuaded from moving, the concept is functionally equivalent to a penalty).

35. *See id.*

than would denying them reduced residential state college tuition rates.[36]

In light of the Supreme Court's failure to define deterrence, federal courts have taken the approach that "[I]n the absence of hard evidence of a deterrent effect on inter-state migration, only classifications which deprive newly arrived residents of 'vital government benefits and privileges' will be held to impose penalties on the right to travel sufficient to trigger strict scrutiny analysis."[37] This standard insures that the assumption of deterrence will not flow from insubstantial or arguably non-existent penalties. Without an explicit definition of deterrence, this focus on the significance of the deprivation appears to be the best means of assuring that a deterrent affect does, in fact, exist.

The Alaska Supreme Court's approach in *Brown*[38] reflects both the difficulty of identifying deterrence and the need for the approach which the federal courts have adopted to address this difficulty. According to the *Brown* court:

> The suspicion with which this court will view infringements upon the right to travel depends upon the degree to which the challenged law can be said to penalize exercise of the right . . . . This in turn depends upon the objective degree to which the challenged legislation tends to deter interstate migration.[39]

The court then recognized in a footnote that a demonstration of actual deterrence is unnecessary; instead, the relevant factors leading to the conclusion that travel has been unconstitutionally deterred are the fact and severity of the restriction on travel.[40] This language effectively rearticulates the Supreme Court's penalty definition and eliminates any emphasis on a finding of actual deterrence. The Alaska Supreme Court may profess to evaluate statutes potentially violating the right to travel according to the *objective* degree to which they deter travel. However, because the court has articulated no workable objective measure of deterrence, the court's actual approach follows that of the federal courts.

When a statute inflicts a penalizing deprivation of vital government benefits, the federal courts presume that potential travelers will be discouraged from exercising their constitutional rights. This pre-

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36. *See id.*

37. Shenfield v. Prather, 387 F. Supp. 676, 685 (N.D. Miss. 1974) (upholding state bar admissions plan which required all persons seeking admission to take bar exam, except graduates of the University of Mississippi School of Law and attorneys who had practiced five years in a state granting reciprocal admission privileges to Mississippi attorneys).

38. 687 P.2d 264 (Alaska 1984).

39. *Id.* at 271 (citations omitted).

40. *Id.* at n.11.

sumption, however, does not reflect reality. Few people actually compare laws in the old and new states of residences before deciding whether or not to move. Statutes that penalize travel have their impact on people who decide to move and are subsequently denied privileges in the new state. Consistent with this reasoning, the Supreme Court's review of right to travel claims now focuses on the importance of the right that is being denied.

2. *Denial of Fundamental Political Rights and Basic Necessities of Life.* In *Shapiro,* the Court held that the welfare benefits denied were "aid upon which may depend the ability of families to obtain the very means to subsist — food, shelter, and other necessities of life."[41] Three years later in *Dunn v. Blumstein,*[42] the Court found that conditioning the privilege of voting, "a fundamental political right," on one year's residency within the state penalized the right to travel. The lower federal courts have uniformly adopted both the language and the reasoning of *Shapiro* and *Dunn.*[43] The courts have invalidated state provisions as violations of the right to travel only if the provision denied a new state resident a "basic necessity" or a "fundamental political right."

In *Maricopa County,* which involved the denial of non-emergency medical care, the Court reaffirmed earlier decisions holding that the denial of fundamental political rights and basic necessities of life were unconstitutional penalties on the right to travel.[44] The Court then implied that state statutes would be found to unconstitutionally penalize travel *only* if they denied residents essential needs or political rights and that the scope of these categories would not be interpreted broadly. After noting the ambiguous scope of the *Shapiro* Court's penalty analysis, Justice Marshall highlighted the caveat in the *Shapiro* opinion that some waiting periods or residency requirements might not be penalties on the right to travel.[45] Next, the Court equated the importance of the medical care in issue with the welfare benefits in *Shapiro,* reasoning that because both are necessary to basic sustenance, they deserve greater constitutional protection than state benefits and privileges that are less necessary to survival.[46] Contrasting medical care and welfare benefits with the privilege of decreased residential college tuition available only to long-term state residents,

41. 394 U.S. at 627.

42. 405 U.S. 330 (1972).

43. *See, e.g.,* Niles v. University Interscholastic League, 715 F.2d 1027 (5th Cir. 1983); City of Akron v. Bell, 660 F.2d 166 (6th Cir. 1981); *Shenfield,* 387 F. Supp. at 685.

44. 415 U.S. at 259.

45. *Id.* at 258-59.

46. *Id.* at 259.

the Court quoted an earlier federal district court decision which stated, "While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health* of persons unable to live without public assistance . . . ."[47] *Maricopa County* thus confirmed that "basic necessities" were limited to those required for survival.

In addition to limiting the scope of the penalty analysis formulated in *Shapiro, Maricopa County* emphasized an important element in the penalty analysis: the significance of the deprivation to the particular claimant.[48] The Court examined *what* the residency requirement denied the potential recipient, and *how significant* the benefit was to the well-being of that recipient. The Court then held that if the benefit being denied is equivalent to a basic necessity or fundamental political right to the individual, then the state may justify withholding the benefit only if the deprivation is necessary to promote a compelling state interest.[49]

Under the Arizona statute at issue in *Maricopa,* an indigent became eligible for free non-emergency medical care once he had lived within the county for one year. The claimant, Mr. Evaro, was an indigent afflicted with a chronic bronchial illness. He suffered a severe attack after having lived in the county for only a month and was denied free care.[50] The Court reasoned that this medical care was as much a basic necessity of life to an indigent with chronic respiratory disease as was the welfare aid denied in *Shapiro,*[51] so that the county's denial of free care to Mr. Evaro constituted a penalty on travel. The Court supported its conclusion by contrasting the hardship associated with the denial of medical care with the hardship a new resident encounters when asked to pay increased school tuition. If the new resident cannot pay the higher tuition costs, he is not foreclosed from any benefit essential to his survival. The inconvenience or increased costs the new resident is asked to accept do not impinge on the right to travel to a degree sufficient to find a constitutional penalty on the right. The penalty required to invoke strict judicial scrutiny must involve a significant deprivation, and "[d]eprivations which are only

47. *Id.* at 260 n.15 (emphasis in original) (citing Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971). The *Starns* court was quoting Kirk v. Board of Regents, 273 Cal. App. 2d 430, 440, 78 Cal. Rptr. 260, 266-67 (1969), *appeal dismissed,* 396 U.S. 554 (1970).

48. 415 U.S. at 253.

49. *Id.* at 261-62.

50. *Id.* at 251-52.

51. *Id.* at 259 ("Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." (footnotes omitted)).

uncomfortable are not enough."[52]

Commentators have criticized the severity of the penalty analysis as ignoring the fundamental nature of the right to travel.[53] In equal protection analysis of other fundamental rights, such as the right of free speech, *any* infringement of the right is sufficient to invoke the compelling state interest test. In the context of other fundamental rights, the Constitution is violated by the mere act of classifying individuals on the basis of their exercise of the right. The violation does not depend upon the degree to which an additional right is denied. If travel is infringed only through the deprivation of another important right, critics argue that travel alone no longer appears fundamental.[54]

This criticism ignores the dual nature of the right to travel. Direct barriers to freedom of movement have always invoked strict scrutiny.[55] The right to travel, however, now encompasses more than direct penalties on ingress and egress. The right to migration also includes protection from indirect burdens imposed on a new resident after he has moved into a new state to settle. Rather than diminishing the significance of the right to travel, the severity of the burden analysis allows greater constitutional protection to rights, such as welfare, that are not fundamental themselves,[56] without requiring that every indirect burden on travel render a statute invalid.[57]

Furthermore, any real penalty that a statute inflicts on a citizen results from the significance of the benefit that the statute denies. When an individual loses free speech — the right to express his ideas — he loses the very object of constitutional protection. In contrast, the individual suffering a right to travel violation does not lose his "freedom" to travel. His movement has not been restricted in a physical sense. His right has been violated only by what he has been denied, and what he has been denied is often not significant enough to allow the conclusion that the fundamental right has been impermissibly burdened. For example, collecting a highway toll from an interstate traveler does not unconstitutionally burden his right to travel. The benefits he derives from his ability to use the state's highways out-

52. Fisher v. Reiser, 610 F.2d 629, 639 n.5 (9th Cir. 1979) (Hufstedler, J., dissenting) (noting that one-year residency requirement for lower college rates imposes merely uncomfortable deprivation), *cert. denied,* 447 U.S. 930 (1980).

53. *See, e.g.,* Note, *Durational Residence Requirements from Shapiro through Sosna: The Right to Travel Takes a New Turn,* 50 N.Y.U.L. REV. 622, 668-72 (1975).

54. *Id.*

55. *See, e.g.,* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

56. Comment, *supra* note 31, at 1153-54.

57. If every indirect burden on travel constituted a penalty on the right, then *any* burden would subject a statute to strict judicial scrutiny. Subjecting legislation to such scrutiny is usually fatal. *See supra* text accompanying note 8.

weighs the small monetary price he pays for the right to use them.[58]

The mere imposition by the state of the choice between moving and therefore losing state benefits or remaining a resident with full benefits does not determine whether travel has been penalized; rather, it is the *nature* of the benefit that determines whether the right has been violated.[59] When a statute imposes a choice between freedom to migrate and the right to vote or to receive a basic necessity of life, it penalizes exercise of the right.

Unfortunately for the Alaska Supreme Court, the United States Supreme Court's definition of a penalty on the right to travel — depriving a new resident of basic necessities of life or political rights — does not establish a convenient classification system for identifying specific governmental benefits which, if denied, would penalize the right. Still, the Supreme Court's categories do identify the focus of the penalty analysis: the significance of the benefit to the claimant. If the benefit in issue is as important to the potential recipient as welfare or medical care is to an indigent, or as voting rights are to any citizen, then the state can only justify denying the benefit if it can demonstrate that the denial is necessary to accomplish a compelling state goal. Alaska courts claim to reject this "denial of basic necessities" approach to identifying impermissible impingements on travel.[60] Nevertheless, by whatever label, the focus of the reviewing court's inquiry must be the same: the significance to the claimant of the benefit withheld. If a court does not initially evaluate the relative importance of the benefit, it cannot determine the level of state interest necessary to sanction the deprivation.

Alaska has adopted a "sliding scale" approach to interpreting its own constitution's equal protection clause.[61] Under the sliding scale approach, a court confronting a claim that a statute unconstitutionally infringes protected rights must balance the nature of the right involved against the state's purpose and means of implementing its purpose to

58. The Court has applied this reasoning in upholding a one-year residency requirement for access to state courts for divorce. *See Sosna,* 419 U.S. 393 (1975). The new resident who must wait one year before seeking a divorce in the new state's court is not penalized. He is not permanently denied basic sustenance or political freedom, and in return for waiting, he gains a substantial guarantee that his eventual divorce decree will be free from collateral attack in other states. *Id.* at 407-10.

59. Note, *The Right to Travel: A Barrier to Targeting Jobs for the Needy through Residence Requirements?,* 17 COLUM. J.L. & SOC. PROBS. 599, 649-50 n.324 (1983). The note concludes that in determining whether the deprivation exacts a penalty, the court performs an ad hoc examination of the nature of benefit or privilege withheld.

60. *See* Williams v. Zobel, 619 P.2d 448, 452 (Alaska 1980), *rev'd on other grounds,* 457 U.S. 55 (1982); Hicklin v. Orbeck, 565 P.2d 159, 163 (Alaska 1977), *rev'd on other grounds,* 437 U.S. 518 (1978) (stating "[w]e have never used this 'basic necessities' reasoning.").

61. *See* State v. Erickson, 574 P.2d 1, 11-12 (Alaska 1978).

determine the degree of the burden on the state to justify the statute. Evaluating the nature of the statutory deprivation of benefits is thus even more crucial under the Alaska equal protection system than under the federal constitutional system. In the rigid two-tiered federal analysis, if a denial does not inflict a penalty, the court will uphold that denial if it finds that the underlying statute had some rational relation to a legitimate state objective. Legislation is rarely invalidated under this highly deferential standard of review. By contrast, in Alaska, once a statute is removed from strict judicial scrutiny, the sliding scale approach means the infringement is still subject to substantial judicial review. The most important variable in fixing the appropriate level of the Alaska court's review is the relative weight to be afforded the impaired constitutional interest.[62] Depending upon the nature of the infringement, the state will have a greater or lesser burden in justifying its legislation.

If the court determines that the statute does not substantially impinge on an individual's rights and thus is subject to a low level of review, the state need only show it had a legitimate purpose in enacting the statute and that its means of implementation are substantially related to that purpose. As the level of judicial scrutiny moves up the continuum of available review levels, the state must prove a more compelling purpose and a tighter fit between means and ends.[63]

Since the determinative variable in fixing the appropriate point on this sliding scale of review in right to travel challenges to state statutes is the degree of the infringement, evaluating the severity of the penalty a statute inflicts on the right to travel is crucial. As the court in *Brown* explains, "The suspicion with which this court will view infringements upon the right to travel depends upon the degree to which the challenged law can be said to penalize exercise of the right."[64]

III. CAN BONA FIDE RESIDENCY REQUIREMENTS PENALIZE THE RIGHT TO TRAVEL?

A. Permissible Residency Requirements

Potential workers' compensation recipients, including the plaintiff in *Brown,* may not base claims that state citizens and non-citizens are entitled to equal benefits on a state's alleged absolute duty to provide equally without regard to citizenship or residency. The Supreme Court has consistently recognized proof of residency as a permissible prerequisite to state benefit eligibility. While invalidating the waiting

62. *Brown,* 687 P.2d at 269; State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), *reh'g denied,* 104 S. Ct. 3572 (1984).

63. *Ostrosky,* 667 P.2d at 1193.

64. 687 P.2d at 271.

periods imposed in *Shapiro, Dunn,* and *Maricopa County,* the Court strongly implied that a state could make state residency a condition for receiving each of the benefits involved.[65] The fourteenth amendment "expressly recognize[s] one elementary basis for distinguishing between persons who may be within a State's jurisdiction at any particular time — by setting forth the requirements for state citizenship."[66] The Constitution does not require that each state provide the same level of benefits to citizens and non-citizens. The Supreme Court has expressly recognized that "A state may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence."[67]

Additionally, the Court has noted that these residency requirements may serve important state interests. For example, residency requirements prevent fraud in voting and welfare collection by assuring that claimants obtain the privilege from one state only.[68] Similarly, a state may equalize tax burdens and the benefits created through the use of these taxes by conditioning reduced state tuition rates on proof of residency.[69] Often, the state's ability to limit the extension of privileges to its own residents is essential to its ability to continue functioning effectively.[70]

B. Right to Travel Guarantees to Emigrating Residents

As a state may permissibly condition the eligibility of incoming residents for state benefits on proof of residency, any person leaving the state and relinquishing his state citizenship similarly relinquishes his claim to state privileges. Thus, an emigrating resident should seemingly be unable to prove right to travel violations upon losing his state benefits.

As the Court in *Maricopa County* noted, the right of interstate travel assures "new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."[71] Requiring that a state accord all incoming citizens status and benefits equal to those of long-term residents does not auto-

65. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974); Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972); Shapiro v. Thompson, 394 U.S. 618, 636 (1969).

66. Zobel v. Williams, 457 U.S. 55, 69 (1982) (Brennan, J., concurring).

67. *Id.* at 67-68.

68. *See Dunn,* 405 U.S. at 345; *Shapiro,* 394 U.S. at 637.

69. *See* Starns v. Malkerson, 326 F. Supp. 234, 240-41 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971).

70. *See* Califano v. Torres, 435 U.S. 1, 5 n.7 (1978) (per curiam).

71. 415 U.S. at 261.

matically support the converse position that the state must continue to provide benefits to citizens who choose to leave.

Cases addressing the possible continuing obligation of a state to provide benefits to residents who have emigrated from the state have rejected the duty. In *Califano v. Torres,*[72] the Supreme Court upheld a termination of federal Supplemental Social Security Income benefits when the claimant moved from Connecticut to Puerto Rico. The old age and disability payments were available only to potential recipients residing in one of the fifty states. The Court recognized that the right to travel encompassed travel to Puerto Rico, so that the denial of Torres' benefits resulted from her exercise of a constitutional right.[73] Nevertheless, after referring to the mandates of *Shapiro* and *Maricopa County* requiring equality of benefits to new citizens, the Court stated:

> In the present cases the District Court altogether transposed that proposition. It held that the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine and we decline to do so now. Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there.[74]

The *Torres* decision makes clear that any claim a former recipient may have to the continuation of prior benefits does not follow automatically from the duties imposed on the states under *Shapiro* and *Maricopa County.*

Relying heavily on *Torres,* the Ninth Circuit in *Fisher v. Reiser*[75] upheld a Nevada statute that granted cost of living increases in workers' compensation benefits to state residents only. The claimant, Mrs. Fisher, and her husband had formerly lived in Nevada where Mr. Fisher had been totally disabled in a work-related accident. After the accident, the couple moved to California so their children could help care for Mr. Fisher. Under the Nevada scheme, they remained eligible for disability benefits after the move. Upon her husband's death, Mrs. Fisher qualified for widow's death benefits, but she was denied the cost of living increase subsequently granted by the state because she was no longer a Nevada resident. The denial came despite Mrs. Fisher's dire financial needs.[76]

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72. 435 U.S. 1 (1978) (per curiam).

73. *Id.* at 4 n.6.

74. *Id.* at 4 (footnotes omitted).

75. 610 F.2d 629 (9th Cir. 1979), *cert. denied,* 447 U.S. 930 (1980).

76. *Id.* at 632-33. At the time the cost of living increase was approved in 1977, Mrs. Fisher's monthly income was $345.80, including $167.50 in compensation benefits and $178.30 in Social Security payments.

Mrs. Fisher sought to enforce an obligation against a state of former residence and not against her present state of residence. The court found this distinction from the claimant's position in *Shapiro* to be "critical,"[77] and one which removed her claim from right to travel protection. Since the cost of living increase was equated with a welfare payment, Mrs. Fisher's situation was held to be equivalent to that of a welfare beneficiary moving from a state offering high welfare benefits to one with lower benefits. Since any state could choose not to provide this type of monetary benefit, "[l]osing such benefits upon migration from a state which does provide them does not thereby mean the right to travel has been infringed."[78]

In equating the cost of living increase with a welfare grant, the court oversimplified Mrs. Fisher's position and the nature of her claim.[79] Still, both *Torres* and *Fisher* highlight the federalism concerns inherent in automatically extending *Shapiro's* protection of immigration to situations of emigration. According to the *Fisher* court, "It is a fact of our federal system that a state is limited, both in its competence and its responsibility, to exercising its welfare powers for those persons who are its residents, and, perhaps in some cases, those temporarily within its borders."[80] Because it has no taxing power over non-resident benefit recipients, the state would assume an exorbitant fiscal burden if it were required to continue providing for their unqualified support.[81] Economically, the state cannot support both its present and former residents, and the present residents, those paying into the state tax regime, would necessarily suffer. More importantly, if non-residents could always successfully demand continuing benefits, these demands would undermine the independence and sovereignty of individual states by immersing them in a constant tangle of foreign laws applying within their borders. The state would become the home of residents who were at least partially governed by the laws of other

77. *Id.* at 633.

78. *Id.* at 635.

79. *See id.* at 640-41 (Hufstedler, J., dissenting) ("[T]he nexus of eligibility [for workers' compensation benefits] is not present residence but past employment in the state."); *see also* Note, *The Right to Travel — Residence Requirements and Former Residents: Fisher v. Reiser,* 93 HARV. L. REV. 1585, 1592 (1980):

> If the cost-of-living supplement in *Fisher* were entirely distinct from the basic compensation scheme in terms of funding, objectives, and basis for eligibility, it would be functionally equivalent to welfare. Then, emigration would clearly sever the crucial tie between the state, the benefit, and the beneficiary because *Shapiro* left no doubt that simple residence is a permissible and relevant basis of eligibility for welfare.

80. Fisher, 610 F.2d at 633; *see also Zobel,* 457 U.S. at 68 (Brennan, J., concurring) (States extending attractive benefits to their own citizens "is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework.").

81. *See Fisher,* 610 F.2d at 634.

states. As the Court in *Torres* warned, imposing an absolute obligation on states to continue paying benefits to any person who had once lived within the state "would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents."[82]

While *Torres* and *Fisher* caution that an absolute, automatic state duty to continue caring for former residents is too great a burden on federalism to be incorporated within the right to travel, granting states unrestrained authority to terminate all of a recipient's state benefits upon emigration is equally unfair.[83] A state cannot fairly be allowed to terminate government employment pensions simply because the retired employee moved out of the state. Rather than attempting to address a state's continuing obligation to provide benefits to its former residents in absolute terms covering all contexts, the more equitable and constitutionally sound method of determining a state's duty is through evaluating emigration claims under the analysis the court employs in immigration contexts: Does the denial of benefits upon emigration *penalize* the former recipient? As in the immigration cases, infringements on travel which operate to penalize a former resident for exercising his constitutional right should be subjected to strict judicial scrutiny.

C. Potentially Impermissible Residency Requirements

The United States Supreme Court has consistently distinguished durational residency tests from simple tests of bona fide residency, and has repeatedly emphasized that it found only the "waiting period" imposed by a durational residency requirement to be unconstitutional.[84] The constitutional significance between the two tests lies in the basis of the classification by which benefits are extended or withheld. Statutory waiting periods determine the eligibility of potential recipients based on the *length* of their citizenship rather than the *fact* of their citizenship. For example, two potential recipients may each establish themselves as bona fide residents of a state, but a durational requirement might deny benefits to one of the citizens if he had not resided in the state for the period of time required by statute. A state may permissibly single out its citizens as eligible to receive state privileges, but

82. 435 U.S. at 4-5.

83. The courts have left open the possibility that a state may have a continuing obligation to provide some benefits. *See Torres,* 435 U.S. at 5 ("If there ever could be a case where a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel, this is surely not it."); *Fisher,* 610 F.2d at 634 ("[W]e are not prepared to say that a state may never be held to have some continuing duties to a former resident . . .").

84. *See, e.g., Dunn,* 405 U.S. at 343.

it may not create different classes of citizenship based on the length of time an individual has been a resident.[85] Thus, durational residency requirements violate the right to travel by imposing their prohibitions *only* on those who have recently exercised their constitutional right.

McCarthy v. Philadelphia Civil Service Commission[86] provides an example of the Supreme Court's distinction between the two types of residency requirements. The Court upheld a city ordinance requiring all employees of the City of Philadelphia to be residents of the city as a bona fide residency requirement. Since the ordinance did not exempt the city's current employees, even persons already working for the city prior to the ordinance's enactment were expected to move within the municipal boundaries. McCarthy was fired after sixteen years of service to the city when he moved from Philadelphia to New Jersey.[87]

In attempting to reconcile the holdings in *McCarthy* and *Shapiro,* some lower courts have interpreted *McCarthy* to hold that *only* the waiting period in a residency requirement penalizes travel.[88] This absolute position ignores the true nature of the exception noted in *Shapiro* and its progeny for potentially permissible residency requirements. The *Shapiro* court did not hold that all waiting periods are penalties and that all residency requirements are not penalties upon the exercise of the right to travel.[89] Furthermore, the validity of bona fide residency requirements was not actually challenged in *Shapiro.* Similarly, in *Dunn v. Blumstein* the court refused to carve out a per se validation of all residency requirements. It recognized only the constitutionality of "appropriately defined and uniformly applied" residency provisions.[90] The Supreme Court thus has left open the possibility that states imposing residency requirements for receipt of particular benefits or applying those requirements inappropriately might burden the right to travel.

Furthermore, since the Court has refused to invalidate *all* dura-

85. *See Zobel,* 457 U.S. at 64 (permitting states to apportion services according to length of residency would allow them to divide citizens into expanding numbers of permanent classes. "Such a result would be clearly impermissible.").

86. 424 U.S. 645 (1976) (per curiam).

87. *Id.*

88. *See, e.g.,* Gilman v. Martin, 662 P.2d 120, 125 (Alaska 1983) (right to travel impinged only when governmental entity creates distinctions between residents based upon duration of their residency and not when distinctions are created between residents and non-residents); *see also Fisher,* 610 F.2d at 635 (emphasizing the distinction between the "bare residency requirement" permissible under *McCarthy* and the durational requirements invalidated in *Shapiro, Dunn,* and *Maricopa County*).

89. *Shapiro,* 394 U.S. at 638 n.21 ("We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth." (emphasis in original)).

90. 405 U.S. at 342 n.13.

tional requirements, it could not have intended for the mere inclusion or exclusion of a waiting period in a statutory benefit scheme to wholly determine the standard of review applicable to any given statute. For instance, states may constitutionally impose a one-year waiting period on new residents before granting them access to the state's court for divorce,[91] or before granting them decreased college tuition rates.[92] The states in the foregoing situations partially justified the waiting periods as necessary to assure bona fide residency in the particular contexts. In divorce proceedings, the state needs conclusive proof of residency to insure that its divorce decrees will not be subject to collateral attack.[93] Similarly, in school tuition situations, because college students often move to attend the school of their choice, the state may demand strong proof of a student's intent to reside in the state permanently before granting him residential tuition rates.[94] In cases like these, a required length of residency is a legitimate requirement for establishing actual residency.[95]

If a state may constitutionally require that a new citizen live within the state for a specified length of time to prove that he is actually a resident, then drawing definitive lines between durational and simple residency requirements becomes artificial. Every "simple" residency requirement effectively imposes some waiting period — the length of time necessary to demonstrate a bona fide intent to reside within the state. The particular period of time a state may permissibly require before recognizing bona fide residency differs depending only on the nature of the benefit the resident is seeking.[96] Consequently, labelling a statutory provision as a "simple" residency requirement cannot, in itself, guarantee that the provision will not penalize the right to travel.

The possibility that some residency requirements may penalize the right to travel should not undermine the greater deference accorded bona fide tests of residence; the state's right to ascertain a claimant's actual residency is vital. Still, some limited subset of residency requirements might unconstitutionally penalize the right to travel. Such penalties should be identified as are other penalties on the right to travel: by examining the actual significance of the deprivation to the claimant.

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91. Sosna v. Iowa, 419 U.S. 393 (1975).

92. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

93. *Sosna*, 419 U.S. at 407.

94. *Starns*, 326 F. Supp. at 240.

95. *See* Note, *supra* note 53, at 678.

96. *See id.* at 645. The commentator notes that durational residency requirements for bar admission are typically upheld or struck down according to the *length* of the imposed waiting period.

Evaluating the potential penalty a residency requirement may inflict is most significant in situations where a claimant is deprived of his benefits upon leaving the state. In *Fisher v. Reiser,*[97] Judge Hufstedler's dissent explained how denying benefits to one who leaves the state may be a denial of benefits based on exercise of the constitutional right to travel.[98] In *Fisher,* the claimant originally became eligible for workers' compensation benefits, not because she lived in Nevada, but because of an accident occurring there. The "nexus of eligibility" for workers' compensation benefits was not current residence within the state, but employment in the state at the time of the accident.[99] A new resident does not become eligible for workers' compensation benefits solely by moving into the state, nor does a previously injured worker qualify for disability benefits in a new state of residence subsequent to his injury. Mrs. Fisher would have been eligible for the same initial amount of compensation whether or not she *ever* lived in the state. When a state deprives a resident of these benefits when he moves out of state, the deprivation is imposed solely because the individual exercised his right to travel, and the deprivation should therefore be subjected to judicial analysis as a potentially unconstitutional penalty on travel. If the benefit denied is a basic necessity of life or a fundamental political right, then the state has penalized the right to travel and can only justify the deprivation if it is necessary to achieve a compelling state goal.

Only the deprivation of benefits for which residency was not initially required for eligibility could potentially impose a penalty on the right to travel. If a claimant originally had to establish himself as a bona fide resident of the state before becoming eligible for the benefit, then discontinuing the benefit when the individual gave up the prerequisite residency cannot violate the right to travel. In contrast, however, if a recipient need not have been a state resident to collect the benefit initially, then the right to travel should prohibit the state from terminating the recipient's benefits solely because he moves out of the state. In this latter situation, right to travel concerns should arise only in connection with loss of a few state benefits. Subjecting such deprivations to penalty analysis would not implicate the federalism or fiscal concerns of a general requirement that states continue to provide benefits to all former residents.

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97. 610 F.2d at 629.

98. *Id.* at 640-42 (Hufstedler, J., dissenting).

99. *Id.* at 640-41. *Shapiro* recognized this "nexus of eligibility" distinction as well: Eligibility for welfare benefits is determined by citizenship while eligibility for state insurance program benefits is tied to the individual's contributions. *See Shapiro,* 394 U.S. at 633 n.10.

IV. RIGHT TO TRAVEL ANALYSIS OF ALASKA'S ADJUSTMENT OF WORKERS' COMPENSATION BENEFITS

The Alaska statute[100] challenged in *Brown* did not terminate a worker's compensation benefits simply because he moved out of Alaska, but instead provided for an adjustment of the benefits. In relevant part, the statute stated that for a recipient who resided in a state other than Alaska "The weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska."[101] Restated, the statute took the worker's initial award based on his Alaska wages and multiplied it by the ratio of the average wage in his new state of residence to the average wage in Alaska. In order to understand the reasons Alaska felt a need to adjust workers' benefits when they left the state and the reasons the state enacted the particular adjustment that it did, the purposes underlying the system of workers' compensation must first be explored.

A. Purposes of Workers' Compensation

1. *Replacing Lost Earning Capacity.* In general, workers' compensation attempts to reconcile the competing interests of an employee, his employer, and society by providing an efficient, certain remedy to victims of work-connected injuries, and by placing the financial burden of the injury on the ultimate recipient of the worker's labor, the consumer.[102] To collect compensation, an employee need only show that he has been injured in a work-related accident and that the injury disabled him.[103] He neither has to prove his employer's negligence nor his own lack of contributory negligence.[104] While the employer bears the initial burden of liability for compensation in the form of insurance premiums, the cost is ultimately passed on to the consumer in the price of the goods or services the employer produces.[105]

Under the workers' compensation system, both the worker and the employer are spared the time and expense of litigation, and the disabled worker is assured prompt recovery for his injury. In exchange for accepting this certain and speedy remedy, the employee

100. ALASKA STAT. § 23.30.175(d) (repealed and reenacted as § 23.30.175(c) (1982)).

101. *Id.*

102. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20 (1985); *see also* Hewing v. Peter Kiewit & Sons, 586 P.2d 182, 187 (Alaska 1978) (one major purpose of workers' compensation legislation is to furnish simple, speedy recovery for injured workers).

103. 1 A. LARSON, *supra* note 102, at § 2.10.

104. *Id.*

105. *Id.* at §§ 2.70, 3.20.

relinquishes his right to pursue a large tort recovery from his employer.[106] Recognizing the existence of this compromise is crucial to understanding the compensation a disabled employee receives.

A worker's recovery is not intended to equal the award he would likely have received as damages in a tort recovery, nor is it intended to reimburse his total economic loss. Rather, the worker's award is limited to recovery of the estimated amount of his lost earning capacity — not his actual earnings.[107] Past wages are used to estimate the probable future earning capacity from which the worker's financial loss attributable to his disability can be measured.[108]

Since workers' compensation attempts to award the worker the financial loss actually attributable to his injury, the goal in calculating lost future wages is to make the best possible estimate of impairment of future earnings "in light of all the factors known."[109] In light of all the factors known, earning capacity is not necessarily synonomous with past earnings. Alaska courts have consistently recognized that a worker's future earning capacity depends upon a varying combination of factors including the extent of the worker's injury, his age and education, the employment available in the area for persons with similar capabilities, and the worker's own intentions as to his employment in the future.[110] No single factor is determinative in calculating lost earning capacity; any factor which may affect future wage earning ability is relevant in determining actual diminution in earning power.

Workers' compensation is designed to replace only the earnings a worker will not receive *because* of his injury, and not those earnings he loses as a result of causes other than his injury. If an employer can demonstrate that a worker's loss of earnings resulted solely from economic conditions unrelated to the worker's injury, the employer is released from compensation liability. For example, courts have held that if a worker has made a good faith effort to locate work, but is unable to secure a position, not because of his disability, but because

106. *Id.* at § 1.10; *see also* State v. Purdy, 601 P.2d 258 (Alaska 1979) (employer's liability for workers' compensation is exclusive liability).

107. 2 A. LARSON, *supra* note 102, at § 57.00; *see* Vetter v. Alaska Workmen's Compensation Board, 524 P.2d 264, 266 (Alaska 1974) (disability compensation rests not on medical impairment as such but on loss of earning capacity related to impairment); *Hewing,* 586 P.2d at 185-88 (board was correct in attempting to determine loss of earning capacity but must consider not only actual post-injury earnings but "other available clues" in determining disability).

108. 2 A. LARSON, *supra* note 102, at § 60.11(d). Alaska courts have adopted Larson's reasoning almost verbatim. *See, e.g., Vetter,* 524 P.2d at 266 (primary consideration is loss of earning capacity).

109. *Vetter,* 524 P.2d at 266 (quoting 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 60.21 (1970)).

110. *Vetter,* 524 P.2d at 266; *Hewing,* 586 P.2d at 186 (quoting *Vetter,* 524 P.2d at 266).

no positions are available, he is not entitled to workers' compensation to cover that loss of earnings.[111] Similarly, a worker may not receive compensation for lost earnings if he is fired after being injured, and the injury played no part in the employer's decision to release him.[112] Finally, Alaska courts have held that if a worker voluntarily removes himself from the labor market through conduct unrelated to the injury, he has suffered no compensable disability.[113] Simply stated, if a worker's loss does not result from his injury, it is not compensable.

If a claimant may recover only for the impairment of his future earning capacity resulting from his injury, then the economic conditions under which he would have sought his future earnings should be relevant. The Alaska Supreme Court has previously held that in calculating wage loss resulting from a work-related injury, wages must be adjusted to reflect general economic changes in earning levels.[114] As of 1979, twenty-two states and the District of Columbia had enacted some type of cost of living adjustment into their workers' compensation schemes.[115] Most of the adjustments were annual, automatic, and tied to fluctuations in average weekly wages.[116] If economic fluctuations within the compensating state are relevant to future earning capacity, then certainly more extreme differences in wage levels between the state originally awarding compensation and the state in which the claimant will presumably seek his future earnings are also significant.[117]

2. *Rehabilitation of the Worker.* A second major goal of workers' compensation is rehabilitation of the injured worker — encouraging him to return to work as soon as he is able.[118] Consistent with this goal, compensation schemes generally set benefit levels well below the worker's pre-injury level of earnings to avoid creating any disincentive

111. *See, e.g.,* Wiedmaier v. Industrial Comm'n, 121 Ariz. 127, 589 P.2d 1 (1979).

112. *Vetter,* 524 P.2d at 266.

113. *Id.* (finding no compensable injury when injured woman decided not to return to work to prevent her husband from moving into a higher tax bracket).

114. *Hewing,* 586 P.2d at 186; *see* 2 A. LARSON, *supra* note 98, at § 57.32.

115. 2 A. LARSON, *supra* note 102, at 60.60.

116. *Id.*

117. In *Brown,* the Alaska Supreme Court held that earning capacity was not exclusively related to location, but also to skills and ability to seek out labor markets. Brown had demonstrated ability to seek out high wage markets. 687 P.2d at 273. The majority of the court reasoned that Brown's decision to convalesce outside of Alaska "casts no inference" on his inclination to return to work in Alaska had he been healthy. *Id.* at 273 n.14. The dissent pointed out, however, that the mere fact that a worker has once traveled to Alaska is not an indication that he would do so again and be able to find a job of equivalent pay. *Id.* at 278. The more plausible inference is that the worker will reenter the labor force in his new state of residence. *Id.* at 278.

118. 1 A. LARSON, *supra* note 102, at § 2.50; *Brown,* 687 P.2d at 273.

for the worker to return to work.[119] Obviously, if a worker received benefits equivalent to his prior wages he would have little incentive to reenter the labor force.

Necessarily, the danger of disincentive increases significantly if a worker who has been awarded compensation based on high wages and a high cost of living is able to live in an area where the cost of living is lower. If the difference is substantial, the worker's compensation may be of greater value in real terms than the wages he received when employed. This problem of overcompensation is particularly acute within the Alaska Workers' Compensation Act. First, original awards are based on Alaska wages. In 1977, the average wage in Alaska was $414 per week, while the national average was only $183.61 per week.[120] As of 1984, Alaska workers were eligible for the highest level of workers' compensation benefits in the nation.[121] Second, the cost of living in Alaska is much higher than the national average. In 1980, the Bureau of Labor estimated that an intermediate budget for a four-person family would total $23,134. The same family living in Anchorage, Alaska, would require $29,682 to maintain the same standard of living.[122]

A recipient who is able to take unadjusted compensation benefits

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119. 1 A. LARSON, *supra* note 102, at § 2.50. Professor Larson explains that the amount of compensation is not much higher than necessary to keep a worker from destitution. This amount is usually between one-half and two-thirds of the worker's average pre-injury wages.

Alaska's scheme is more generous in its compensation than the plan in most states: injured workers generally receive four-fifths of the pre-injury, spendable weekly wage. This amount is subject to a fixed ceiling, however, to avoid dissuading highly paid workers from returning to work. ALASKA STAT. § 23.30.175(a) (1984); *see also Brown,* 687 P.2d at 273.

The Social Security Act was amended in 1965 to eliminate a federal disincentive to rejoin the labor force. Congress recognized that providing workers with state compensation and federal social security disability benefits greatly decreased a worker's need to return to work and impeded rehabilitative efforts. S. REP. No. 404, 89th Cong., 1st Sess. 100, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1944, 2040. The 1972 amendment inserted an offset provision into the statute to decrease disability benefits if the unadjusted benefits combined with state workers' compensation exceeds 80% of pre-injury average wages. 42 U.S.C. § 424(a) (1984).

The Alaska legislature has also recognized the need to prevent overlapping benefits by disallowing an injured worker compensation during any week in which the worker also received unemployment benefits. ALASKA STAT. § 23.30.187 (1984); *see also Brown,* 687 P.2d at 272 (purpose of the statute is to ensure that benefits are not so high as to discourage recipients from returning to work).

120. Seward Marine Services, Inc. v. Anderson, 643 P.2d 493, 496 n.6 (Alaska 1982).

121. 4 A. LARSON, *supra* note 102, at Appendix A.

122. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 81-195, AUTUMN 1980 URBAN FAMILY BUDGETS AND COMPARATIVE INDEXES FOR SELECTED AREAS Table 3 (1981).

out of Alaska receives a "windfall." His benefits will be especially inflated both because they are originally calculated on Alaska wages, which are significantly higher than those in most states, and because they will not be decreased in real terms by the high Alaska cost of living. Under these circumstances, a worker may likely find it as profitable to collect compensation as to return to work.

B. The Compensation Adjustment Provision

The Alaska compensation adjustment provision[123] substantially furthered both of the purposes of workers' compensation. The statute avoided overcompensating the injured worker and discouraging his return to work, while also assuring that the amount of compensation was related to the worker's lost earning capacity. The provision thus significantly protected the goals of workers' compensation legislation. Contrary to the Alaska Supreme Court's ruling in *Brown,* the adjustment did not penalize the right to travel.

No court has ever held, or even implied, that an injured worker has a constitutional right to a particular amount of workers' compensation.[124] Workers' compensation benefits are an exclusively statutory award, and the worker's mere expectation of a particular amount of benefits from the state does not confer a constitutional right to that amount. Since a recipient is not constitutionally guaranteed a specific amount of compensation, but is statutorily granted an award calculated to approximate his lost earning capacity, a worker is theoretically deprived of nothing if his compensation is adjusted when he leaves the state. The Alaska adjustment provision was merely designed to accurately reflect the probable wage loss actually attributable to the worker's injury.

Most state compensation schemes, including Alaska's, provide for a modification of an award upon a "change of conditions."[125] For example, if a recipient's degree of disability lessens, then his benefits no longer accurately represent the loss in earning capacity caused by his injury, and the award is modified to reflect his improved condition. Similarly, a recipient should not be entitled to retain compensation

123. ALASKA STAT. § 23.30.175(d) (repealed and reenacted as § 23.30.175(c) (1982)).

124. *See, e.g.,* Richardson v. Belcher, 404 U.S. 78, 80 (1971) (expectation interest in public benefits does not confer a contractual right to the expected amount); Pedrazza v. Sid Fleming Contractor, Inc., 607 P.2d 597, 599 (N.M. 1980) (workers' compensation is not a fundamental right with due process protection); *Brown,* 687 P.2d at 270 (recognizing that no court has held that as a matter of constitutional law, workers' compensation benefits must be set at any particular level).

125. ALASKA STAT. § 23.30.130 (1976 & Supp. 1984); *see also* CAL. LABOR CODE § 5803 (West 1971 & Supp. 1985) (modification of award for any good cause); N.Y. WORK. COMP. LAW § 123 (McKinney 1965).

that is unrelated to his injury and that resulted solely from a substantial change in economic conditions.

The court in *Brown* recognized that providing unadjusted benefits to out of state workers might undermine the efficacy of the workers' compensation scheme.[126] Nevertheless, the court invalidated the adjustment provision because the change in a worker's cost of living in the new state might not be as great as the difference in wage levels, so that, in real terms, a beneficiary might sustain an economic loss upon moving.[127] This argument should have been irrelevant because workers' compensation is intended to replace lost earning capacity and not lost income. The Alaska Supreme Court did not recognize that any worker, disabled or not, who leaves Alaska for a state where wages are not as high in relation to cost of living will suffer a similar loss of purchasing power. The deprivation the worker suffers would be imposed by the economy of the new state and not by the operation of the Alaska adjustment provision. Such a deprivation is not related to the worker's injury, and should not affect the court's conclusion regarding the effect of Alaska's statute.

Furthermore, if the relationship between cost of living and wages in the new state is different than their relationship in the old state, an adjustment for cost of living change distorts the connection between benefits and earning capacity. Nevertheless, the *Brown* court concluded that using cost of living statistics to realign benefits would serve the state's purpose without inflicting a penalty on recipients.[128]

Even assuming that in moving to a new state a recipient suffered a slight reduction in the real value of his benefits, the severity of the deprivation could not reach the level of deprivation courts have previously found to unconstitutionally penalize travel. Any lost benefits would not be "aid upon which may depend the ability . . . to subsist."[129] Eligibility for the workers' compensation benefits does not

126. In *Brown,* 687 P.2d at 272, the state actually asserted two purposes for the enactment of the statute: to decrease insurance premiums paid by employers, and to avoid overcompensating workers and thus create disincentives to their return to work. The court found that the first purpose had "no independent force" as a justification for imposing the classification, *id.* at 272, but did recognize that the state has "important interests in avoiding disincentives to rehabilitation and in creating incentives for injured workers to go back to work . . . ," *id.* at 272-73, and agreed that "the effectiveness of these incentives may depend on the cost of living in the state in which the worker lives," such that "paying the worker unadjusted amounts of benefits may actually discourage a return to work." *Id.* at 273.

127. 687 P.2d at 274.

128. *Brown,* 687 P.2d at 274 ("If there were a way to equalize the buying power of benefit dollars in each state we would have difficulty in concluding that recipients would thereby suffer any penalty despite a reduction in actual dollars paid to out-of-state workers.").

129. *Shapiro,* 394 U.S. at 627 (1969). The Court in *Shapiro* characterized the wel-

depend on financial need.[130] Additionally, Alaska workers' compensation recipients who moved out of the state generally continued to receive greater benefits than similar workers receiving compensation in the new state because the original compensation award was based on Alaska wages and cost of living — both of which were at the time, and continue to be, among the highest averages in the nation. Alaska's statutory adjustment only modified this award by the *ratio* of wages in the new state to Alaska wages; the provision neither recalculated benefits using the wages of the new state, nor reduced compensation to the level offered by the new state. Finally, under the Alaska provisions, a worker's compensation benefits could not be reduced below a set minimum which was identical for both resident and non-resident claimants. The recipient who moved was in no way denied a "necessity of life," and in fact continued to be rewarded for moving to Alaska in the first place through his continued receipt of higher compensation benefits than would have been available to him in the new state.

Since the adjustment incorporated into Alaska's Workers' Compensation Act did not exact a penalty on those exercising their right to travel, the provision should not be subject to the federal strict scrutiny standard of review. Under Alaska's sliding scale approach to equal protection discussed above,[131] the "suspicion with which [the] court will view infringements on the right to travel depends upon the *degree* to which the challenged law can be said to penalize exercise of the right."[132] The Alaska court must balance the nature of the right involved and the infringement imposed by the residency requirement against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.[133]

In *Brown,* the infringement imposed on the right, if any, was minimal. The interests of the state bordered on compelling, and the means it employed, while not perfect, fairly and substantially furthered the purpose of the statute.

Alaska has a substantial interest in maintaining an effective workers' compensation plan. The plan's importance is evident in the fact

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fare benefits denied to incoming residents as "aid upon which may depend the ability of the families to obtain the very means to subsist." *Id.*

130. Workers compensation benefits are based on a worker's lost earning capacity and are completely independent of the recipient's financial needs. The court in *Fisher,* 610 F.2d at 636, suggested that since workers' compensation is not determined by financial need, the state has more leeway in permissible adjustments.

131. *See supra* notes 61-64 and accompanying text.

132. *Brown,* 687 P.2d at 271 (emphasis supplied); Williams v. Zobel, 619 P.2d 422, 432-33 (Alaska 1980) (Rabinowitz, C.J., concurring).

133. *Brown,* 687 P.2d at 273; State v. Ostrosky, 667 P.2d 1184, 1193 (Alaska 1983), *reh'g denied,* 104 S. Ct. 3572 (1984).

that all states have now enacted some type of scheme to aid injured workers.[134] Without Alaska's adjustment provision, however, disparate state economic conditions could substantially undermine the basic goals of the statute. When a recipient's benefits no longer approximate his lost earning capacity, and he is given no incentive to return to work, the compensation plan no longer serves its purposes.

Furthermore, Alaska has a compelling interest in protecting the comparative value of its workers' compensation benefits to its own citizens. Without the statutory adjustment, Alaska residents are penalized for *not* leaving the state and moving to areas where their benefits will allow them to live more comfortably. Subsection 175(d) of the Alaska Workers' Compensation Act did not invidiously discriminate among similarly situated workers' compensation beneficiaries. Rather, the provision attempted to distribute comparable benefits among dissimilarly situated individuals. The state's purpose in enacting the statute was not to discriminate against certain recipients solely on the basis of residency, but rather to distinguish between them based upon relevant differences in economic environments. The residents of Alaska cannot be asked to suffer a comparative diminution in their benefits based on a rigid formulation of the right to travel. The right to travel should guarantee equal benefits to all eligible recipients and protect individuals who have moved from suffering a penalty in the form of diminished benefits solely because they have changed residences. Still, the right to travel does not completely prohibit a state from recognizing that an individual has recently moved into or out of the state and from adjusting its relations with the individual to reflect that change. In allowing such recognition and adjustment, the right to travel can assure that all eligible recipients receive truly equal benefits.

V. CONCLUSION

The right to travel remains an amorphous area of the law. The concept of a penalty on the right — the level of infringement necessitating strict judicial scrutiny of the statute — remains undefined. A clearer articulation of permissible residency requirements and their distinctions from impermissible durational requirements is also necessary if the right to travel is ever to be fully understood.

The subject of residency requirements should be of particular concern to Alaska courts. A large percentage of Alaska's population has historically been transitory. In order to attract and keep people within the state, Alaska has an undeniably strong interest in determining, to the greatest extent constitutionally permissible, the benefits it may extend on the basis of residency within the state.

134. 1 A. LARSON, *supra* note 102, at § 5.30.

Alaska courts have already moved ahead of many other courts in clarifying the proper role of the right to travel. Alaska's sliding scale approach to equal protection analysis already provides the flexibility in evaluating the nature and infringement of rights that federal courts have attempted to provide in their "severity of the penalty" analysis of right to travel claims. The Alaska system also allows recognition of the state's interest in preserving federalism in right to travel cases without forcing a court to distort the nature of the infringement a statute imposes so that the statute will be examined under the deferential federal rational basis standard of review and its validity thereby guaranteed.

Additionally, rather than adopt the absolute position of some courts that bona fide residency requirements — in contrast to durational, waiting period requirements — may never penalize travel, the Alaska Supreme Court has recognized that in particular contexts residency requirements may burden the right. Also, the court rejected the inequitable concept of the "one-way" right to travel adopted in *Fisher*.[135] In some cases, the right to travel encompasses the right to "emigrate" from the state as well as the right to migrate into the state. Still, the court should not embrace the premise that this right to emigrate imposes on the state an obligation to former residents that is coextensive with the obligation owed to its present residents. Any state's ability to maintain its status as an independent sovereign depends on its ability to create an attractive environment for its residents by providing them with benefits which are available to them *solely* because they chose to become state residents.

Recognizing the needs of the sovereign states, the United States Supreme Court has drawn the concept of penalty narrowly. Mere inconveniences or slight deprivations do not constitute penalties on the right to travel. The minimal deprivation, if any, the former adjustment provision of the Workers' Compensation Act imposed on travelers did not reach the level of deprivation recognized by courts as a penalty on travel. Additionally, the provision substantially furthered the purposes of the Workers' Compensation Act. The former adjustment provision was a valid attempt to provide comparable compensation to both present and former Alaska residents. It adequately compensated workers who chose to move out of the state while guaranteeing that workers who remained in the state did not suffer a diminution in the relative value of their benefits because they chose to remain in the state. While Alaska should be applauded for its at-

135. *Brown v. Alaska Pacific Assur. Co.*, 687 P.2d 264, 273-74 (Alaska 1984); *see also* Fisher v. Reiser, 610 F.2d 629, 640 (9th Cir. 1979), *cert. denied*, 447 U.S. 930 (1980) (Hufstedler, J., dissenting) (rejecting the idea that the right to travel protects only residents travelling *into* a new state and not those leaving the state).

tempts to protect the constitutional right to travel, these efforts should not come at the expense of its own bona fide residents.

Elizabeth A. Johnson