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NEIGHBORHOOD PARKING PROGRAMS: ARE THEY UNCONSTITUTIONALLY DISCRIMINATORY?

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I. INTRODUCTION

> . . . *[Z]oning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.*[1]

The state has the authority to enact zoning legislation through its broad discretionary powers to provide for the health, safety and welfare of the public. This power is derived from the Tenth Amendment to the Constitution which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively or to the people." Traditionally the state delegates this authority to the municipality, particularly in the instance of zoning ordinances aimed at traffic control and the parking of automobiles.[2] The municipality is generally accorded wide flexibility to adapt its regulations to existing conditions. In response to serious traffic congestion problems having an adverse impact on the "quality of life," several municipalities throughout the United States have enacted neighborhood parking programs which create parking privileges for residents. More specifically, the municipal ordinances exempt residents of an entire city,[3] or residents of a particular neighborhood within a city,[4]

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[1] Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (emphasis added).

[2] 6 E. MCQUILLIN, MUNICIPAL CORPS., 24.35 (3d ed. 1969).

[3] This is the type of program upheld in Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977). See text at note 5, *infra*.

[4] This is the type of program which was struck down in County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). See text at note 6, *infra*.

from certain parking prohibitions. The exempted residents are issued permits for display on their automobiles which entitle them to park in areas identified by some type of "parking-by-permit-only" sign.

Recently the constitutionality of several of the neighborhood parking programs has been challenged by individuals who have been prohibited from parking in the restricted areas. One such challenge occurred in Cambridge, Massachusetts, in the case *Commonwealth v. Petralia*.[5] The Massachusetts Supreme Judicial Court held that the Cambridge permit parking plan did not violate the equal protection clause of the Fourteenth Amendment. In *County Board v. Richards*,[6] however, the Virginia Supreme Court decided that the disparate treatment accorded to residents and nonresidents under the permit parking plan was an unconstitutionally discriminatory attempt to remedy Arlington County's commuter traffic problems.

Arlington County, dissatisfied with its state court's rejection of the parking plan, filed a petition for a writ of certiorari seeking review by the United States Supreme Court. The petition stressed an arguable conflict between the highest courts of the states of Massachusetts and Virginia, since a neighborhood parking plan had withstood a constitutional challenge in *Commonwealth v. Petralia*.[7] The amicus curiae briefs in support of certiorari submitted by Montgomery County, Maryland[8] and the United States,[9] stressed the need for the Court's resolution of any conflict in favor of the constitutionality of the parking programs. They argued in part that neighborhood parking programs are an effective means of achieving compliance with federal Clean Air Act[10] standards, and that the

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[5] 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[6] 217 Va. 645, 231 S.E.2d 231 (1977).

[7] 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[8] Brief of Amicus Curiae Montgomery County, Maryland in Support of Certiorari, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). The interest of Montgomery County, Maryland is as follows: In 1974 the County adopted a plan which operates similarly to the Arlington plan. A Bethesda businessman appealled his conviction, claiming a violation of his constitutional rights. The Circuit Court of Montgomery County, Maryland in State v. Thompson, Crim. No. 19018 (March 16, 1977) held that the ordinance violated the Fourteenth Amendment of the United States Constitution.

[9] Memorandum for the United States as Amicus Curiae in Support of Certiorari, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). The memorandum was filed by the Solicitor General, Acting Assistant Attorney General, Assistant to the Solicitor General and attorneys for the Department of Justice.

[10] The Clean Air Act, 42 U.S.C. §§ 1857a - 1857l (Supp. IV 1974) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)). See text at note 136, *infra*.

forced discontinuation of the program would inhibit Clean Air Act implementation. Certiorari was granted, and on October 12, 1977, in a brief, unsigned opinion, the United States Supreme Court set aside the decision of the Supreme Court of Virginia which had invalidated the Arlington neighborhood parking program.[11]

Since the Court offered only a limited expression of its reasoning in reversing the Virginia decision, inquiry into the constitutionality of neighborhood parking plans requires examination, in light of current constitutional doctrine, of state rulings on the issue.[12] This article will undertake such an examination with primary reference to *County Board v. Richards*[13] and *Commonwealth v. Petralia*,[14] since these are the most recent decisions pro and con and represent the opinions of the highest courts of the respective states. The article will discuss the local conditions prompting enactment of the permit parking plans in Arlington County, Virginia, and Cambridge, Massachusetts. In order to then determine the constitutionality of the plans it is necessary to survey the two-tiered standard of review formulated by the United States Supreme Court in equal protection cases. To determine whether the higher standard of re-

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[11] County Bd. v. Richards, 98 S.Ct. 24 (1977) (per curiam). The Court stated in pertinent part: "To reduce air pollution and other environmental effects of automobile commuting, a community may reasonably restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit . . . [and] reducing noise, traffic hazards, and litter . . . . [T]he Constitution does not outlaw these social and environmental objectives . . . ." *Id.* at 26.

[12] In addition to the above mentioned state decisions, the District of Columbia Superior Court and the Supreme Court of Ohio have also addressed the question of the constitutionality of permit parking programs. In Business and Professional Ass'n. v. District of Columbia, Civ. No. 7472-76 (D.C. Superior Court, Aug. 9, 1976), the court issued a preliminary injunction on the basis of unconstitutionality, enjoining the implementation of a permit parking program in that jurisdiction. Upon further proceedings the suit was dismissed and an appeal of the dismissal is pending. In State v. Whisman, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970), the court invalidated an ordinance which prohibited parking on two streets except by permit to residents of those streets. The court held not only that the ordinance was unconstitutionally discriminatory, but that it unconstitutionally attempted to "vest ungoverned and unbridled discretion in the Safety Director by failing to provide standards or criteria for his guidance." *Id.* at 64, 263 N.E.2d at 415. In addition to this particular infirmity of the ordinance a crucial distinction between *Whisman* and the other cases which have addressed this issue (aside from the factual differences in the programs) is that New Boston, Ohio, which enacted the ordinance, is a tiny community with a total population of 3,325 according to the 1970 census figures. A locality of this size could not possibly experience the traffic congestion and pollution problems experienced by larger cities, nor was it faced with a federal mandate to control auto emissions. Due to these distinguishing features, *Whisman* is not considered in this inquiry.

[13] 217 Va. 645, 231 S.E.2d 231 (1977).

[14] 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

view, "strict scrutiny," is triggered, the article will investigate whether the residency classification is traditionally suspect, or whether the plans abridge fundamental personal rights, such as the right to travel. If strict scrutiny is not triggered the appropriate standard of review is "minimum rationality," which is based on the classification having a rational relationship to a legitimate state objective. Thus, the article will consider whether the legislative objectives of the parking plans are within the parameters of the state's police power. If so they will be deemed legitimate and the analysis will shift to the critical question of the rationality of the plans.

II. Case Descriptions: Arlington County v. Richards and Commonwealth v. Petralia

Arlington County is a small densely populated community with approximately 157,000 residents living in 25.75 square miles.[15] The residential neighborhood where the permit parking ordinance was operative adjoins a district of large office and commercial buildings called Crystal City. The residential zone has 192 spaces along portions of three streets containing 101 residences in 81 buildings. The most thorough sampling demonstrated that 188 of the 192 spaces were occupied, and that the drivers and passengers of 156 of the parked cars were headed for Crystal City.[16] Commuter traffic attendant to the Crystal City complex became an area of concern to local authorities, and this concern is reflected in the stated legislative objectives of the Arlington permit parking ordinance.[17]

An action challenging the constitutionality of the ordinance was brought by a group of commuters who worked in Crystal City. All plaintiffs, with the exception of Rudolph Richards, commuted to work by driving their own automobile. Most of them had been parking all day, every working day, on the residential streets covered by the plan. Rudolph Richards lived within walking distance of his workplace at Crystal City, although the particular street on which he resided was not covered by the plan. Richards argued at trial that his inability to park on the streets in front of his neighbors' homes (while his neighbors were free to park in front of his home) denied

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[15] Petitioner's Brief for Certiorari at 3, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[16] *Id.* at 4-5.

[17] See text at note 97, *infra*.

him equal protection of the laws.[18] All commuting plaintiffs joined in the equal protection challenge attempting to demonstrate that the problems which the ordinance was designed to remedy did not exist, or in the alternative that the problems were not caused by commuters.[19] The County introduced evidence to demonstrate the rational basis of its legislative judgment that permit parking would alleviate serious traffic congestion problems caused by commuters.[20]

The Arlington County Circuit Court enjoined enforcement of the ordinance, finding the plan violative of the equal protection clause of the Fourteenth Amendment.[21] The court indicated that the evidence presented at trial did not demonstrate that the classification made by the ordinance bore any reasonable relationship to the stated objectives.[22] The Virginia Supreme Court affirmed, holding "that the ordinance on its face offends the equal protection guarantee of the 14th Amendment."[23] The United States Supreme Court, on certiorari review, reversed, stating that "[t]o reduce air pollution and other environmental effects of automobile commuting, a community reasonably may restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit."[24]

The Cambridge, Massachusetts permit parking plan covers several residential neighborhoods within the city. Defendant Petralia was prosecuted for illegally parking his automobile in a "parking-by-permit-only" area of East Cambridge adjacent to the Middlesex District Court House. The court house had reportedly generated traffic problems for the residents of East Cambridge, and local officials sought to alleviate those problems by enactment of the permit parking plan.[25]

On May 6, 1975, complaints issued in the Third District Court of

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[18] Respondent's Brief in Opposition to Certiorari at 6, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[19] *Id.* at 5.

[20] Petitioner's Brief for Certiorari at 5, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[21] Richards v. County Bd., In Chancery No. 24659 (Circuit Court of Arlington County, Va., 1975), an unreported opinion reprinted in Petitioner's Brief for Certiorari at 21a-22a App. B.

[22] *Id.*

[23] County Bd. v. Richards, 217 Va. 645, ___, 231 S.E.2d 231, 235 (1977).

[24] County Bd. v. Richards, 98 S.Ct. 24, 26 (1977) (per curiam).

[25] Record at 8, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)). The jury trial in Superior Court was never held since the Superior Court referred the question of constitutionality directly to the Supreme Judicial Court of Massachusetts.

Eastern Middlesex against the defendants Guy A. Petralia, Allan A. Fishman, and Joseph H. Porter, charging each of them with a parking violation in the City of Cambridge.[26] All three entered pleas of not guilty on May 14, and filed motions to dismiss.[27] The motions were denied on the same date, and the three defendants were found guilty and fined $10.00 for each offense.[28] The three defendants appealed to Middlesex Superior Court, and on March 26, 1978, Defendant Petralia filed a motion to dismiss on the grounds of unconstitutionality of the permit parking plan.[29] The Superior Court reported the cases to the Massachusetts Supreme Judicial Court pursuant to Massachusetts General Laws chapter 278, section 30A,[30] which provides for an interlocutory report in a criminal case of questions of law "so important or doubtful as to require the decision of . . . [the Supreme Judicial Court] thereon before trial, in the interest of justice."[31] On July 8, 1976, the cases were ordered transferred to the Massachusetts Supreme Judicial Court,[32] and on April 29, 1977, that court upheld the constitutionality of the Cambridge permit parking plan.[33]

III. The Standard of Review in Equal Protection Cases

The United States Supreme Court has developed a two-tiered standard of review in equal protection cases.[34] The higher level of review, referred to as "strict scrutiny," is employed when a legislative classification is inherently suspect[35] or inhibits fundamental personal rights.[36] The lower level of review is referred to as

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[26] Brief for the Commonwealth at 2, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)).

[27] *Id.* at 2-3.

[28] *Id.* at 3.

[29] *Id.*

[30] *Id.* at 4.

[31] St. 1954, ch. 528, Mass. Gen. Laws Ann. ch. 278, § 30A, as cited in Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 862 n. 4, 362 N.E.2d 513, 515 n. 4 (1977).

[32] Brief for the Commonwealth at 4, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)).

[33] Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[34] *See generally* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1101-04 (1969).

[35] *See* Loving v. Virginia, 388 U.S. 1, 9-11 (1967). See also note 34, *supra*.

[36] *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969). See also note 34, *supra*.

"minimum rationality"[37] and is employed whenever strict scrutiny is not triggered. The Court summarizes its approach to equal protection challenges as follows: "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[38]

Under the strict scrutiny standard the Court demands more than a mere rational relationship to a legitimate state interest. Generally the Court will require that the classification be necessary to a compelling state interest,[39] and the burden of justification is borne by the state rather than the challenger.[40] The Court will strike down legislation subjected to strict scrutiny if it is demonstrated that a "less restrictive alternative"[41] would achieve the same end.

In contrast to strict scrutiny, the minimum rationality standard of review demands a high degree of deference to legislative fiat. A reviewing court will not invalidate a piece of legislation on the basis that a less restrictive alternative exists, but rather it will uphold distinctions made "with substantially less than mathematical exactitude."[42] The Supreme Court has long recognized that:

> [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.[43]

With respect to zoning ordinances, in particular, the Court has likewise indicated that the appropriate test is whether "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[44] "[A] reasonable margin to insure effective enforcement, will not put on a law, otherwise valid, the stamp of invalidity."[45]

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[37] See note 34, *supra*.

[38] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[39] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

[40] *See* Loving v. Virginia, 388 U.S. 1, 9 (1967).

[41] *See id.* at 11; McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[42] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1977).

[43] Williamson v. Lee Optical, 348 U.S. 483, 489 (1950).

[44] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[45] *Id.* at 388-89.

Although the two-tiered approach is formally recognized by the Supreme Court, state courts[46] and legal scholars[47] have frequently suggested that the Court actually employs intermediate standards of review. Justice Marshall, in a series of dissenting opinions,[48] has urged the majority to discard the rigid two-tiered formula in favor of a "sliding scale" of review. Under the sliding scale approach, the scope of review would depend on the nature of the classification and the personal interests affected.[49] Both the intermediate standard and the sliding scale approaches are most relevant and useful in equal protection challenges where the classification is not in the suspect category, but is nonetheless a disfavored classification such as sex or wealth.[50]

IV. Strict Scrutiny

A. Right to Travel Not Impaired

As indicated, in order to determine whether strict scrutiny should be employed or whether a rational relationship between the classification and objective is sufficient, it is necessary to determine whether the permit parking plans abridge fundamental personal rights.[51] Opponents of the neighborhood parking programs have contended that the scheme interferes with the constitutionally protected right to travel.[52] The key to discovering whether any right is constitutionally protected, or as it is otherwise termed, fundamen-

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[46] *See* Orsini v. Blasi, 36 N.Y. 2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975).

[47] *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. Rev. 479 (1974).

[48] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

[49] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). According to Justice Marshall, the Court adjusts the standard of review according to the "character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).

[50] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

[51] See text at note 36, *supra*.

[52] *See* Brief for the Appellant at 5, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)).

tal, is not to be found by comparing the social significance of the claimed right as opposed to other rights. Nor is it to be found by weighing the relative importance of the rights. "Rather, the answer lies in assessing whether . . . [the right is] explicitly or implicitly guaranteed by the Constitution."[53]

In recent cases, the Supreme Court has abandoned its attempt to identify the constitutional provisions which create a right to travel. As the Court stated in *United States v. Guest*:

> . . . [F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution. . . . Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of inter-state travel, there is no need here to canvass those differences further. All have agreed that the right exists.[55]

Again in *Shapiro v. Thompson*[56] the Court stated, "we have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."[57] The Court then quoted the above passage from *Guest* to explain its lack of concern with identifying specific constitutional sources for the right to travel.[58]

A survey of the equal protection challenges where the right to travel has been successfully invoked reveals a consistent case format; virtually every case involved a durational residency requirement which was a prerequisite to receiving certain benefits from the state[59] or engaging in certain activities.[60] In other words, the cases

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[53] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[54] 383 U.S. 745 (1966).

[55] *Id.* at 758-59.

[56] 394 U.S. 618 (1960).

[57] *Id.* at 630 (footnotes omitted). In *Shapiro*, the Court states as follows:

> In Cornfield v. Coryell, 6 F.Cas. 546, 552 (no. 3230) (D.D.E.D. Pa. 1825), Paul v. Virginia, 8 Wall. 168, 180 (1869), and Ward v. Maryland, 12 Wall. 418, 430 (1871), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, §2. See also Slaughter-House Cases, 16 Wall. 36, 79 (1873); Twining v. New Jersey, 211 U.S. 78, 97 (1908). In Edwards v. California, 314 U.S. 160, 181, 183-185 (1941) (Douglas and Jackson, JJ., concurring), and Twining v. New Jersey, *supra.*, reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also Crandall v. Nevada, 6 Wall. 35 (1868). In Edwards v. California, *supra.*, and the Passenger Cases, 7 How. 283 (1849), a Commerce Clause approach was employed. See also Kent v. Dulles, 357 U.S. 116, 125 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964); Zemel v. Rusk, 381 U.S. 1, 14 (1965), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

394 U.S. at 630 n. 8.

[58] Shapiro v. Thompson, 394 U.S. 618, 630-31 (1960).

[59] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); Graham v. Richardson, 403 U.S. 365 (1961).

[60] *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970).

involved a residency classification which was based upon an individual's having recently exercised his/her right of interstate travel. The permit parking cases are clearly distinguishable from these equal protection/right to travel cases. The facial dissimilarities between the permit parking cases and other equal protection challenges successfully invoking the right to travel are as follows: (1) the permit parking plans employ a bona fide continuing residency requirement as opposed to a durational type residency requirement; (2) the previous Supreme Court cases recognize the right to travel *inter-* as opposed to *intra-*state; (3) the previous cases do not support a general, expansive right to travel, but rather a more specific right to migrate and resettle; and, perhaps a more basic distinction, (4) the benefit of which the non-resident is deprived in the permit parking cases is arguably insubstantial.

An initial argument against successful invocation of the right to travel in the permit parking cases is that thus far all of the equal protection/right to travel challenges which have prevailed have involved durational residency requirements, and the permit parking plans require only that an applicant be a resident at the time of his application for a permit. In *McCarthy v. Philadelphia Civil Service Commission*,[61] the Supreme Court held that the durational nature of the residency requirement was integral to the abridgement of the right to travel.[62] In that case a Philadelphia municipal regulation requiring city employees to be residents of the city was held to be constitutional as a bona fide continuing residency requirement. The Court announced that the regulation did not violate the right of interstate travel of a city fireman whose employment was terminated under the regulation after he moved his residence from Philadelphia to New Jersey.[63] The bona fide continuing residency requirement in the Philadelphia ordinance was explicitly distinguished from invalid durational residency requirements which erect a barrier to fundamental constitutional rights:

> [The right to travel] cases involved a statutory requirement of residence in the State for at least one year before becoming eligible to vote, as in *Dunn*, or to receive welfare benefits, as in *Shapiro* and *Memorial Hospital*. Neither in those cases, nor in any others have we questioned

[61] 424 U.S. 645 (1976).
[62] *Id.* at 646-47.
[63] *Id.* at 647.

> the validity of a condition that a person be a resident *at the time* of his application.[64]

The permit parking plans require only that applicants be residents at the time of their application and would thus be upheld under this recently announced test.

A second dissimilarity between the permit parking cases and the Supreme Court cases successfully invoking the right to travel is that all of the previous cases concerned the right to travel interstate. The right to travel allegedly impaired by the permit parking plans was the right to travel intrastate, since none of the defendants crossed state lines to illegally park in the restricted parking areas. The Supreme Court has never affirmatively recognized a fundamental right to travel intrastate. In *United States v. Wheeler*,[65] the Court indicated by way of dicta that there exists a fundamental right to travel intrastate,[66] but in *United States v. Guest*[67] the Court discredited the *Wheeler* dicta.[68] Nonetheless, several lower court cases have held that the right to travel intrastate is constitutionally protected.[69] For example, in *King v. New Rochelle Municipal Housing Authority*[70] the District Court for the Southern District of New York struck down a five year residency requirement for admission to public housing, stating that, "[t]o the extent that the right to travel derives from 'our constitutional concepts of personal liberty' . . . it is not dependent on the crossing of state lines, but encompasses movement within the state as well."[71] An in-depth analysis of the intra-interstate distinction is beyond the scope of this article. It is noteworthy, however, that the fundamentality of the right of intrastate travel does not carry the weight of Supreme Court precedent,[72] and to argue that the Court would recognize such a right is at most conjecture.

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[64] *Id.* at 646 (footnotes omitted) (emphasis in original).

[65] 254 U.S. 281 (1920).

[66] *Id.* at 293.

[67] 383 U.S. 745 (1966).

[68] *Id.* at 759 n. 16.

[69] *See* Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972) (requirement that policemen and firemen live in the community they serve held invalid); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (municipal ordinance requiring two years city residence before admission to public housing held invalid); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971) (ordinance requiring city school teacher to reside in city held invalid).

[70] 314 F. Supp. 427 (S.D.N.Y. 1970).

[71] *Id.* at 430 (citations omitted).

[72] The Supreme Court has never held that there is *no* fundamental right to *intrastate*

Additional grounds exist for a determination that the right to travel is not impaired by permit parking plans. All of the previously mentioned right to travel cases involved the right to migrate and resettle in a community, not merely the right to visit. None of the defendants in the permit parking cases contend that their right to migrate to the restricted parking areas has been infringed. What has been the issue before the courts has not strictly been the "right to travel," but rather the "right of resettlement" or, as the Court described, the right "to migrate, resettle, find a new job, and start a new life."[73]

In right to travel cases the right to migrate is affected when the durational residency requirement places a burden on relocation. This means that the durational residency requirement, while not an absolute bar to entrance, inhibits resettlement by depriving the newcomer of some state benefit or by restricting some activity. In analyzing this type of residency requirement courts will examine the benefit or activity withheld on the basis of recent interstate travel, and then determine whether the right to travel has been substantially affected. Courts do not demand that there be an actual, physical deterrence of the right to travel.[74] In *Shapiro v. Thompson*[75] the Supreme Court held that denying welfare benefits to persons who had not met a one year durational residency requirement amounted to an unconstitutional penalty for having recently exercised the right to travel interstate.[76] Again in *Dunn v. Blumstein*[77] the Court

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travel. The Court has, however, discredited the dicta in United States v. Wheeler, 254 U.S. 281, 293 (1920) that such a right exists. *See* United States v. Guest, 383 U.S. 745, 759 n. 16 (1966).

[73] Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974), *quoting from* language in Shapiro v. Thompson, 394 U.S. 618, 629 (1969). *See generally* Note, *The Right to Travel and Community Growth Controls*, 12 HARV. J. LEG. 244, 279 (1975); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U. L. REV. 989, 1012 (1969).

[74] Even though physical restraint in movement is not the crux of the right to travel, the facts of the permit parking cases show that there was no physical restraint on movement. The non-resident is not actually prevented from traveling to areas that restrict on-street parking to residents. One's ability to travel to and from an area of the city is not necessarily cut off by the mere fact that one cannot park in that area of the city. Further, the Supreme Court has never recognized a fundamental right to travel by automobile. In a recent decision the Court affirmatively stated that use of a car is not a fundamental right. Dixon v. Love, 97 S. Ct. 1723 (1977). The Fifth Circuit Court of Appeals has held that, "nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental 'right to commute'." Wright v. City of Jackson, 506 F.2d 900, 902 (5th Cir. 1975). Public transportation, whether by subway, bus or taxi, is available in the areas of Cambridge, Massachusetts and Arlington County, Virginia where the permit parking plans are in effect.

[75] 394 U.S. 618 (1969).

[76] *Id.* at 629.

[77] 405 U.S. 330 (1972).

held that denying the right to vote to persons who had not met the one year state residency requirement was an unconstitutional infringement on the right to travel.[78] The Court indicated in *Dunn* that "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence."[79]

The Supreme Court refined the *Shapiro* and *Dunn* standard in *Memorial Hospital v. Maricopa County*.[80] In that case the Court held that denying an indigent emergency medical care on the basis that the indigent had not resided in the county for one year was an unconstitutional infringement on the right to travel. The Court reaffirmed its position that actual deterrence of the right to travel is unnecessary, but emphasized that the nature of the activity or benefit withheld influences the decision whether the right to interstate travel has been unconstitutionally infringed.[81] In *Maricopa* the Court indicated that the benefit withheld, medical care, is "a basic necessity of life," and therefore strict scrutiny will be given to the statute.[83] The Court implied that the fact that *Shapiro* involved denial of welfare benefits, an arguable necessity, and that *Dunn* involved denial of the constitutionally protected right to vote, was relevant to the application of strict scrutiny.[84] Thus, after *Maricopa* the focus in right to travel cases shifted to a determination of which interests were so important that depriving an individual of them would infringe on the right of interstate travel and therefore trigger the strict scrutiny test.[85] In order to trigger strict scrutiny, abridgement of the fundamental right of interstate travel must be coupled with denial of a necessity of life or a constitutionally protected right.

The term "necessity of life" has never been explicitly defined by the Supreme Court; however, the Court has stated that "medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental enti-

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[78] *Id.* at 338.

[79] Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972).

[80] 415 U.S. 250 (1974).

[81] *Id.* at 258-61.

[82] Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

[83] *Id.* at 254.

[84] *Id.* at 259.

[85] *See* Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 125 (1975).

tlements."[86] In the permit parking cases the benefit which the municipality is denying is permission to lawfully park one's car on the public street. Certainly this cannot be considered necessary to basic sustenance, rather it should be considered within the latter category of a less essential governmental entitlement. Nor is parking a right explicitly guaranteed by the Constitution. Under the standards set by the Supreme Court it is inconsequential that the parking plans do not present an actual deterrence,[87] but the minimal significance of the benefit withheld, on-street parking, would seem to be determinative.

If permit parking plans do not abridge the fundamental right to travel, the strict standard of review will not be triggered on the basis of infringement of a fundamental personal right. The possibility of strict scrutiny does not end here, however. The legislative classification must also be examined.

B. Residency Classification Not Suspect

Determination of the nature of the classification employed in the permit parking plans is essential to a discovery of the appropriate standard of review.[88] If classification on the basis of residency is traditionally suspect, then a stricter standard of review will be employed.[89] If, on the other hand, residency is a non-suspect classification, then the appropriate standard of review will be whether the residency classification is rationally related to the legitimate state interests of pollution control and preservation of the residential character of the neighborhood.[90]

A non-suspect classification exists where:

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[86] Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974) (footnotes omitted).

[87] In Sosna v. Iowa, 419 U.S. 393 (1975), a later equal protection case involving the right to travel, the Supreme Court held that a one year durational residency requirement for obtaining a divorce is not unconstitutional. The Court might have based its decision upon a determination that divorce is neither a basic necessity of life nor a constitutional right. However, the Court did not explicitly offer this reasoning, and instead indicated that the durational residency requirements could be justified on grounds other than administrative convenience or budgetary considerations. A thorough analysis of *Sosna* is beyond the scope of this inquiry. It is sufficient here to note that the permit parking plans, as well, are justifiable on grounds other than budgetary considerations and administrative convenience and that *Sosna* apparently lends no support to the successful invocation of the right to travel in the permit parking challenge.

[88] See text at note 35, *supra*.

[89] Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[90] *Id.* See text at notes 97-121, *infra*.

> [T]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[91]

Using this criteria, the only classifications which the Supreme Court has recognized as suspect are those relating to race, alienage, or national origin.[92] Classification on the basis of residency, in and of itself, has not been recognized by the Court as suspect.[93] In cases where the Supreme Court has employed strict scrutiny in reviewing residency-based ordinances, the reason for the stricter standard of review was a denial or infringement, on the basis of recent interstate travel, of either a necessity of life or some constitutionally protected activity.[94] In these cases use of a suspect classification was *not* the reason for employing strict scrutiny. As the Supreme Court indicated in *McCarthy v. Philadelphia Civil Service Commission*,[95] a bona fide continuing residency requirement such as is employed in the permit parking cases is entirely permissible and does not trigger the stricter standard of review.

V. Minimum Rationality

The preceding investigation of the residency classification and the right to travel compels the conclusion that the permit parking plans

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[91] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[92] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 9-11 (1967) (race); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race); Oyama v. California, 332 U.S. 633, 646 (1948) (nationality); Korematsu v. United States, 323 U.S. 214, 216 (1944) (nationality). *See also* Strickman, *School Desegregation at the Crossroads*, 70 N.W. L. Rev. 725, 729 n. 16 (1976). Professor Strickman notes:

> Conditions of birth such as sex and illegitimacy, although akin to ancestry in many respects, have yet to be identified as suspect criteria by a majority of the Court. Jiminez v. Weinberger, 417 U.S. 628, 631 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). Wealth discrimination alone, although 'traditionally disfavored', remains a nonsuspect classification. San Antonio Independent School Dist. v. Rodriguez, *supra* at 18-29. *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

Id. at 725, n. 15.

[93] In a brief opinion, the United States Supreme Court indicated that "the Constitution does not . . . presume distinctions between residents and non-residents of a local neighborhood to be invidious." County Bd. v. Richards, 98 S. Ct. 24, 26 (1977) (per curiam).

[94] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

[95] 424 U.S. 645, 647 (1976).

employ no suspect or disfavored classification and infringe upon no fundamental interests. Consequently, the appropriate standard of review is minimum rationality.[96] Having established that a limited standard of review should be employed with respect to the permit parking plans, the crucial question becomes: Does the residency classification employed in the ordinances bear a rational relationship to legitimate state objectives? The answer to this question requires a two-part determination: first, are the asserted legislative objectives of the permit parking plans legitimate; and second, are the permit parking plans rationally related to these objectives.

A. Legislative Objectives of the Parking Plans

The legislative objectives of the Arlington permit parking plan are set forth in the preamble to the ordinance:

> The County Board of Arlington County, Virginia, hereby ordains that in order to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for parking of vehicles by persons using districts zoned for commercial or industrial uses . . .; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County . . . Section 29D of the Zoning Ordinance is enacted. . . .[97]

The asserted legislative objectives of the Cambridge plan are not expressly set forth in either the municipal ordinance or the enabling statute. However, the brief for the Commonwealth states:

> While the legislature did not expressly define its purposes in enacting St. 1972, c. 340,[98], we are not required to blind ourselves to possible

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[96] See text at note 37, *supra*.

[97] Arlington County, Va., Amendment and Reenactment of § 29D Zoning Ordinance, Re: Street Parking in Residential Districts (May 18, 1974), *cited in* County Bd. v. Richards, 217 Va. 645, ____, 231 S.E.2d 231, 232 (1977).

[98] St. 1961, ch. 455, § 3(a) (an Act establishing a Department of Traffic and Parking and a Board of Traffic and Parking in the City of Cambridge), was the original enabling legislation for the CAMBRIDGE, MASS., ORDINANCE 73-9, § 16.4(b) (1973) (amending Ordinance 66-I). St. 1961, ch. 455, § 3(a) was amended by St. 1972, ch. 340 which provides in pertinent part:

> rationales that may have influenced the Legislature . . . . The Legislature may have determined that it was desirable to reduce use of the private automobile in Cambridge. Such a reduction would achieve two objectives. First, it would reduce the amount of air pollution in Greater Boston. Second, it would reduce traffic congestion in Cambridge itself.[99]

The asserted objectives of both the Cambridge and Arlington permit parking programs can be divided into two major categories: (1) air pollution control and (2) preservation of the residential character of the neighborhood by reducing traffic congestion. Certain of the numerous stated objectives of the Arlington plan do not fall neatly under either category but may arguably be classified as within the parameters of one or both categories. For example, preservation of the safety of children might be considered to be a subcategory of preservation of the residential character of the neighborhood. Whether or not these two major categories of objectives fall within the police power of the state is the crux of a determination whether the legislative objectives are a legitimate state interest.[100]

1) Air Pollution Control

State governments have broad powers to make rules concerning the use of public streets and the right to drive upon them.[101] "The use of the automobile as an instrument of transportation is peculiarly the subject of regulation."[102] There is little dispute either that public streets or private automobiles are proper subjects of regulation. Neither is there any substantial disagreement that the legislative objective of air pollution control is properly within the state's police power to provide for the safety and welfare of the public. In *Train v. Natural Resources Defense Council, Inc.*[103] the Supreme

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> Any rule or regulation adopted under this clause prohibiting the parking or standing of vehicles on the whole or any part or parts of one or more streets, ways, roads or parkways under the control of the city may provide that it shall not apply in such residential areas as shall be specified, and at such times as shall be prescribed, in such rule or regulation, to any motor vehicle registered under chapter ninety of the General Laws as principally garaged in the city and owned or used by a person residing in such area. . . .

[99] Brief for the Commonwealth at 31, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (citation omitted) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E. 2d 513 (1977)). The jury trial in Superior Court was never held since the Superior Court referred the question of constitutionality directly to the Supreme Judicial Court of Massachusetts.

[100] Lochner v. New York, 198 U.S. 45, 53 (1905), *discredited on other grounds.*

[101] See text at note 2, *supra. See also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761, 783 (1945).

[102] Silver v. Silver, 280 U.S. 117, 122 (1929).

[103] 421 U.S. 60 (1975).

Court was presented with an issue of statutory construction of the Clean Air Amendments of 1970.[104] The Court considered the "anatomy of the statute, . . . its legislative history, and . . . the history of congressional efforts to control air pollution,"[105] and left no uncertainty that a state's interest in controlling pollution (thereby achieving compliance with federal clean air mandates) is an interest within the state's police power.

The states' general interest in air pollution control in both the Cambridge and Arlington plans is, simultaneously, an interest in achieving the primary ambient air standards mandated by the Clean Air Act.[106] The Cambridge permit parking plan is part of a Massachusetts federally-approved and promulgated plan to comply with the Clean Air Act.[107] At the time of the trial in *County Board v. Richards*,[108] the County's plan had been conditionally approved as a method of meeting Environmental Protection Agency (EPA) requirements pursuant to the Act.[109] The fact that the parking plans are components of a comprehensive clean air plan lends credence to the municipalities' assertions that the parking plans were enacted partially in the interest of pollution control. The fact that the Supreme Court has recognized pollution conrol to be within the state's police power is conclusive that the asserted objective is a legitimate state interest.

2) Preservation of Neighborhood Character

Preservation of the residential character of the neighborhood involved is another major category of asserted objectives. An initial

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[104] The Clean Air Act, 42 U.S.C. §§ 1857a-1857l (1970) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)).

[105] Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975).

[106] The Clean Air Act, 42 U.S.C. §§ 1857a-1857l (1970) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)).

[107] *See* the Transportation Control Plan for the Metropolitan Boston Intrastate Air Quality Control Region promulgated in Transportation and Land Use Controls, 40 C.F.R. §§ 52.1128(a)-52.1128(b)(8) (1976). For a discussion of the background leading up to the promulgation of the regulation, *see* 40 Fed. Reg. 25, 152-70 (1975). The regulations were enacted pursuant to the mandate of the Clean Air Act, 42 U.S.C. §§ 1857a-1857l (1970) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)). The plan exempts from the on-street parking ban in Cambridge those with a Cambridge parking sticker. Regulation Limiting On-Street Parking by Commuters, 40 C.F.R. 52.1134(c)(2) (1976).

[108] 217 Va. 645, 231 S.E.2d 231 (1977).

[109] Record at 256-93, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977); Petitioners Brief for Certiorari at 28a-29a (letter from Alan Kirk II, Ass't. Administrator for Enforcement and General Counsel, United States Environmental Protection Agency, to Charles G. Finn, Assistant County Attorney for Arlington County, Virginia, Nov. 18, 1974).

inquiry in this area involves a determination whether the state police power is sufficiently broad to cover this objective. The answer is clear, for as early as 1949 the Supreme Court stated that the police power "extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."[110] The Court reaffirmed this position in *Village of Belle Terre v. Boraas*:[111] "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[112] In *Belle Terre* the Court upheld a zoning ordinance which excluded from the village certain groups of unrelated persons that were thought to contribute to overcrowded conditions. The non-residents who sought admission to the village contended that the ordinance was violative of equal protection and the rights of association, travel and privacy.[113] They argued that the ordinance did not achieve goals sufficiently important to justify the imposition on association, but the Supreme Court concluded that such value judgments are a proper matter of legislative discretion: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."[114]

In *Village of Euclid v. Ambler Realty Co.*,[115] the Supreme Court approved the exclusion of industries and apartments from residential areas to keep them free from disturbing noises, increased traffic, and the hazards of moving and parked automobiles, as well as to provide children with "the privilege of quiet and open spaces for play, enjoyed by those in more favored localities."[116] Justice Sutherland, writing for the majority, commented:

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, ne-

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[110] Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (footnotes omitted).
[111] 416 U.S. 1 (1974).
[112] *Id.* at 9.
[113] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
[114] *Id.* at 9.
[115] 272 U.S. 365 (1926).
[116] *Id.* at 394.

> cessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analagous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of a constitutional guaranty never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[117]

Thus, it is behond doubt that the Supreme Court recognizes both the legitimacy and the importance of preservation of the residential character of a neighborhood as an objective of zoning legislation. Opponents of the residential parking programs claim, however, that the asserted objectives of the ordinance are mere sham and that the actual objective is to create an exclusive parking privilege for the residents of the restricted area.[118] An analogy may be drawn to *Belle Terre*, where an argument was raised that the purported objectives of the zoning ordinance were merely a legitimatizing label, covering the true objective of "[fencing] out those individuals whose choice of lifestyle differs from that of its current residents."[119] Both the majority opinion in *Belle Terre* and Justice Marshall's dissenting opinion recognized the possibility of an underlying, impermissible objective; but the possibility was never actually examined because in a minimum rationality review such examination is not properly within the scope of judicial inquiry. The Court will not assume jurisdiction over wrongful motives of the legislature.[120]

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[117] *Id.* at 386-87.

[118] Brief for Appellant at 5, Commonwealth v. Fishman, No. 729 (Middlesex Superior Court, Mass., 1976) (companion case to Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E. 2d 513 (1977)); Respondent's Brief in Opposition to Certiorari at 6, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). Since the ordinance is challenged as creating a parking monopoly, perhaps it is useful to consider a recent case where an ordinance which creates a hot dog monopoly was upheld over an equal protection challenge. In City of New Orleans v. Dukes, 427 U.S. 297 (1977), the Supreme Court sustained an ordinance which prohibits pushcart food sales in the French Quarter, but by a "grandfather provision" exempts pushcart vendors who have operated in the quarter for eight years. The fact that a "monopoly" was created was not seen as determinative of the provision's constitutionality. See text at note 162, *infra*.

[119] *Id.* at 17 (Marshall, J., dissenting).

[120] *See* McCray v. United States, 195 U.S. 27 (1904).

Perhaps the most useful approach in examining the problem of the covert objective is to distinguish "objective" from "result." The result of the *Belle Terre* ordinance is to exclude from residency those individuals who have chosen an alternative lifestyle. The Court indicates that the purported objectives (i.e., "restricting uncontrolled growth, solving traffic problems, keeping rental costs to a reasonable level, and making the community attractive to families")[121] are legitimate. In the case of the neighborhood parking plan the result is to bar non-residents from parking in the restricted areas. Although this result, like the result in *Belle Terre*, is unpleasant to those who are excluded, the objectives (like those in *Belle Terre*) are within the parameters of the state's police power and hence permissible.

B. Relationship Between the Residency Classification and the Legislative Objectives of the Permit Parking Plans

The final question in this constitutional analysis may now be raised: Is the residency classification employed in the permit parking plans rationally related to the legislative objectives of pollution control and preservation of the residential character of neighborhoods? The answer begins to emerge upon examination of two cases where residents were accorded certain exemptions in municipal parking schemes. In *Pittsburgh v. Alco Parking Corp.*,[122] the Supreme Court recognized the right of the City of Pittsburgh to distinguish between residential and non-residential parking and to impose additional burdens on the latter. The city justified treating non-residential parking differently from residential parking partially on the basis that "[n]on-residential parking places for motor vehicles, by reason of . . . their relationship to traffic congestion . . ., affect the public interest differently from parking places accessory to the use and occupancy of residences."[123]

A permit parking plan which restricts parking in residential areas to residents and guests resembles a traffic regulation establishing truck loading zones in commercial areas, since each land use conforms to the character of the adjacent zone. Parking for commercial

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[121] Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

[122] 417 U.S. 369 (1974).

[123] *Id.* at 378. A city ordinance imposed an increased 20% tax on the gross receipts from parking or storing automobiles at off-street non-residential parking spaces. The Court said that, "[t]he city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax." *Id.* at 379.

or employment reasons may rationally be regarded as out of character in a residential zone. The distinction between parking in connection with residential use and parking in connection with commercial use was upheld in *South Terminal Corp. v. EPA*,[124] where the Court of Appeals for the First Circuit found that it was reasonable to exempt residential parking from the "freeze" on new commercial parking facilities. The court ruled that the exemption for residents was not only appropriate, but perhaps necessary to make a parking restriction program equitable.[125] *South Terminal* is of particular relevance since it reviews the Metropolitan Boston Air Quality Transportation Control Plan[126] of which the Cambridge parking plan is now a component.[127]

When the Boston transportation control plan was reviewed in *South Terminal* the correlation between parking limitations, which had been substituted for travel prohibitions, and a reduction of commuter miles traveled was recognized by the court: "While vehicle use prohibition would have decreased hydrocarbon emission by more than the substituted strategy, the substitute seems plainly less disruptive and more acceptable."[128] The court of appeals held that ample technical support had been established for the plan's strategy of targeting commuting trips.[129] "Commuters are the largest identifiable segment of the driving population. Given the significant number of vehicle miles generated by that activity, we cannot say that it was arbitrary or capricious to have placed major controls upon commuters."[130]

As indicated, the parking restrictions upheld in *South Terminal* were a compromise measure replacing proposals to impose far more severe burdens on commuters. The compromise evolved as a result of Massachusetts' failing to meet the deadline set by the Clean Air Act[131] to submit an acceptable transportation control plan.[132] Due to

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[124] 504 F.2d 646 (1st Cir. 1974).

[125] *Id.* at 671.

[126] 38 Fed. Reg. 30960 (1973). The plan encompasses the City of Boston and several outlying suburbs. 40 C.F.R. § 81.19. The plan is termed a "transportation control plan" because it focuses upon pollutants caused mainly by vehicles rather than by "stationary sources" like factories, incinerators and power plants.

[127] Regulation Limiting On-Street Parking by Commuters, 40 C.F.R. § 52.1134. *See also* 40 Fed. Reg. 25152 (1975).

[128] South Terminal Corp. v. EPA, 504 F.2d 646, 672 (1st Cir. 1974).

[129] The court found that work trips comprise 40% of all vehicle miles of travel. *Id.*

[130] *Id.* at 673.

[131] 42 U.S.C. § 1857c-5(a) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)).

[132] South Terminal Corp. v. EPA, 504 F.2d 646, 654 (1st Cir. 1974).

this failure, the EPA proposed a transportation control plan for the Metropolitan Boston Area in July of 1973.[133] These proposals, aimed at reducing the number of vehicle miles of travel, were considerably more restrictive than the Cambridge parking plan.[134] After a period of public hearings and comment, a modified version of the proposed transportation control plan was promulgated. The most severe of the proposals were dropped, including a one-day-a-week prohibition on commuting. Restrictions on the availability of parking spaces were substituted.[135]

The EPA had suggested to the states that limitations on parking might be particularly effective in reducing the number of vehicle miles traveled, and that reduction of vehicle miles traveled should prove particularly effective in reducing air pollution.[136] To the extent that a permit parking plan creates a disincentive to commuter vehicular traffic, and an incentive in favor of other alternatives, this is consistent with the efforts of the EPA and various state authorities to prescribe transportation control methods to reduce air pollution.

The Cambridge permit parking plan was promulgated by the EPA in 1975 in yet a further set of amendments to the Boston transportation control plan.[137] The rationale behind these amendments was stated both in terms of the general efficiency of the strategy and the need for expediency in light of the 1977 deadline for achieving primary ambient air standards.[138] The firm contention of those who carried the plan into effect was that parking limitations not only reduce air pollution but they do so relatively cheaply and quickly: "These strategies are employed because commuters represent the most available group for diversions to car pools and mass

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[133] 38 Fed. Reg. 17689, 17690 (1973).

[134] They included a total parking ban in Boston between the hours of 6 to 10 A.M. and 4 to 6 P.M.; the imposition of a $5.00 surcharge on off-street parking; restrictions on the flow of traffic through the Mystic River Bridge, the Harbor Tunnels, and on the Massachusetts Turnpike; restrictions on the amount of gasoline delivered to retail service stations; and a total ban on vehicle use in the Metropolian Area applicable to each commuter a minimum of one day out of each work week. 38 Fed. Reg. 17692 (1973).

[135] 38 Fed. Reg. 30960 (1973). For current restrictions on parking in Greater Boston, Mass., *see generally* Transportation and Land Use Controls, 40 C.F.R. §§ 52.1128(a)-52.1128(b)(8) (1976).

[136] 38 Fed. Reg. 30629 (1973); *see also* 38 Fed. Reg. 16551, 16552 (1973); U.S. Environmental Protection Agency, White Paper (on the problems of vehicular pollution control) (Aug. 1973).

[137] Regulation Limiting On-Street Parking by Commuters, 40 C.F.R. § 52.1134 (1975). *See also* 40 Fed. Reg. 25152 (1975).

[138] The Clean Air Act, 42 U.S.C. §§ 1857a-1857l (Supp. IV 1974) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)).

transit. Further, the work trip is the most significant single-purpose trip in terms of total contribution to congestion and vehicle miles traveled."[139]

The Arlington County, Virginia permit parking plan has a similar history. The state of Virginia promulgated a plan that recognized the importance of reducing vehicle miles traveled. Local jurisdictions were left the task of selecting devices,[140] and Arlington County adopted an ordinance restricting non-resident parking as a device to reduce vehicle miles traveled. The ordinance was approved by the EPA in November of 1974, as a "reasoned approach to address, among other community needs, degrading air quality due to excessive commuter parking."[141] Prior to the United States Supreme Court's reversal of the Virginia decision in *County Board v. Richards*,[142] petitioners claimed that the result of the Arlington decision was to impede seriously the region's efforts in enhancing environmental quality.[143]

That the parking plans are tied in with federal clean air legislation is by no means conclusive of their constitutionality. However, the previous discussion reveals that it is well-recognized that the imposition of additional burdens on a class of "non-resident parkers" will reduce vehicle miles traveled. Reduction of vehicle miles traveled is a primary means of air pollution control. It is logical to conclude, therefore, that the residency classification employed in the permit parking plans is rationally related to the goal of pollution control. Further, the Fourteenth Amendment does not "require absolute equality or precisely equal advantages,"[144] nor does the Constitution require "things which are different in fact . . . to be treated in law as though they were the same. Hence, legislation may

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[139] 40 Fed. Reg. 25159 (1975).

[140] 38 Fed. Reg. 33702, 33706-07 (1973).

[141] Letter from Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel, U.S. Environmental Protection Agency, to Charles G. Finn, Assistant County Attorney for Arlington County, Virginia (Nov. 18, 1974). Petitoner's Brief for Certiorari at 28a-29a, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[142] 217 Va. 645, 231 S.E.2d 231 (1977).

[143] Petitioners Brief for Certiorari at 6-7, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). *See* Memorandum for the United States as Amicus Curiae in Support of Certiorari at 3, County Bd. v. Richards 217 Va. 645, 231 S.E.2d 231 (1977); Brief of Amicus Curiae Montgomery County, Maryland in Support of Certiorari at 16, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977). Arlington County and other component jurisdictions of the Metropolitan Washington Council of Goverments have been working cooperatively as the National Capital Interstate Air Quality Planning Committee (AQPC) in the interest of developing air quality and transportation control plans for the region.

[144] Ross v. Moffitt, 417 U.S. 600, 612 (1974).

impose special burdens upon defined classes in order to achieve permissible ends."[145] Thus if residential and non-residential parking present different problems with respect to traffic congestion, and if they are in conformity with differing land uses, a municipal ordinance which treats the two classes of parking differently is certainly reasonable.

The Massachusetts Supreme Judicial Court agreed that the disparity of treatment was rational given the goals of the permit parking plan.[146] The court stated:

> The discrimination made by the Cambridge regulation is based rationally on the use or non-use of a motor vehicle. A resident who parks near his home is not using his automobile, whereas a person who parks in an area away from his home has used his vehicle and thus has contributed to the problems which the Cambridge regulation seeks to address. The rational distinction made by the Cambridge regulation is founded on vehicle use. Place of residence is merely a reasonable means of measuring that use.[147]

Why was there a contrary result at the state court level in *County Board v. Richards*?[148] What persuaded the Virginia Supreme Court that "the classification created by this ordinance bears no reasonable relation to its stated objectives and . . . on its face offends the equal protection clause of the Fourteenth Amendment"?[149]

Perhaps further examination will reveal a particularly arbitrary aspect of the Arlington plan which is absent in the Cambridge plan. As discussed previously, the Cambridge ordinance allows any Cambridge resident who owns vehicles principally garaged in Cambridge to obtain a permit sticker authorizing parking in any "parking-by-permit-only" zone throughout the city. The Arlington ordinance, on the other hand, permits only those residents of the limited area covered by the plan to obtain a parking sticker, which is effective only within the same limited area. Respondent Richards in *County Board v. Richards* argued that the particular inequity of the Arlington plan was that the plan failed to treat all citizens alike, even within the same neighborhood.

> Rudolph Richards, although living on a street not under the plan, lives in the identical neighborhood covered by the plan. His home is one block

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[145] Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (citations omitted).
[146] Commonwealth v. Petralia, 77 Mass. Adv. Sh. 868, 362 N.E.2d 513, 518 (1977).
[147] *Id.*
[148] County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231, (1977).
[149] 217 Va. at ____, 231 S.E.2d at 235.

> away from the streets reserved for his neighbors (Rec. 81). Richards does not have parking restrictions in the public street in front of his house (Rec. 91). Anyone can park in front of his house including his neighbors privileged by the Plan. Richards cannot park in front of his said neighbor's house.[150]

This set of facts could not occur under the present Cambridge plan. Under an earlier Cambridge parking plan,[151] which did not authorize all city residents to obtain a permit (like the Arlington plan), Mr. Richards' situation was a possibility. It is noteworthy that the first Cambridge plan was dismissed as unconstitutional by the Third District Court of Eastern Middlesex County, Massachusetts, on the grounds that the plan discriminated impermissibly among Cambridge residents in violation of the equal protection clause of the Fourteenth Amendment.[152] That court indicated that a permit program available to all Cambridge residents would be valid,[153] and the traffic director thereafter altered the permit parking program to its present form.[154]

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[150] Respondents Brief in Opposition to Certiorari at 6, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[151] St. 1972, ch. 340 appears literally to authorize stickers only for persons residing in a specified residential area where parking is authorized by permit only. In 1974 the Third District Court of Eastern Middlesex ruled that a regulation which did not authorize all city residents to obtain a sticker discriminated impermissibly among Cambridge residents in violation of the equal protection clause of the Fourteenth Amendment. That court indicated that a parking program available to all Cambridge residents would be valid. Commonwealth v. Sorett, (Middlesex District Court, Mass., 1974) (unreported opinion reprinted in Brief for the Commonwealth at 71-73, Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)). The traffic director apparently thereafter altered the parking sticker program to make stickers available to all residents of Cambridge who owned vehicles principally garaged in Cambridge. Thus the "earlier" Cambridge plan seems but a different application of the present enactment.

[152] Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 863 n. 6, 362 N.E.2d 513, 516 n. 6 (1977). In Commonwealth v. Sorett, (Middlesex District Court, Mass., 1974) (unreported opinion reprinted in Brief for the Commonwealth at 71-73, Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977)), Judge Arthur Sherman ruled that the then existing parking plan was "violative of the equal protection clause of the Fourteenth Amendment." He went on to state, however:

> It is our view that a Permit Parking Program which permits residents whose automobiles are registered in the City of Cambridge to park on the streets of Cambridge during certain hours but which does not permit residents of other municipalities whose vehicles are not registered in the City of Cambridge to park in such streets would be valid . . . .

Sorett, reprinted in Brief for the Commonwealth at 71-73, Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[153] *Id.*

[154] In its present state the plan provides permits for all Cambridge residents, covering all permit-restricted areas of the city. The court indicated its support of parking limitations as a means of achieving the stated legislative objectives when it stated:

Although not expressly stated in *Commonwealth v. Petralia*,[155] the Massachusetts Supreme Judicial Court found no constitutional infirmity in a scheme such as the prior Cambridge and Arlington plans which limit parking stickers to residents of the restricted area.[156] The court did not expressly rule on the constitutionality of the prior Cambridge plan, as that issue was not properly before it. However, the court did express its opinion as to why the Arlington plan was struck down, and the limiting of stickers to residents of the restricted streets was not viewed as determinative.[157] This view appears to be consistent with the constitutional standard that, "[l]egislative classifications need not be perfect in order to survive a challenge on equal protection grounds."[158] Certainly by this standard, the existence of one possibly inequitable set of circumstances (such as Mr. Richards') would not be sufficient to invalidate the plan.

The Virginia Supreme Court did not find the matter of limiting

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> [I]f the [present] regulation were constitutionally invalid for favoring residents of Cambridge who do not live in the East Cambridge restricted parking area in preference to non-residents, the appropriate judicial remedy might be to *deny parking rights to such residents of Cambridge* as well as to the defendant. Such a solution would achieve the purpose of the regulation better than granting parking rights to everyone by striking down the regulation in its entirety.

Commonwealth v. Petralia, 77 Mass. Adv. Sh. 860, 868 n. 7, 362 N.E.2d 513, 518 n. 7 (1977) (emphasis added).

[155] 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[156] *See* 77 Mass. Adv. Sh. at 868, 362 N.E.2d at 518.

[157] The opinion expressed by the S.J.C. was that the Arlington ordinance's declared purposes were to protect the zone and its residents:

> Those purposes were not founded, if they could have been under State law, on the impact of non-resident parking on regional considerations, such as traffic congestion, air pollution, and the encouragement of public transportation. The opinion accordingly gives no consideration to the possibility that a parking regulation, seemingly favoring residents of an area might be justified on broader considerations than those expressed by the local board.

Id. at 867, 326 N.E.2d at 518.

[158] *Id.* The constitutional standard announced by the Massachusetts Supreme Judicial Court is consistent with that repeatedly announced by the United States Supreme Court:

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.

Whalen v. Roe, 429 U.S. 589, 597 (1977). The Court went on to state that: "'We are not concerned, however, with the wisdom, need, or appropriateness of the legislation.' Olsen v. Nebraska ex. rel. Western Reference and Bond Ass'n., 313 U.S. 236, 246 (1941)." Whalen v. Roe, 429 U.S. at 597 n. 19. *See* McGowan v. Maryland, 336 U.S. 420, 426 (1961): "A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it."

stickers to residents of the restricted streets to be determinative. It based its rejection of the Arlington permit parking plan on the grounds that it is improper to give residents a "parking monopoly in the public streets of their neighborhood;"[159] and that although a statute favoring residents over non-residents may reduce the amount of air pollution, "solutions achieved at the price of invidious discrimination are too dear."[160] These grounds are arguably inconsistent with several recent decisions of the United States Supreme Court. Creation of a "parking monopoly" in certain residential areas cannot be justifiably characterized as *improper* and not related to the goals of neighborhood preservation in light of the Supreme Court's holding in *City of New Orleans v. Dukes*,[161] that creation of a hot dog monopoly is *proper* and rationally related to the goal of preservation of neighborhood character.[162]

In *Dukes* the purpose of the ordinance was to preserve the French Quarter's values as a tourist attraction by excluding hot dog vendors who had not operated in the Quarter for at least eight years. In the permit parking cases, the ordinance is supposed to preserve the residential character of the neighborhoods involved by prohibiting vehicles owned and operated by non-residents from being parked on the streets of the neighborhood. One might argue, however, that although the ordinances are similar in purpose, the *Dukes* ordinance should be subject to a less stringent standard of review[163] since it falls into the category of "economic legislation." While the permit

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[159] County Bd. v. Richards, 217 Va. 645, ___, 231 S.E.2d 231, 234 (1977).

[160] *Id.* at ___, 231 S.E.2d at 235.

[161] 427 U.S. 297 (1977).

[162] *Id.* at 304.

[163] In City of New Orleans v. Dukes, 427 U.S. 297 (1977), the Court stated:

> States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their programs step by step, *Katzenback v. Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to further regulations. See, *e.g. Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). In short the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see *e.g. Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. . . .

City of New Orleans v. Dukes, 427 U.S. at 303-04. The Court in *Dukes* overruled Morey v. Doud, 354 U.S. 457 (1957), the only case in decades in which the Court had held that ordinary state or local legislation dealing with business affairs denied equal protection of the laws. Thus, *Dukes* stands for yet another resounding rejection of the principles of judicial activism set forth in Lochner v. New York, 198 U.S. 45 (1905).

parking ordinances are dissimilar to the *Dukes* ordinance in that they are social rather than economic legislation, this argument must nevertheless fail. The Court stated in *Village of Belle Terre v. Boraas*[164] that with respect to both "economic and *social* legislation . . . legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' "[165]

Whether an ordinance exacts a price "too dear"[166] in relation to its objectives is a legislative judgment, not a judicial judgment, and it is immaterial that the benefits of the ordinance may not have been established to the court's satisfaction.[167] Nonetheless, the Arlington permit parking ordinance serves values no less important than those at stake in *Belle Terre*. There, an incidental infringement on the right of association was not too great a price to pay for preservation of the character of the neighborhood. In *Young v. American Mini Theatres, Inc.*,[168] an ordinance drew a line between adult movie theatres and others and restricted where the former could be operated. The result reached in *Young* indicates that an incidental infringement on First Amendment rights will not be considered too great a price for preservation of the character of the neighborhood. The Court stated, "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed to experiment with solutions to admittedly serious problems."[169]

The Virginia Supreme Court in *County Board v. Richards*[170] did

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[164] 416 U.S. 1 (1974).

[165] *Id.* at 8 (citations omitted) (emphasis added). As the petitioners in County Bd. v. Richards, 217 Va. 645. 231 S.E.2d 231 (1977) argued with respect to the commuter's evidence at trial:

> [E]ven if they had shown that the ordinance had been a failure, that it was wholly unnecessary — which they did not — such a showing would be relevant . . . only if *Lochner v. New York* [198 U.S. 45 (1905)] were still good law. In *Whalen v. Roe* [429 U.S. 589 1977)] the court said that contrary to the holding of Lochner 'State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.' [Whalen v. Roe, 429 U.S. at 597].

Petitioner's Brief for Certiorari at 15, County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977).

[166] County Bd. v. Richards, 217 Va. 645, ____, 231 S.E.2d 231, 235 (1977).

[167] Whalen v. Roe, 429 U.S. 589, 597 (1977).

[168] 427 U.S. 50 (1976).

[169] *Id.* at 71. *See* Comment, *Young v. American Mini Theatres, Inc.: The War on Neighborhood Deterioration Leaves First Amendment Casualty*, 6 ENV. AFF. 101, 112 (1977).

[170] 217 Va. 645, 231 S.E.2d 231 (1977).

not limit its review to whether the classification was rational in relation to the objectives of the ordinance. Instead it engaged in a balancing of the personal inequities and social benefits of the ordinance and concluded that the ordinance exacted a price "too dear."[171] The Virginia decision may be criticized on the basis that such balancing exceeds the proper scope of review. The Supreme Court has repeatedly renounced the past era of judicial activism.[172] The Court maintains that its role is not legislative, and that under the minimum rationality standard of review it is immaterial whether the challenged legislation seems unnecessary or unwise.[173]

VI. Conclusion

A constitutional analysis of *Commonwealth v. Petralia*[174] and *County Board v. Richards*[175] compels the conclusion that the permit parking plans do not violate the equal protection clause of the Fourteenth Amendment. Since classification on the basis of residency is not traditionally suspect, and since the permit parking plans do not abridge the fundamental right to travel, the strict scrutiny standard of review is not triggered. The plans withstand minimum rationality review: the legislative classification on the basis of residency is rationally related to the legitimate state objectives of air pollution control and preservation of the residential character of neighborhoods. Thus, the Supreme Court's reversal of the Virginia decision was appropriate.

In reversing the Virginia court, the Supreme Court once again reminds reviewing courts that it is unacceptable to overstep judicial bounds and intrude into an area of legislative judgment. Under minimum rationality review the wisdom of challenged legislation is not at issue. Yet it is hardly difficult to understand why the permit parking plans would be considered unwise by some. Many dislike

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[171] This balancing test may be appropriate in a case involving a First Amendment challenge such as Young v. American Mini Theatres, 427 U.S. 50 (1976). County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977) involved no such First Amendment challenge. As well, a balancing test is arguably appropriate in an equal protection challenge which successfully invokes the right to travel. *See* Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117, 126-27 (1975); Comment *The Right to Travel—Quest for a Constitutional Source*, 6 Rut.-Cam. L. J. 122, 134-35 (1974). Since the court in County Bd. v. Richards, 217 Va. 645, 231 S.E.2d 231 (1977), never even acknowledged the right to travel argument, such a justification of the balancing test cannot be made.

[172] See note 165, *supra*.

[173] *Id.*

[174] 77 Mass. Adv. Sh. 860, 362 N.E.2d 513 (1977).

[175] 217 Va. 645, 231 S.E.2d 231 (1977).

the personal inconvenience attendant to such restrictions. Many simply resent what they feel to be unfair and unnecessary governmental intervention. Such attitudes will not be easily changed and, unfortunately, may prove to be an impediment to the achievement of a clean, healthy environment. Certainly the adoption of any transportation control strategy will inconvenience selected individuals; indeed, any strategy is "bound to come between the citizen and his automobile."[176] As the Second Circuit stated with respect to New York clean air legislation:[177]

> We are aware that enforcement of the air quality plan might well cause inconvenience and expense to both governmental and private parties, particularly when a congested metropolitan community provides the focal point of the controversy. But Congress decreed that whatever time and money might otherwise be saved should not be gained at the expense of the lungs and health of the community's citizens . . . .[178]

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[176] South Terminal Corp. v. EPA, 504 F.2d 646, 654 (1st Cir. 1974).

[177] Proposed Transportation Control Plan for the Metropolitan New York City Area. See Friends of the Earth v. EPA, 499 F.2d 1119 (2d Cir. 1974), for a detailed discussion of the history of New York's steps toward compliance with the Clean Air Act, 42 U.S.C. §§ 1857a-1857l (1970) (as amended and renumbered 95 P.L. No. 95, 91 Stat. 685 (1977)).

[178] Friends of the Earth v. Carey, 535 F.2d 165, 179 (2d Cir. 1976).