NOTES

Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?

Elizabeth Goud Patterson

Faced with the pressures of rapidly increasing population, industrial expansion, and real estate development, many communities have ceased to view growth as a benefit and are seeking ways to direct or control it. Recent surveys have shown that 45 percent of Americans are dissatisfied with the size of their community,[1] and 54 percent feel that population and industrial growth in the area in which they live should be regulated.[2] The dissatisfaction with urban growth indicated by these figures is particularly strong in the faster-growing states.[3] Associations to discourage development and growth have been formed in at least Oregon and New Mexico,[4] and anti-growth candidates have been elected to local and state office in Colorado, Arizona, California, and Florida.[5]

1. Sundquist, *Europe Stops the Urban Swarm*, NATION, July 20, 1974, at 39 (reporting a poll taken for the Commission on Population Growth and the American Future). Most of the persons dissatisfied with their community indicated a preference for a smaller place. Only 39 percent of those living in large cities were satisfied with the size of the city.

2. *Regulate Growth, Most Say*, Arizona Daily Star, Dec. 2, 1974, § B, at 7, col. 5 (reporting a national opinion survey). Similar results were reported as to growth control on a global scale. A majority of 64 percent responded affirmatively to the question: "Do you yourself believe that sooner or later world population and economic growth will have to be regulated to avoid serious shortages, or not?"

3. ROCKEFELLER BROTHERS TASK FORCE, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH 13 (W. Reilly ed. 1973) [hereinafter cited as ROCKEFELLER REPORT].

4. *The Great Wild Californicated West*, TIME, Aug. 21, 1972, at 15.

5. Barnes, *If It's Progress, We Don't Want It*, NEW REPUBLIC, May 4, 1974, at 10; Gilman, *Cactus Power Spreads Its Roots*, Arizona Daily Star, June 9, 1974, § E, at 1; Leary, *Reports & Comment—California*, THE ATLANTIC, Nov. 1973, at 17. According to Gilman, *supra*, controlled growth sympathizers in the city of Tucson may number more

Traditionally, Americans have subscribed to the idea that "bigger is better" and have based local growth policies on chamber of commerce principles;[6] more industry and business meant more jobs and economic progress for the community as a whole.[7] Cities and their residents have found, however, that growth is a mixed blessing which creates new and serious problems of its own.[8] Demand for municipal services increases at a rate beyond what can be efficiently provided, causing levels of service to decrease while costs to both the city and the taxpayer rise.[9] The planning function is often unable to keep pace with the city's growth, resulting in haphazard location and design of new developments.[10] Mass transit becomes correspondingly more difficult because of the lack of nodal development.[11] Growth brings increases in per capita crime, pollution, traffic congestion, mental illness, and family breakdown and shortages of vital resources such as water and energy.[12] High demand for housing often results in decreased competition among builders, resulting in large amounts of housing which is marginal both in quality and in style.[13] In

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than one-half of the city's population of 300,000. The ROCKEFELLER REPORT, *supra* note 3, at 34, tells of "[f]our successful candidates for local office in Dade County, Florida, who banded together as the Committee for Sane Growth, [seeking] to solve the paradox of 'the more people who come to share our good life, the less good it becomes.'"

In addition to the election of candidates supporting growth control, the popular mood can be seen in referendum results, such as the heavy vote by Coloradoans to bar the use of state and Denver city funds for the 1976 Winter Olympic Games. See *id.* at 35, 44 (the leader of the movement to keep the Olympics out of Colorado, Richard Lamm, was elected Governor of the state in 1974). A number of growth control measures in California have been instituted through initiative measures. *See* Leary, *supra* at 17.

6. ROCKEFELLER REPORT, *supra* note 3, at 14; *see* Morgan, *Running Out of Space*, HARPER'S, Sept. 1973, at 59.

7. Morgan, *supra* note 6, at 60; *Drive to Curb Growth in the U.S.—Its Impact*, U.S. NEWS & WORLD REP., Jan. 15, 1973, at 30-32.

8. Ehrlich, *Introduction to Population Symposium*, 23 HASTINGS L.J. 1345, 1351 (1972); *see* ROCKEFELLER REPORT, *supra* note 3, at 33-36; Train, *The Quality of Growth*, 184 SCIENCE 1050 (1974).

9. Lamm, *Is Bigger Also Better?*, NEW REPUBLIC, June 5, 1971, at 17, 19; Morgan, *supra* note 6, at 60; Singell, *Optimum City Size: Some Thoughts on Theory and Policy*, 50 LAND ECONOMICS 207, 208 (1974); Note, *The National Land Use—Environmental Problems: Legal and Pragmatic Aspects of Population Density Control*, 43 U. CIN. L. REV. 377, 379-80 (1974).

10. W. Woods, Problems in Urban Growth Control, Feb. 12, 1974 (unpublished work on file with the University of Arizona College of Law); *see* Leary, *supra* note 5, at 17; Train, *supra* note 8, at 1051. "What creates the sense of overcrowding and congestion is not simply the number of people who live and work in our urban areas, but rather the fact that their jobs, homes, shopping centers, and recreation areas are strewn like debris across the length and breadth of the landscape." *Id.* at 1051.

11. W. Woods, *supra* note 10.

12. Gilman, *supra* note 5, at 1; Karnow, *Running Out of Room*, NEW REPUBLIC, Apr. 20, 1974, at 7; Lamm, *supra* note 9, at 17; Sundquist, *supra* note 1, at 39; *The Great Wild Californicated West*, *supra* note 4, at 15.

13. W. Woods, *supra* note 10; *see* Barnes, *How to Use Land*, NEW REPUBLIC, Sept. 21, 1974, at 10, 11. Petaluma, California, city manager Robert H. Meyer said that during the time when the Petaluma growth control ordinance, see text accompanying notes 202-204 *infra*, was in operation: "We were getting better housing. Knowing they were in competition with others, builders were more generous with open space and bicycle paths. They provided better treatment of creeks. They were encouraged to provide lower-cost housing." Barnes, *supra* at 11.

short, the quality of life declines, and concurrently, the ability of the muncipality to cope with the problems diminishes.

So far, the state and federal governments have failed to treat effectively the problems of excessive growth. Only three states have legislation restricting development which is potentially harmful to the environment, which does not have adequate services available, or which does not conform with state land-use plans.[14] Although federal legislation is being considered which would encourage states to enact land-use controls, it is presently stalled in Congress.[15] In the absence of federal or state management of land use and population distribution, municipalities desiring growth control have had to choose between local controls or none at all, and a number of them have opted in favor of local controls. Such controls have typically gone beyond previously accepted forms of regulation[16] and have been a subject of much controversy among the population at large and in the legal profession.[17]

Much of the legal discussion has centered on the constitutional right to travel, the contention being that growth control statutes unconstitutionally infringe this right.[18] For example, in *Construction Industry Association v. City of Petaluma*,[19] a federal district court in California recently ruled that a municipal attempt to control growth by limiting the number of housing starts violates the right to travel. Recent Supreme Court decisions, however, suggest that municipalities may, within constitutionally acceptable parameters, control their own growth.

14. FLA. STAT. ANN. §§ 380.05-.06 (1974), provide for naming "areas of critical state concern" which will be subject to state-approved land-use regulations and place restrictions on "developments of regional impact." HAWAII REV. STAT. §§ 57-1, 205-2 to -12 (supp. 1974), provide for the development of urban design plans by appropriate counties to facilitate quality design in future development and construction, both public and private, and further provide for the zoning of all lands in the state as urban, rural, agricultural, or conservation. VT. STAT. ANN. tit. 10, §§ 6001-89 (Supp. 1974), provide for the issuance of permits for developments of a certain size or developments above a certain elevation based on compliance with a state land-use plan and numerous other criteria. Other states are considering similar measures. For instance, 11 land-use bills were introduced in the Colorado legislature last year. Barnes, *supra* note 5, at 11.

15. Following passage of national land-use legislation by the Senate during the 1974 session, the House of Representatives refused to consider the bill. *A Giant Step Backward*, TIME, June 24, 1974, at 76; *Land Use*, NEW REPUBLIC, June 22, 1974, at 9. The measure was reconsidered during the 1975 session by the House Interior Committee, which voted against reporting the bill to the floor. Arizona Daily Star, July 16, 1975, § A, at 12, col. 8-9.

16. See text accompanying notes 198-247 *infra*.

17. *See* ROCKEFELLER REPORT, *supra* note 3, at 88-100; Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973); *Growth: Not So Fast!*, NEWSWEEK, Aug. 13, 1973, at 80; Leary, *supra* note 5, at 17; Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development*, 57 IA. L. REV. 126 (1971).

18. Note, *Local Government—City Size Limitation—Municipal Government Attempts to Curtail Growth May Violate Right to Travel*, 60 GEO. L.J. 1363 (1972); Note, *The Right to Travel and its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971); Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

19. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975). The Ninth Circuit held that the builders' association lacked standing to assert potential residents' right to travel.

This Note will demonstrate this thesis by examining the nature and scope of the right to travel, especially as this right is applied to migration and settlement in a new community. Current standards for judging right to travel claims, particularly under the due process and equal protection clauses, along with judicial attitudes toward land-use control, will be discussed and applied to several types of growth control regulation. Although it is conceivable that migration could receive constitutional protection via the commerce clause, such analysis will not be attempted here due to the scarcity of legal authority linking migration to the commerce clause.[20] Whether or not growth-restricting laws will stand in the face of constitutional attack depends on the construction given to the right to travel and the weight given to problems which such laws attempt to solve.

CONSTITUTIONAL SOURCE OF THE RIGHT TO TRAVEL

Although a constitutional right to travel has long been recognized,[21] it is nowhere expressly guaranteed in the Constitution. Court decisions and commentators have variously ascribed the source of the right to the commerce clause,[22] the privileges and immunities clause of article IV, section 2,[23] the privileges and immunities clause of the fourteenth amendment,[24] and the due process clause of the fifth and fourteenth amendments.[25] In some of its more recent opinions, however, the Supreme Court has expressly refrained from identifying the source, since "[a]ll have agreed that the right exists."[26] This omission may have been justified in the particular cases since they involved clearly protected aspects of the right to travel.[27] The validity of growth control measures, however, may turn on relatively untested aspects of the right to travel:

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20. *See* discussion note 43 *infra*.
21. United States v. Guest, 383 U.S. 745, 757 (1966).
22. Edwards v. California, 314 U.S. 160 (1941).
23. United States v. Wheeler, 254 U.S. 281, 297-99 (1920); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823).
24. Colgate v. Harvey, 296 U.S. 404, 429 (1935); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Hague v. CIO, 101 F.2d 774 (3d Cir. 1939), *modified on other grounds*, 307 U.S. 496 (1939); Paley v. Bank of Am. Nat'l Trust & Sav. Ass'n, 159 Cal. App. 2d 500, 324 P.2d 35 (Ct. App. 1958); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405.
25. Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958); Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 185 (1965).
26. United States v. Guest, 383 U.S. 745, 759 (1966); *see* Oregon v. Mitchell, 400 U.S. 112, 237 (1970) (Brennan, J., concurring in part); Shapiro v. Thompson, 394 U.S. 618, 630 (1969).
27. These cases involved movement through a state in the course of interstate travel or migration from one state to another. Since the grounds of decision rested on the impermissibility, under the equal protection clause, of statutory classifications based on having recently traveled, it was unnecessary to determine the constitutional provision giving rise to the right to travel.

whether intrastate travel is protected, whether indirect burdens on the right are permissible, and whether the right to migrate to a specific location is given the same protection as the right to ingress and egress. The constitutional basis of the right is essential in making determinations such as these.

The Articles of Confederation made specific provision for the right to "ingress and regress to and from" the various states. This clause, however, was not included in the Constitution,[28] and it has been suggested that the provision was viewed as needless surplusage, since its content was embodied elsewhere in the document.[29] This embodiment, however, has never been satisfactorily located.[30] A more plausible explanation of the omission might be found in the strong belief in natural, or fundamental, rights which prevailed in the late 18th century.[31] According to the thinking of the times, a government based on consent of the governed had no authority to abridge the natural rights possessed by the people. It was unnecessary to formally reserve such rights to the people in the text of the Constitution since that document could give to the federal government no power to abridge a natural right.[32] This view is sup-

28. The privileges and immunities clause was taken from the Articles of Confederation by the Pinckney draft, which completely omitted the guarantee of "free ingress and regress." There was no debate about the omission at the Constitutional Convention. Z. CHAFEE, *supra* note 25, at 185-86; *see* J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 345, 481 (G. Hund & J. Scott eds. 1970).

29. Z. CHAFEE, *supra* note 25, at 185.

30. *Id.* at 185-87. Chafee dismisses the commerce clause and the fourteenth amendment privileges and immunities clause, preferring to lodge the right within the protections of the due process clause. Although this basis for the right was eventually recognized by the Supreme Court, it is not an altogether satisfactory explanation. It cannot explain the omission from the original Constitution, for there is no due process clause in the Constitution itself. Further, the only due process clause existing for the first 100 years of the nation's history was confined in application to the federal government, whereas infringement of the right to interstate travel was generally by action of a state.

31. *See generally* DECLARATION OF INDEPENDENCE; C. BECKER, THE DECLARATION OF INDEPENDENCE (1966); E. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" (1953); C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1766 (1966).

32. THE FEDERALIST No. 84, at 578 (J. Cooke ed. 1961) (A. Hamilton). *See generally* Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENGLAND L. REV. 215 (1972). The debate which preceded ratification of the Constitution and the insistence of some states on the inclusion of a bill of rights permit the inference that not all Americans of the post-revolutionary period accepted the Jeffersonian political philosophy based on natural rights and consent of the governed. Such an inference is erroneous, however, for the premises of the Jeffersonian philosophy were "commonly taken for granted." C. BECKER, *supra* note 31, at 26. The basis for the opposition to the Constitution was, rather, a distrust of centralized power. Natural rights might inhere in the people, but only insofar as they were not subverted by a malign and powerful government. Said one antifederalist writer,

> When a building is to be erected which is intended to stand for ages, the foundation should be firmly laid. The Constitution proposed to your acceptance is designed, not for yourselves alone, but for generations yet unborn. The principles, therefore, upon which the social compact is founded, ought to have been clearly and precisely stated, and the most express and full declaration of rights to have been made. But on this subject there is almost an entire silence.

THE ANTIFEDERALIST No. 84, at 242, 243-44 (M. Borden ed. 1965) (originally ascribed to T. Treadwell but possibly attributable to R. Yates). *See* J. MAIN, THE ANTIFEDERALISTS (1961).

ported by the early cases of *Corfield v. Coryell*[33] and *United States v. Wheeler*.[34] Interpreting the privileges and immunities clause of article IV, these decisions held that there are certain rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[35] One such right, according to the Supreme Court, was the right to reside peacefully within a state, to travel freely therein, and to have free ingress and egress.[36] It thus being established that the right to travel was fundamental to the citizens of each state and protected against the state government, it followed that the state must afford the same protection to citizens of the other states, as required by the privileges and immunities clause of article IV, section 2.[37]

The right to travel through the various states also found early support in the concept of federalism. In early Supreme Court cases, the idea was advanced that the right to pass through any state in the Union was fundamental to a federal system of government.[38] This result was necessitated by the requirements of administering a federal government,[39] as well as by the need for harmony among the states and a proper feeling of unity.[40] The federalism rationale is closely related to the privileges and immunities doctrine, since that doctrine was intended to promote a feeling of unity and harmony among the people of the different states.[41] The actual source, then, of the right to travel appears to lie in concepts which were viewed as basic at the time this nation was born, inalienable personal rights and fundamentals of a federal system.

As belief in natural rights waned in the late 19th century,[42] the Court attempted to tie the right to travel to express provisions of the

33. 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
34. 254 U.S. 281 (1920).
35. Corfield v. Coryell, 6 F. Cas. 546, 551 (No. 3230) (C.C.E.D. Pa. 1823); *accord*, United States v. Wheeler, 254 U.S. 281, 293 (1920); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 76 (1872). This principle was quoted in connection with an interesting application of the right of ingress in Worthy v. United States, 328 F.2d 386 (5th Cir. 1964). There, the court overturned a conviction for unlawfully entering the United States without a valid passport on grounds that the government cannot subject to a criminal penalty a citizen's fundamental right of free ingress to his country. *Id.* at 394.
36. United States v. Wheeler, 254 U.S. 281, 293 (1920); Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823).
37. United States v. Wheeler, 254 U.S. 281, 294 (1920); Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823).
38. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).
39. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43-45 (1867).
40. Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).
41. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); ARTICLES OF CONFEDERATION art. IV; THE FEDERALIST No. 80, at 537 (J. Cooke ed. 1961) (A. Hamilton).
42. *See generally* C. BECKER, *supra* note 31.

Constitution rather than rely on the abstract concept of fundamentalness. These provisions were the Bill of Rights and the libertarian Civil War amendments, then recently added. The right was most often spoken of as a privilege and immunity of national citizenship under the fourteenth amendment,[43] and later, as a liberty protected by the due process clause of the fifth amendment.[44] No great departure from previous theory was entailed by the use of these two clauses since a fifth amendment liberty is, practically speaking, a fundamental personal right,[45] and the Court has confined fourteenth amendment privileges and immunities to

43. Oregon v. Mitchell, 400 U.S. 112, 285 (1970) (Stewart, Blackmun & Burger, JJ., concurring in part); Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, Black & Murphy, JJ., concurring); *id.* at 181 (Jackson, J., concurring); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Kurland, *supra* note 24, at 415-18.

In one case, a majority of the Court extended constitutional protection to travel through the commerce clause, with four concurring justices arguing that the privileges and immunities clause was the proper basis. Edwards v. California, 314 U.S. 160 (1941). Nonetheless, the commerce clause rationale should probably be given little weight in an overall inquiry as to the source of the right. This case did not purport to protect travel or migration itself, but rather the transportation of persons interstate, which had earlier been recognized as a form of commerce in other contexts. *See* Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308 (1913). Interstate travel has also been recognized as a form of commerce in the context of public accommodations. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). It is quite another thing, however, to regard travel as commercial in nature for all purposes, thus limiting the state police power to enact laws affecting these activities. *See, e.g.*, Campbell v. Hussey, 368 U.S. 297 (1961); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); Kelly v. Washington, 302 U.S. 1 (1937).

The problems become apparent when attempting to analyze noncommercial regulations, such as those limiting growth, under traditional commerce clause standards. The test for determining the constitutional validity of a state police power regulation which affects interstate commerce was recently stated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970): "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Planning for land use and dealing with other urban problems are, of course, legitimate local interests traditionally left to the affected area for regulation. The case law would seem to invalidate such regulations only when the free flow of commerce across state lines is materially restricted, *see* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945), or where the legislation is in an area requiring national uniformity of regulation. *See* Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Neither of these conditions would appear to be met at least until a number of growth restricting ordinances had been passed in a state, thus imposing a more serious burden on the ability to migrate into the state.

44. Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958).

45. The theory that the right to travel is based on natural rights, and is now protected by the due process clause, was adopted by the Circuit Court for the District of Columbia in Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955). There the court held:

> The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that "No person shall be . . . deprived of . . . liberty . . . without due process of law."

Id. at 941. *See* Snyder v. Massachusetts, 291 U.S. 97 (1934) (stating that the due process clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105).

those rights which are fundamental to the federal system of government.[46] The real advantage of attributing the right to travel to specific constitutional provisions, however, is in making available for analysis the traditional judicial standards for determining when a violation of those provisions has occurred.[47] This in turn makes possible a determination of what aspects of travel are protected.

Movement and Migration as Protected Forms of Travel

Attention must initially focus on the distinction between movement and migration, each of which is a form of travel to which constitutional protection has been granted.[48] The case law relating to migration is far more scarce than that dealing with movement, yet it is the migration aspect which is crucial in analyzing the constitutionality of municipal growth control ordinances. Insofar as such laws have an impact on persons traveling to a community, it falls on those seeking to establish a residence there, rather than those whose stay in the city is of limited duration.

The privileges and immunities clause of the fourteenth amendment, under its earliest interpretation in the *Slaughterhouse Cases*,[49] was said to include the right to "become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."[50] Later cases added the right to pass freely through any state in the course of travel[51] and the right to enter public lands.[52] With the exception of the latter, these are the same activities which had received protection as rights fundamental to federalism.[53]

Due process analysis in the right to travel area has been applied by the Court only under the fifth amendment to cases involving foreign movement.[54] Nevertheless, the constitutional liberty of travel should not be limited to the right to leave and re-enter the country since the fundamental right which the constitutional liberty embodied was far more

46. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 80 (1872).
47. See text accompanying notes 145-173 *infra*.
48. *See* Dunn v. Blumstein, 405 U.S. 330, 338 (1972).
49. 83 U.S. (16 Wall.) 36 (1872).
50. *Id.* at 80.
51. Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, Black & Murphy, JJ., concurring); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).
52. Twining v. New Jersey, 211 U.S. 78, 97 (1908).
53. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).
54. In a series of cases challenging State Department regulations prohibiting the issuance of passports to members of Communist organizations and for travel to Cuba, the Supreme Court held that denial of a passport is an effective denial of the right to travel in violation of the due process clause of the Constitution. Zemel v. Rusk, 381 U.S. 1 (1965) (finding the denial justified by national security considerations); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

inclusive. It will be recalled that *Wheeler* and *Corfield* described the natural right as including ingress and egress and intrastate mobility.[55] Language in *Kent v. Dulles*[56] likewise indicated that freedom to travel within national frontiers was subject to the same due process protection as international movement.[57]

On the other hand, the due process clause has never been expressly employed to protect migration and settlement. The closest the Supreme Court has come to this use was in *Shapiro v. Thompson*,[58] where the Court stated that "constitutional concepts of personal liberty," as well as the nature of the Federal Union, support the right to travel.[59] Since the outcome of *Shapiro* had the result of protecting migration, it would seem to be implicit in this statement that migration, as well as movement, is encompassed in constitutional liberty.[60] It should also be noted that the *Wheeler* and *Corfield* cases defined the natural right of travel to include establishing a residence within a state.[61] The categorization of migration as a fundamental personal right is consistent with American history and culture. The nation was populated primarily by migrants who crossed the ocean, and then the continent, seeking escape from tyranny or personal failure, and seeking new opportunities in a new land.[62] Even after the passing of the frontier, mobility has remained a constant in American society, which has found a place in the vernacular[63] and has received comment from statesmen[64] and poets.[65] The ability to move to a new

55. United States v. Wheeler, 254 U.S. 281, 293, 297-98 (1920); Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823).

56. 357 U.S. 116, 126 (1958).

57. *Id.* at 125-26.

58. 394 U.S. 618 (1968).

59. *Id.* at 629.

60. Lower courts seem to agree. *See* King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Eggert v. City of Seattle, 81 Wash. 2d 840, 845-46, 505 P.2d 801, 804 (1973). Justice Douglas, however, believes that interstate migration is protected only under the fourteenth amendment privileges and immunities clause, and that only movement itself merits due process protection. Aptheker v. Secretary of State, 378 U.S. 500, 519-520 (1964) (Douglas, J., concurring); Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring). *Compare* Bell v. Maryland, 378 U.S. 226, 250 (1964) (Douglas, J., concurring in part), *with* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 270 (1974) (Douglas, J., concurring).

61. United States v. Wheeler, 254 U.S. 281 (1920); Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

62. *See* C. GOODRICH, B. ALLIN, H. BRUNCK, D. CREAMER, M. HAYES, C. THORNTHWAITE, F. TRYON & R. VANCE, MIGRATION AND ECONOMIC OPPORTUNITY: THE REPORT OF THE STUDY OF POPULATION REDISTRIBUTION 503 (1936) [hereinafter cited as C. GOODRICH]. *See generally* G. PIERSON, THE MOVING AMERICAN (1972); D. FEHRENBACHER, THE ERA OF EXPANSION: 1800-1848 (1969); E. PAXSON, HISTORY OF THE AMERICAN FRONTIER 1763-1893 (1924).

63. G. PIERSON, *supra* note 62, at 47-57, 254.

64. For example, one of the colonial governors remarked that the American settlers "acquire no attachment to Place: But wandering about Seems engrafted in their Nature; and it is a weakness incident to it, that they should for ever imagine the Lands further off, are still better than those upon which they have already Settled." G. PIERSON, *supra* note 62, at 5.

65. Stephen Vincent Benet's poem "Western Star" begins:

town, find a new job, and start a new life has been an important road to opportunity in America.[66] These social and historical factors support the limited legal authority indicating that the right to migrate is more than an incident of federalism, but is rather a fundamental element of American society which is protected to each individual.[67]

Is There a Right to Travel to a Particular Place?

Assuming that constitutional protection is afforded to both movement and migration does not necessarily mean that there is a right to travel anywhere that one might wish. It could instead refer to the impermissibility of confining the individual to the town in which he lives, as was in effect done to the poor by early English and American laws.[68] Or it could simply be prohibitive of the erection of barriers to entry into the state, such as customs and immigration regulations. This point is critical in determining the validity of municipal growth control ordinances, which at most affect migration into a city or town. Unless the migrant's choice of the town in which he will settle is constitutionally protected, a law restricting or prohibiting only migration to a certain town would not

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Americans are always moving on.
It's an old Spanish custom gone astray,
A sort of English fever, I believe,
Or just a mere desire to take French leave,
I couldn't say. I really couldn't say.
But, when the whistle blows, they go away.
Sometimes there never was a whistle blown,
But they don't care, for they can blow their own
Whistles of willow-stick and rabbit bone,
Quail-calling through the rain
A dozen tunes but only one refrain,
"We don't know where we're going, but we're on our way."

66. G. PIERSON, *supra* note 62, at 12; ROCKEFELLER REPORT, *supra* note 3, at 18; P. SCHWIND, MIGRATION AND REGIONAL DEVELOPMENTS IN THE UNITED STATES 1950-1960, at 21 (1971) (U. of Chicago Dept. of Geography Research Paper No. 133); *see* Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

67. There are, of course, arguments to the contrary. The settlement of the American continent occurred at a time when vast amounts of land were available and it was important to the economy that these areas be made productive. This migration was supported by a strong national mood, approaching a religious fervor, for expanding the dominion of the United States over the entire continent. Moreover, it is obvious that even at that time not all persons had a right to seek new homes and new opportunities. Several early Supreme Court decisions stated that cities had a right to pass laws forbidding the entrance of convicts, fugitives, paupers, idiots, lunatics, lewd women, and persons likely to become a public charge. Hannibal & St. Joseph R.R. v. Husen, 95 U.S. 465 (1878); Henderson v. Wickham, 92 U.S. 259 (1876); Passenger Cases, 48 U.S. (7 How.) 283 (1849); Mayor of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

The opportunity to start a new life has not always been regarded by the Supreme Court as fundamental in other contexts. In United States v. Kras, 409 U.S. 434 (1973), the Court held that the interest in obtaining a new start in life through bankruptcy proceedings did not rise to a constitutional level. Similarly, starting a new life through divorce was found to be an insufficient interest on which to base invalidation of a durational residency requirement for divorce in Sosna v. Iowa, 95 S. Ct. 553 (1975).

68. Z. CHAFEE, *supra* note 25, at 163-67; *see* Shapiro v. Thompson, 394 U.S. 618, 628 n.7 (1968); Mayor of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

be vulnerable to a right to travel challenge. Since there is no case law dealing expressly with a right to travel to a particular destination, the answer must be inferred from the purposes underlying the right to travel and its constitutional sources.

Insofar as the right to travel is based on the privileges and immunities clause of the fourteenth amendment, it is difficult to perceive how protection could be extended to the traveler's choice of destination within the state. This clause is limited to protection of rights which are integral to the federal system of government and has received narrow judicial interpretation on the rare occasions on which it has been used.[69] It would appear to protect the migrant only from restrictions against entering or settling in the state, such as those which exist among nations.[70]

The limits of due process protection are much less clearly defined and could reasonably be viewed as encompassing choice of destination. Since this point has not arisen in any case, however, it is necessary to look to analogous areas of the law for indications as to whether destination is protected. The level of protection given intrastate travel provides a basis for analysis. Insofar as a person within a state has a right to move to or settle at some other point within that state, that right must also be accorded to someone without the state.[71] Thus, an interstate traveler has the right to travel to a particular place at least to the same extent that a state allows its own citizens to travel to that place. Protection of intrastate travel may, however, extend beyond that which is sanctioned by the state, and the existence of such a right within the due process concept of liberty is a subject of current debate.[72] Although recent Supreme Court decisions have uniformly referred to the right as a right to interstate travel,[73] the Court has specifically mentioned the possibility of a distinction

69. *See* discussion note 145 *infra.*

70. Although certain functions fundamental to federalism might seem to require travel to a particular place, choice of destination in this circumstance could be protected as a part of the function itself, rather than through a more general protection of travel. It seems more likely that a right to travel protected by concepts of federalism under the narrowly-interpreted privileges and immunities clause is limited to freedom from international-type barriers between states, in line with the original protection of "ingress and regress" by the Articles of Confederation.

71. This conclusion is mandated by the privileges and immunities clause of article IV, section 2. *See* United States v. Wheeler, 254 U.S. 281 (1920); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

72. Note, *Constitutional Law—Residence Requirement for Municipal Employees,* 62 CALIF. L. REV. 436, 438-41 (1974); *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 270 (1974) (Douglas, J., concurring); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied,* 404 U.S. 863 (1971); Simon v. City of New York, 22 Misc. 2d 718, 197 N.Y.S.2d 288 (S. Ct. 1960); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973); Note, *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 591 (1973).

73. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Griffin v. Breckenridge, 403 U.S. 88, 105 (1971); Oregon v. Mitchell, 400 U.S. 112, 237 (1970) (Brennan, White & Marshall, JJ., concurring in part); *Id.* at 285 (Stewart, Blackmun & Burger, JJ., concurring in part); Shapiro v. Thompson, 394 U.S. 618, 638 (1968).

between interstate and intrastate travel only in *Memorial Hospital v. Maricopa County*,[74] where it found no need to decide the issue. The Court did indicate in a footnote, however, that in some circumstances it would be inconsistent to invalidate a regulation as to interstate migrants but allow it to stand as against persons who have migrated from another part of the state.[75] Several lower court decisions have indicated that there is a right to travel intrastate as well as interstate,[76] and it has been suggested that even intraneighborhood travel is protected.[77]

As already noted, the Supreme Court has not yet recognized migration as a due process liberty, much less implied that such liberty extends to migration intrastate. The lower courts which have recognized the right to intrastate migration have uniformly failed to discuss the meaning and scope of such a right.[78] It appears to be assumed that a right to intrastate migration would protect travel from any place in the state to any other place therein.[79] There is generally no discussion of where the plaintiff came from, and the destination has varied from a city[80] to a county[81] or a different school district.[82] Other than that such a right exists, it is impossible from these cases to infer the nature of the intrastate migration right sufficiently to draw any conclusions about free choice of destination for interstate travelers.

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74. 415 U.S. 250, 255-56 (1974).

75. *Id.* at 256 n.9. This case involved a durational residence requirement of 1 year in the county to establish eligibility for free hospital care. Given the state's argument that the purpose of the regulation was to limit free hospital care to those who had paid taxes and had community ties, the Court said it would be inconsistent to allow the regulation to be applied to long-time Arizona residents from other counties, but not to migrants from out of state.

76. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Wellford v. Battaglia, 343 F. Supp. 143, 147 (D. Del. 1972); Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971); Josephine County School Dist. No. 7 v. Oregon School Activities Ass'n, 15 Ore. App. 185, 515 P.2d 431, 437 (1973); Eggert v. City of Seattle, 81 Wash. 2d 840, 845, 505 P.2d 801, 804 (1973); *see* Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968). *But see* Simon v. City of New York, 22 Misc. 2d 718, 197 N.Y.S.2d 288 (S. Ct. 1966).

77. United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971); United States v. Matthews, 419 F.2d 1177, 1194 (D.C. Cir. 1969) (Wright, J., dissenting). It is probable, however, that these cases confused the right to travel with another right protected under the privileges and immunities clause of the fourteenth amendment: the right to use of streets and public places. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Hague v. CIO, 307 U.S. 496, 515 (1939).

78. *See* King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); Josephine County School Dist. No. 7 v. Oregon School Activities Ass'n, 15 Ore. App. 185, 515 P.2d 801 (1973).

79. Intrastate travel could mean a number of different things: travel between metropolitan areas, travel within a certain radius, travel to any part of the state, or travel to all except certain restricted areas.

80. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973).

81. Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973).

82. Josephine County School Dist. No. 7 v. Oregon School Activities Ass'n, 15 Ore. App. 185, 515 P.2d 431 (1973).

A second approach to determining whether choice of destination is a protected part of the right to migrate is through examination of the basis for the right. Generally, the basis for the right to migrate appears to lie in the opportunity to start a new life with better possibilities for social or economic advancement.[83] Insofar as the right is geared to the ability to escape from undesirable circumstances,[84] choice of destination would not be an important facet. In fact, studies have found that destination has a relatively small effect on who moves[85] and that undirected migration does not in fact bring about a satisfactory distribution of population to areas of higher opportunity.[86] It could thus be argued that not every site within a state need be available to migrants in order to fulfill the purpose of the right.

On the other hand, it is obvious that the opportunities sought by some migrants may require a particular destination. A localized job or a type of education not widely available may be sought, or the migrant may have been transferred to an employer's branch in a certain city. At issue is the degree to which the individual's precise desires in changing his place of residence are constitutionally protected. It has already been determined[87] that the basic needs of seeking opportunity and escaping from oppression or personal failure are factors integral to the right; to this degree, then, general needs would be protected. Problematical is the extension of this protection to individual needs, that is, the necessity of providing not just a place where the individual can look to a new opportunity, but a place meeting the particular needs of each migrating individual.[88]

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83. *See* text & notes 62-67 *supra.*

84. Of five migrational purposes identified by G. PIERSON, *supra* note 62, at 10-12, four are primarily related to departure from the present home: (1) expelling misfits and undesirables; (2) escape from some kind of tyranny; (3) escape from debts, reputation, or other personal failures; and (4) dissatisfaction with the progress of one's present location. The fifth, road to a better future, is related to destination, but in a rather indefinite way.

85. G. PIERSON, *supra* note 62, at 179-85.

86. C. GOODRICH, *supra* note 62, at 505-19.

87. See text accompanying note 66 *supra.*

88. These motivations can be extremely varied. In addition to the diversity of economic and social purposes which provide the basic motivation, considerations influencing decisions as to destination include health factors and a variety of environmental amenities, such as climate, housing quality, and city "bright lights." *See* P. SCHWIND, *supra* note 66, at 21-23.

The Supreme Court, in Shapiro v. Thompson, 394 U.S. 618 (1969), made it clear that there is no hierarchy of motivations, some of which are worthy of greater consideration than others. Responding to a state's claim that it needed to protect itself against indigents moving to the state solely for its generous welfare benefits, the Court stated:

> But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others [*sic*] factors, the level of a state's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular state in order to take advantage of its better educational facilities.

Id. at 632.

The only indication of the Supreme Court's view on the inclusion of choice of destination in the right to migrate comes from the *Memorial Hospital* decision.[89] There, the Court found a right to travel violation in a county durational residence requirement. The decision implicitly recognized petitioner's right to travel interstate to a particular county. The point was not specifically discussed, however, and the Court seemed almost unaware that the case expanded the scope of the right to migrate beyond what had been previously recognized. This case may be a harbinger of eventual explicit recognition of choice of destination,[90] or it may later be explained away as influenced by specific concern about invidious discrimination against the poor.[91]

It thus appears that the right to travel actually consists of two separate rights, movement and migration. Constitutional protection of movement as a right fundamental to the individual as well as to federalism is well recognized. It seems clear that movement intra- as well as interstate is encompassed within this guarantee,[92] thus giving rise to some degree of protection for choice of destination. Although the case

89. 415 U.S. 250 (1974).

90. Justice Douglas does argue in his concurring opinion that the Arizona statute applies to a long-term resident who moves from one county to another, as well as an interstate migrant, and is therefore not violative of the right to travel. *Id.* at 270. His focus in this argument, however, is not on the choice of destination aspect, but rather on the fact that the statute is not aimed at interstate travelers. See text accompanying notes 141-43 *infra.*

91. *See* 415 U.S. at 271-74 (Douglas, J., concurring). If there is a right to migrate and settle anywhere within a state, that right is not necessarily unlimited. For instance, it is implicit in the widely-accepted concept of zoning that one cannot live anywhere within a zoned area that he pleases. Similarly, one has no right to live on a particular parcel of property if the owner does not wish to rent or sell to him. Additional limitations could be imposed in order to maximize protection of both the individual's right to migrate and the municipality's interest in the quality of life within its boundaries. For example, choice of migrational destination might be limited to counties or to metropolitan areas. Thus, one would have the right to migrate to the San Francisco Bay Area, but not to live anywhere within that area that he might choose. The right to travel would come into play only when so many of the component towns in the metropolitan area had passed restrictive ordinances that migration to the entire area was inhibited.

92. This conclusion seems clear from the reasoning of Kent v. Dulles, 357 U.S. 116, 126 (1958), which is equally applicable to movement in the intrastate context:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

The heritage upon which the Court draws in this statement began with the 13 independent American states which were themselves viewed as separate sovereignties in many ways, even after the Union was formed. *See, e.g.*, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); Pennoyer v. Neff, 95 U.S. 714 (1877); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). The heritage relied on here can only be the early belief, expressed in *Corfield* and *Wheeler*, that citizens of the several states "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." United States v. Wheeler, 254 U.S. 281, 293 (1920). It thus appears that *Kent* extends to and protects intrastate as well as interstate and foreign travel. For a lower court opinion reaching this conclusion, see Josephine County School Dist. No. 7 v. Oregon School Activities Ass'n, 15 Ore. App. 185, 196 n.5, 515 P.2d 431, 437 n.5 (1973).

law is more scarce as to the constitutional protection of migration, it clearly establishes at least the existence of such a right. The prominent role of migration in American life, both past and present, should establish this right as one guaranteed not only for purposes of federalism, but also as a fundamental right of each individual. Less certain, however, is whether this fundamental right to migrate includes a right to choose one's destination. Recognition of a right to intrastate travel, which could be determinative, is by no means universal and is at best ill-defined. However, the social and historical bases for the right could support the inclusion of choice of destination.

CONSTITUTIONALLY IMPERMISSIBLE BURDENS ON TRAVEL

As the foregoing discussion suggests, the right to travel need not and, indeed, does not preclude all governmental or private[93] acts which affect travel, but only those which burden travel in some constitutionally impermissible way.[94] Even when this burden exists, an offending statute may nevertheless be upheld if it is justified by a sufficiently important state interest.[95] Thus, a court's consideration of a right-to-travel claim would normally consist of two separate inquiries: has the right to travel been burdened in the constitutional sense, and if so, is the state interest sought to be served by the statute sufficiently important to justify the burden.[96] Discussion here will first turn to what constitutes a constitutionally impermissible burden.

Direct Restraints

A statute places a direct restraint on travel when it operates on the incident of travel itself. For instance, a prohibition of travel or a fee charged to travelers would be a direct restraint. It is generally recognized that statutes placing a direct restraint on travel are constitutionally burdensome, and indeed, all of the earlier cases invalidating statutes on

93. According to United States v. Guest, 383 U.S. 745, 759-60, n.17 (1966), the right to travel is secured against private as well as governmental interference.

94. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972). Under the equal protection analysis, the statute may be invalidated where no burden on travel is involved if the classification created by the statute bears no reasonable relation to a legitimate state objective. *See* text accompanying notes 146-60 *infra*.

95. Roe v. Wade, 410 U.S. 113, 154 (1973); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Jones v. City of Opelika, 316 U.S. 584, 593-95 (1942); Hague v. CIO, 307 U.S. 496, 516 (1939).

96. This also involves a shift in the burden of proof. While it is initially necessary for the plaintiff to prove impermissible infringement of the right, once this has been satisfactorily established, the burden shifts to the state to prove that a state interest justifies the infringement. Barnes v. Board of Trustees, 369 F. Supp. 1327, 1337 (W.D. Mich. 1973); Borden v. Selden, 259 Iowa 808, 146 N.W.2d 306, 310 (1966).

right-to-travel grounds involved direct restraints. In most of these cases, the challenged statute denied absolutely the freedom to travel to certain areas. In *Edwards v. California*,[97] for instance, a California statute imposing criminal penalties for bringing a nonresident indigent into the state was invalidated. A more recent series of cases struck down statutes and regulations prohibiting the issuance of passports to members or supporters of Communist organizations.[98]

Another type of direct restraint, invalidated in *Crandall v. Nevada*,[99] is a state tax on all persons leaving the state via railroad or stagecoach. A comparison of *Crandall* with *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines, Inc.*,[100] a recent case upholding an airport head tax, indicates that even a direct restraint on travel is not constitutionally burdensome if it has a legitimate purpose related to enhancing travel opportunities. In *Evansville*, the Court found that a charge by a state or municipality of $1 per commercial airline passenger emplaning at an airport within its jurisdiction was "not a burden in the constitutional sense."[101] Although in form this charge closely resembled the $1 tax invalidated in *Crandall*, the Court distinguished the two charges on their purposes. In *Crandall*, the tax was charged regardless of whether Nevada used the revenue to provide any facilities or services for such passengers; it was a direct tax merely for the privilege of leaving the state.[102] The *Evansville* tax, in contrast, was intended to help defray the cost of a facility provided at public expense to enhance travel.[103] It appears, then, that a direct restraint in the nature of a tax is not burdensome if it is designed to facilitate travel in some way. Whether this analysis is also applicable to statutes denying absolutely the right to travel is uncertain, but it is difficult to conceive of a statute which seeks to facilitate travel by denying it altogether.

Penalty on Travel

In addition to statutes directly restraining travel, those which impose a penalty for exercise of the right to travel have been repeatedly held

97. 314 U.S. 160 (1941). Strictly speaking, *Edwards* was an invalidation not on right to travel grounds but on commerce clause grounds. Although the majority opinion rested its decision on the commerce clause, right to travel overtones are apparent in the opinion. Additionally, the concurring opinions by Justices Douglas and Jackson did rest on right to travel grounds.

98. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

99. 73 U.S. (6 Wall.) 35 (1867).

100. 405 U.S. 707 (1972).

101. *Id.* at 714.

102. *Id.* at 712, 713; Hendrick v. Maryland, 235 U.S. 610, 624 (1915).

103. 405 U.S. at 714.

unconstitutionally burdensome.[104] All cases adopting this rationale have involved durational residence requirements imposed by a state as a qualification for the receipt of welfare benefits, exercise of the right to vote in state elections, or some other privilege offered by the state to its residents. None of the cases showed that any of these requirements actually prevented or deterred travel; but such effect on travel was held to be unnecessary since the penalty alone was found to be an unconstitutional burden.[105]

A penalty was found in *Shapiro v. Thompson*[106] and *Dunn v. Blumstein*[107] as a result of the state's classifying residents according to the length of their stay in the state and denying rights or benefits to those with less than 1 year of residence, thereby impermissibly discriminating against them solely because they had recently exercised their constitutional right to travel.[108] It is clear from the decided cases that a law which discriminates between residents solely on the basis of length of residence may be found to unconstitutionally penalize persons who have recently exercised the right to travel. The parameters of the penalty analysis have not, however, been completely defined, and it is thus unclear whether this rationale encompasses situations other than the discriminatory one just outlined.

In a different constitutional context, the Supreme Court has defined "penalty" as "the imposition of any sanction which makes assertion of [a constitutional right] 'costly.' "[109] The principal requirement of this definition is that a sanction be occasioned by the exercise of the right.[110] In other words, only a law imposing a sanction on the traveler because he has traveled is a penalty. Migration to a new state may be costly because of requirements for a driver's license and automobile registration, higher property taxes, or a tight job market in the new locale;

104. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

105. Shapiro v. Thompson, 394 U.S. 618, 634(1969); *id.* at 650 (Warren, C.J., dissenting); *see* Dunn v. Blumstein, 405 U.S. 330, 339-41 (1972) (explaining *Shapiro*).

106. 394 U.S. 618 (1969).

107. 405 U.S. 330 (1972).

108. The concept of penalty analysis originated in *Shapiro*. There is some similarity between this analysis and the article IV privileges and immunities rationale: the new resident must be treated the same as the old resident in the dispensation of vital government benefits and services. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) (quoting from *Leviticus* 24:22 (King James version): "Ye shall have one manner of law, as well for the stranger as for one of your country.").

109. Spevack v. Klein, 385 U.S. 511, 515 (1967); *accord*, Griffin v. California, 380 U.S. 609, 614 (1965). These cases were based on the statement in Malloy v. Hogan, 378 U.S. 1, 8 (1964), that the fifth amendment self-incrimination clause guarantees the right to remain silent and to suffer no penalty for such silence. In *Griffin*, the Court found that allowing the prosecutor to comment on the refusal of the accused to testify was such a penalty. *Spevack* found an unconstitutional penalty in the disbarment of a lawyer for refusing, on fifth amendment grounds, to testify or produce certain records at a judicial inquiry into his alleged professional misconduct.

110. *See* BLACK'S LAW DICTIONARY 1507 (4th ed. 1968).

however, these are not sanctions because they are not aimed particularly at travelers but are applicable to all persons in the state or locality. They are not imposed because one has traveled. Thus, it appears that in order for a sanction or penalty on travel to exist, the statute must be aimed especially at travelers and must put travelers in a worse position than other persons similarly situated. The Supreme Court appears to have followed this approach in *Village of Belle Terre v. Boraas*,[111] dismissing a right to travel challenge to a restrictive zoning ordinance with the observation that the ordinance was "not aimed at transients."[112] It appears, then, that an element of discrimination is essential to a finding that a statute penalizes exercise of the right to travel.[113]

Another factor which is emerging as significant to penalty analysis is whether the discriminatory regulation affects the traveler's access to basic necessities of life or basic rights. In *Shapiro*, emphasis was given to the vital nature of the welfare assistance being denied by the regulation in question.[114] At the same time, however, the door was left open for avoiding the finding that other more benign waiting period or residence requirements were penalties on travel.[115] It became clear that the "basic" or "vital" nature of the right or benefit denied was a distinguishing feature between durational residence requirements which were unconstitutional penalties on travel and those which were not when the Supreme Court summarily affirmed a decision upholding a 1-year durational residence requirement for reduced university tuition on the ground that no basic necessity of life was involved.[116] This distinction was adopted by numerous lower courts in determining the validity of various durational residence requirements.[117] It has recently received

111. 416 U.S. 1 (1974).

112. *Id.* at 7. *See also* Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972) (noting that a migrant's loss of his driver's license because of a higher age requirement in the new state is not a penalty because the age requirement applies to all residents, old and new).

113. It has been suggested that a penalty on travel might be found in a regulation taking away an opportunity which existed before the person chose to travel. Barnes v. Board of Trustees, 369 F. Supp. 1327, 1335 (W.D. Mich. 1973). This interpretation would not appear to be viable, however, because different states are not required to provide identical services or opportunities.

114. 394 U.S. 618, 627 (1969).

115. 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. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Id. at 638 n.21.

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

117. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973), *aff'd* 95 S. Ct. 553 (1975); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970); Adams v. Superior Court, 12 Cal. 3d 133, 524 P.2d 375, 115 Cal. Rptr. 247 (1974); Place v. Place, 129 Vt. 326, 278 A.2d 710 (1971). *But see* State v. Adams, 522 P.2d 1125 (Alas. 1974) (holding that the nature of the benefit denied is relevant only to judging the

additional tacit approval by the Supreme Court, which stated in *Memorial Hospital v. Maricopa County*[118] that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."[119]

In its most recent decision on durational residence requirements, *Sosna v. Iowa*,[120] the Supreme Court seemed to firmly adopt a necessities test. In upholding a residence requirement for divorce, the Court distinguished *Shapiro, Dunn,* and *Memorial Hospital* on the basis that those plaintiffs were "irretrievably foreclosed from obtaining some part of what [they] sought."[121] The distinction would more accurately appear to be between rights and benefits for which the new resident would have an immediate need and those for which he can wait. The need for welfare or medical care is viewed as more immediate than the need for a divorce[122] and is irretrievably lost if not made available as soon as residence is established. The "irretrievable loss" formulation thus appears to be no more than another way of saying that only durational residence requirements affecting necessities of life are impermissible burdens on travel.[123]

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relative importance of the competing state interest, not to determining the applicable standard of judicial review).

118. 415 U.S. 250, 259 (1974).

119. To recognize that necessities of life have a special status determining the validity of discriminatory dispensation of benefits by a governmental entity is not to say that such necessities have the status of constitutional rights in and of themselves. The Supreme Court has adjudged that fundamental rights are only those explicitly or implicitly guaranteed by the Constitution, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973), and that necessities such as welfare, *see* Dandridge v. Williams, 397 U.S. 471 (1970), education, *id.* at 37, and housing, Lindsey v. Normet, 405 U.S. 56, 73-74 (1972), are not such rights.

The importance of the distinction can be illustrated by an example in the housing context. If a municipality holds itself out as providing low-cost housing for indigent families, it may not discriminate between new and old residents in providing this service because the discrimination itself is a burden on travel by penalizing the indigent traveler. If, however, a traveler is unable to find low-cost housing simply because of a housing shortage, even if the shortage were caused by local government policy, no fundamental right has been infringed, as there has been no penalty on the exercise of the right to travel, and there is no constitutional right to housing. The assurance of adequate housing has been held to be a function of the legislature and not susceptible to judicial remedy. *Id.* at 74.

120. 95 S. Ct. 553 (1975).

121. *Id.* at 561.

122. Justice Marshall observes, however, that a divorce petitioner could indeed suffer severe deprivation during the 1-year waiting period. "The year's wait prevents remarriage and locks both partners into what may be an intolerable, destructive relationship." *Id.* at 568-69 (Marshall & Brennan, JJ., dissenting). He concludes that what the majority really means is that it does not regard the deprivation as being very severe. *Id.* Another consideration which may have influenced the majority was the continuing ability of the new resident to file for divorce in her former home, an option not open to those seeking welfare benefits or free medical care. In fact, the plaintiff had obtained a divorce in New York, her former residence, after the suit was filed but before the Supreme Court's decision. *Id.* at 557 n.7.

123. The *Sosna* dissenters are basically in agreement, though different language is used in their formulation: "whether the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel."

Deterrent Purpose

A third possible situation in which a statute might be thought to infringe the right to travel by impermissibly burdening it is where the law has as its purpose the deterrence of travel. The *Shapiro* Court held that a state could not justify its durational residence requirement for welfare as a means for deterring an influx of indigent newcomers since such purpose was constitutionally impermissible. The Court stated that "if a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.' "[124] Although this language might be taken to mean that a deterrent statutory purpose renders the statute impermissibly burdensome, this interpretation would appear to be erroneous. Instead, the language should be read as holding that, given an initial finding of constitutional burdensomeness, such as the penalization mentioned by the *Shapiro* Court, a state purpose of deterring exercise of the right to travel is ineffective as a state-advanced justification for the statute.[125] This interpretation seems to have been accepted by at least one district court[126] and is consistent with the Supreme Court's hesitance to second-guess legislative motives.[127]

Deterrent Effect

A statute might not single out travelers in any way and yet have a deterrent effect on travel.[128] Although actual deterrence may be a factor

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Id. at 567 (Marshall & Brennan, JJ., dissenting). Since this was an equal protection case, the statute had to be justified under the minimal rationality standard even though no burden on travel was found. *See* text accompanying note 149 *infra.*

It has been suggested by one commentator that the necessities doctrine is used when a penalty on travel combines with indigency. Comment, *Strict Scrutiny of the Right to Travel*, 22 U.C.L.A.L. REV. 1129, 1154-55 (1975).

124. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *quoting* United States v. Jackson, 390 U.S. 570, 581 (1968).

125. The deterrent purpose would thus not be relevant until a later stage in the analysis when the state is attempting to justify a statute which has already been found impermissibly burdensome on the constitutional right.

126. In Vaughan v. Bower, 313 F. Supp. 37, 42 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970), the court observed that a state purpose to deter migration of indigents would be constitutionally impermissible, but found further discussion of the point unnecessary since the state had not pressed a deterrent purpose in support of the classification.

127. *See* Flemming v. Nestor, 363 U.S. 603 (1960); United States v. Kahriger, 345 U.S. 22 (1953); United States v. Darby, 312 U.S. 100 (1941). Justice Marshall notes with alarm that in the recent case of Sosna v. Iowa, 95 S. Ct. 553 (1975), the Court had not relied on the interests advanced by the state itself in support of its statute, but had "conjured up possible justifications for the State's restriction in a manner much more akin to the lenient standard we have in the past applied in analyzing equal protection challenges to business regulations." *Id.* at 568 (Marshall & Brennan, JJ., dissenting). Whatever the implications of this aspect of the *Sosna* Court's analysis, it is most unlikely that the Court would conjure a deterrent purpose and then use it as a grounds for invalidating the statute. Rather, such creation of unadvanced state interests is generally done as a means of upholding rather than overturning a state law.

128. The recent cases dealing with durational residence requirements, however, have not, by and large, involved actual deterrence of travel and have held deterrence to be

to consider in determining whether travel is impermissibly burdened, various policy reasons support not finding an impermissible burden based solely on a deterrent effect. The existence of deterrence is a subjective determination which may or may not comport with reality. As one circuit commented, deterrence is an ambiguous concept, and can meant that "at least one person is deterred or everyone is deterred."[129] Additionally, if deterrence alone were sufficient to constitute an unconstitutional burden on travel, any law which made a town or state unattractive to newcomers, or which made migration sufficiently difficult that some people would decide to stay where they were,[130] would be invalid unless supported by a sufficient state interest.

The problem has been cast in slightly different terms by at least one commentator who, relying on the Supreme Court's linking of the right to travel with first amendment freedoms in *Aptheker v. Secretary of State*,[131] concluded that a chilling effect on the right to travel is an unconstitutional burden.[132] Notwithstanding the Court's remark in *Aptheker*, it would appear that the application of the chilling effect analysis to travel situations is not grounded in a proper reading of the case. Even though a link with first amendment rights was made, traditional due process principles were used in deciding the case. This is particularly noteworthy since freedom of association, itself protected by the first amendment, was infringed along with travel by the challenged regulation.

Any notion that first amendment standards extend to the right to travel because of the contribution of travel to informed speech was dispelled by the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[133] In that case, it had been argued that education was essential to effective exercise of free speech and should therefore be given constitutional protection. The Court rejected this proposition, responding that it had "never presumed to possess either

unnecessary when a penalty is involved. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257-58 (1974); Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972); State v. Adams, 522 P.2d 1125, 1126 (Alas. 1974).

129. Cole v. Housing Authority, 435 F.2d 807, 810 n.9 (1st Cir. 1970).

130. "A number of interstate differentials spring to mind that quite certainly chill change of residence, such as, for example, the presence of a state income tax, the measure of unemployment benefits, the extent of public supported education, to name but a few." Place v. Place, 129 Vt. 326, 329, 278 A.2d 710, 711 (1971).

131. 378 U.S. 500 (1964). In *Aptheker* the Court remarked: "[S]ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting travel." *Id.* at 517.

132. Note, *supra* note 18, at 642; *see* Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1972).

133. 411 U.S. 1 (1973).

the ability or the authority to guarantee to the citizenry the most *effective* speech."[134] Therefore, acts contributing to the effective exercise of free speech are not given the same protection as free speech itself.[135] Indeed, no right to travel case after *Aptheker* has even mentioned the link with free speech, much less applied first amendment standards.[136]

It would appear from the foregoing discussion that a statute imposes a constitutionally cognizable burden on travel if it directly restrains exercise of the right by operating on the incident of travel itself. An exception is made, however, for a law which, although technically a direct restraint, is designed to facilitate travel in some way. A law which penalizes exercise of the right through some form of discrimination against those who have chosen to travel will also be found burdensome[137] if it affects the traveler's access to necessities of life. A deterrent effect has

134. *Id.* at 36.

135. Although this would seem to extinguish first amendment protection for migration, *Rodriguez* is not entirely apposite as to movement, the widespread denial of which may be tantamount to denial of association itself. Even if the Court in *Aptheker* had meant to make first amendment standards applicable to all right to travel cases, the applicability of the chilling effect concept in first amendment cases has been limited by the recent Supreme Court decision in Laird v. Tatum, 408 U.S. 1 (1972). That case held that although a constitutional violation may arise from the deterrent or chilling effect of governmental regulations that fall short of direct prohibition against exercise of first amendment rights, that is so only when the challenged exercise of governmental power is "regulatory, proscriptive, or compulsive in nature and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions." *Id.* at 11. Thus, only a statute which is "regulatory, proscriptive, or compulsive" as to travel or travelers would be subject to invalidation because of a chilling effect; such a statute would necessarily also embody a direct restraint on travel or a penalty on travelers.

136. *Cf.* Berrigan v. Sigler, 358 F. Supp. 130, 137 (D.D.C. 1973) (emphasizing that "no controlling legal authority has ever held that the right to travel abroad is a right explicitly protected under the First Amendment").

137. An examination of cases dealing with fundamental rights other than the right to travel indicates such rights are considered burdened only in limited circumstances. One such case held that Illinois' failure to provide absentee ballots to county jail inmates awaiting trial was not subject to strict scrutiny because it was not an absolute denial of the right to vote. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); *accord*, Rosario v. Rockefeller, 410 U.S. 752 (1972); *cf.* Prigmore v. Renfro, 356 F. Supp. 427 (N.D. Ala. 1972). Similarly, the Supreme Court has found no violation of the fundamental right of access to the courts, *see* Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907), in rules requiring filing fees for bankruptcy proceedings and for judicial review of administrative rulings on welfare benefits. United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973). The Court stated that these types of proceedings did not rise to a constitutional level.

In contrast, a filing fee for divorce petitions was invalidated in Boddie v. Connecticut, 401 U.S. 371 (1971), on the ground that judicial action was the only means available for dissolving a marriage. Distinguishing *Boddie* in Sosna v. Iowa, 95 S. Ct. 553 (1975), the Court emphasized that total deprivation of access to the divorce court had been the crucial factor in declaring the *Boddie* statute unconstitutional. "But the gravamen of appellant Sosna's claim is not total deprivation, as in *Boddie*, but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut." 95 S. Ct. at 563. Cases in which the strict scrutiny test has been invoked, see text accompanying notes 146-48 *infra*, have almost uniformly involved an absolute deprivation of a right. *See, e.g.*, Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942). The right to travel cases have already gone farther than most in extending prohibition of abridgment to cases other than those involving absolute denial of a right, and it is improbable that further extensions will be made.

constitutional significance merely as a factor in determining burdensomeness, but is not in and of itself sufficient to establish a burden. These established standards for determining infringement of the right to travel are fairly restrictive, and may not reach all statutes imposing serious obstacles to exercise of the right. Yet, paradoxically, the lack of clarity with which the Supreme Court has expressed the applicable standards has allowed for an overly expansive view of the right to travel as invalidating laws with little real effect on the individual's ability to travel.[138]

The Douglas-Rehnquist Test

At least two present justices on the Supreme Court advocate a simpler, more comprehensible approach to determine whether a statute impermissibly burdens travel. In *Memorial Hospital,* Justices Douglas and Rehnquist, whose legal philosophies are usually quite divergent, joined[139] in expressing the opinion that the Court should limit invalidation on the basis of right to travel to "real and purposeful barrier[s] to movement" and should not extend it to cases where the effect on travel is merely "incidental and remote."[140] In addition, Douglas' *Memorial Hospital* concurrence expressed the idea that a statute must be aimed at travelers in order to violate the right to travel.[141]

Adoption of the Douglas-Rehnquist test would not entail a drastic change of policy by the Court. Only in *Memorial Hospital* has there been a real conflict between the Douglas-Rehnquist test and the traditional standards. Yet the *Memorial Hospital* majority's tacit limitation of the penalty analysis to necessities of life was a step in the direction of recognizing only "direct, purposeful barriers" since a penalty which affects a necessity of life would be a more significant barrier to travel

138. In recent years, right to travel challenges have been entered against everything from a no-fault insurance law, Manzanares v. Bell, 522 P.2d 1291 (Kan. 1974), to an ordinance restricting rentals to minors, Ames v. City of Hermosa Beach, 16 Cal. App. 3d 146, 93 Cal. Rptr. 786 (Ct. App. 1971), to laws restricting city employment to residents of the city. Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973). *See also* Comment, *supra* note 18 (concluding that the right to travel could result in invalidation of all land-use laws).

139. Although Justice Douglas did not explicitly join in Justice Rehnquist's dissenting opinion, he stated in his concurrence that "[s]o far as interstate travel *per se* is considered, I share the doubts of my Brother Rehnquist." 415 U.S. at 270. Justice Douglas' concurrence was based on the invidious discrimination against the poor which he saw in a statute erecting a 1-year barrier to medical care around areas having medical facilities for the poor.

140. *Id.* at 285 (Rehnquist, J., dissenting).

141. *Id.* at 270. Justice Douglas has in the past strongly supported the right to travel, saying that it "makes all other rights meaningful," Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (concurring opinion), and that it "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." Kent v. Dulles, 357 U.S. 116, 126 (1958). His strong advocacy of the right has, however, been expressed only in cases where a law was aimed at travelers and presented a direct and purposeful barrier to movement. *See* Kent v. Dulles, *supra* at 129; Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring).

than one that did not. The main dispute between the majority and Justice Rehnquist could be characterized as merely a difference of opinion over whether or not medical care was a necessity.

The Court also moved in the direction of the Douglas-Rehnquist test by later adopting the "aimed at travelers" concept in *Village of Belle Terre v. Boraas*,[142] and by failing to find a durational residence requirement for divorce to be a burden on travel in *Sosna*.[143] Though the direct and purposeful barrier test was not explicitly adopted by the *Sosna* Court, it may be inferred from the opinion, written by Justice Rehnquist, that the right to secure a divorce in a new state was not deemed so important that its denial would be a significant barrier to travel. What may, in fact, have occurred in *Sosna* was a merging of the necessities doctrine of penalty analysis[144] with the direct and purposeful barrier formulation of the Douglas-Rehnquist test.

STATE INTERESTS JUSTIFYING A BURDEN ON THE RIGHT TO TRAVEL

If a court finds that a growth control regulation burdens travel in a constitutionally impermissible manner, this does not end the analysis; the state or municipality will still have the opportunity to show that the ordinance is justified by an overriding state interest. Whether this showing is made involves a two-fold inquiry. The first aspect of the inquiry involves a determination of whether the state interest adduced is sufficiently overriding. The second aspect involves a determination of whether the regulation adequately advances the interest. How overriding the interest must be and how adequately it must be advanced will vary depending on whether the complaint is based on equal protection or due process.[145]

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142. 416 U.S. 1 (1974).
143. 95 S. Ct. 553 (1975).
144. See text accompanying notes 114-23 *supra*.
145. The standards governing violations of the privileges and immunities clause of the fourteenth amendment will not be discussed at length because the courts are reluctant to invoke this clause. Kurland, *supra* note 24, at 413. There are several explanations for this reluctance: the limitation of privileges and immunities protection to citizens, the exemption of the national government from the prohibitions of the clause, and the preference for other, more inclusive, provisions to accomplish what might have been the functions of this clause. *Id.* at 414-15. The limited case law which exists is unclear as to the standards used when the clause is invoked. Some cases indicate that privileges and immunities of national citizenship are absolutely immune from state infringement, *see* Colgate v. Harvey, 296 U.S. 404 (1935); Paley v. Bank of Am. Nat'l Trust & Sav. Ass'n, 159 Cal. App. 2d 500, 324 P.2d 35 (Ct. App. 1958), while others say that such privileges are relative and subject to reasonable regulation in the public interest. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Hague v. CIO, 307 U.S. 496 (1939); State v. Ernst, 110 N.J. Super. 520, 266 A.2d 171 (Camden County Ct. 1970). It is unclear in these cases how important a public interest must be to override a privilege of national citizenship. The appropriate standards are probably similar to those traditionally used in judging due process claims. See text accompanying notes 161-76 *infra*. In any event, the

Equal Protection

A regulation which burdens travel by means of a classification, as by restricting travel only for a certain class of people or by exacting some penalty from recent travelers, would be subject to analysis under the equal protection clause of the fourteenth amendment. The established standard for judging equal protection claims involves what is known as the two-tier approach. If the challenged legislative classification burdens the exercise of a fundamental right,[146] or makes a distinction which is itself suspect,[147] the legislation will be upheld only if it is shown to be necessary to promote a compelling governmental interest.[148] If no factor is present requiring that the statute be strictly scrutinized, the traditional rationality test will be used, under which the presumption of constitutionality can be overcome only by a finding that there is no legitimate state objective or that the classification rests on grounds wholly irrelevant to its achievement.[149] The problem which has arisen in application of two-tier analysis is its lack of any middle ground. As a general rule, no statute to which the rationality test was applied was ever overturned,[150] and none to which strict scrutiny was applied was ever upheld.[151]

The Supreme Court has, in some recent cases, diverged from the rigid two-tier approach by applying an intermediate level of scrutiny either under the label of mere rationality,[152] or without specifying what test is used.[153] In general, the cases declining to specify which test was

importance of this clause for purposes of this Note is minimal, because it would not appear to protect the right to migrate to a particular city. See text accompanying note 69 *supra*.

146. Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Carrington v. Rash, 380 U.S. 89 (1965) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

147. Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).

148. *See* cases cited notes 146-47 *supra*. *See generally* Cox, *Foreword—Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); "The State Equal Protection Clause: A New Development," 16 ARIZ. L. REV. 489, 566 (1974).

149. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

150. Perhaps the only exception was Morey v. Doud, 354 U.S. 457 (1957), invalidating an Illinois law requiring all firms selling or issuing money orders in the state, except American Express Company, to secure a license and submit to state regulation.

151. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 19 (1972). For a discussion of other problems in the two-tier analysis, see Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

152. James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Demiragh v. DeVas, 476 F.2d 403 (2d Cir. 1973).

153. *See* Sosna v. Iowa, 95 S. Ct. 553 (1975); Rosario v. Rockefeller, 410 U.S. 752 (1973); Jenness v. Fortson, 403 U.S. 431 (1971); Labine v. Vincent, 401 U.S. 532 (1971); Gunther, *supra* note 151, at 18-20. In Boraas v. Village of Belle Terre, 476 F.2d 806, 814-15 (2d Cir. 1973), the circuit court attempted to formulate and apply a test

used have upheld statutes impinging on fundamental rights.[154] The compelling interest test, however, has not been abandoned and has been used by the Court in a number of recent cases to strike down state laws creating suspect classifications[155] or burdening fundamental rights.[156] The trend of these recent decisions indicates that the Court is attempting to build more flexibility into its equal protection analysis by using the compelling interest test only when a law appears clearly violative, using the mere rationality test when a strong presumption of legitimacy is to be given to the legislation, and using an intermediate fairness test when neither of these situations is present. This intermediate test is probably a balancing test along the order of that proposed by Justice Marshall in his *San Antonio Independent School District v. Rodriguez* dissent.[157] Under Marshall's proposal, the degree of scrutiny given to the state law would vary directly with the constitutional importance of the individual interests at stake and the invidiousness of the classification.[158] At any rate, it is clear that the rigid two-tier formula is no longer being applied by the Court in all equal protection cases,[159] and a showing that the

based on rationality:

> Faced recently with the issue under similar circumstances the Supreme Court appears to have moved from this rigid dichotomy, sometimes described as a "two-tiered" formula, toward a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute.

Using this test, the court found the classification made by the challenged zoning ordinance to be unsupported by any rational basis consistent with permissible zoning objectives and enjoined enforcement of the ordinance. This decision was, however, overturned by the Supreme Court, using the traditional formula. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). For a discussion of this intermediate test in the context of sex classifications, see Note, *Title VII: A Remedy for Discrimination Against Women Prisoners*, 16 ARIZ. L. REV. 974, 978-79 (1974).

154. *See* Sosna v. Iowa, 95 S. Ct. 553 (1975); Rosario v. Rockefeller, 410 U.S. 752 (1973); Jenness v. Fortson, 403 U.S. 431 (1971); Labine v. Vincent, 401 U.S. 532 (1971). An exception was Police Dep't v. Mosley, 408 U.S. 92 (1972), in which a classification infringing on the fundamental right of free speech was overturned using only the test of whether an appropriate government interest was suitably furthered by the differential treatment.

155. *See* Sugarman v. Dougall, 413 U.S. 634 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Gunther, *supra* note 151, at 15-16.

156. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Evans v. Cornman, 398 U.S. 419 (1970); Gunther, *supra* note 151, at 15-16.

157. 411 U.S. 1, 124-25 (1973). Similar views were expressed in Marshall's dissenting opinion in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970), and seem to have been applied in Marshall's majority opinion in Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("As in all equal protection cases, . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.").

158. *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (expressing the belief that varying the degree of scrutiny based on the majority's view of the importance of the interest affected would put the Court in the role of a superlegislature).

159. Vlandis v. Kline, 412 U.S. 441, 457-58 (1973) (White, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

individual interests are only tenuously affected by the regulation or that the interests, though technically within the constitutional guarantee, are not really vital will probably result in the application of some intermediate test.[160]

Due Process

A statute burdening the right to travel without making a classification will be judged under the substantive standards of the due process clause of the fifth or fourteenth amendment.[161] Under due process, it is required that the statute infringing a protected right or interest not be unreasonable, arbitrary, or capricious and that the statute be a means having a real and substantial relation to furthering an appropriate governmental interest.[162] Two frequently used indicators of unreasonableness are the overbreadth of the statute,[163] sometimes embodied in an irrebuttable presumption,[164] and the existence of less drastic means for furthering the interest.[165]

The due process standard applied to protected rights is a flexible one, and accordingly the degree of scrutiny employed in applying the

160. This pattern is clearly illustrated in the Supreme Court cases dealing with durational residence requirements. Because of the importance of the rights and benefits denied to travelers in the first three of those cases, the strict scrutiny test was invoked and the statutes struck down. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (medical care for indigents); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits). In the most recent case, however, travelers were denied the right to sue for divorce, an interest regarded by the Court as less vital than those it had previously considered. Sosna v. Iowa, 95 S. Ct. 553 (1975). In addition, other state interests were involved besides mere budgetary and administrative considerations, the Court citing the state's "parallel interest in both avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." *Id.* at 561. With the state and individual interests thus more closely balanced than in the previous cases, the Court applied what Justice Marshall characterized as "an *ad hoc* balancing test," *id.* at 567 (Marshall & Brennan, JJ., dissenting), upholding the statute with no discussion of what equal protection test was being applied.

161. The fifth amendment precludes deprivations of life, liberty, or property by the federal government without due process of law, and the fourteenth amendment extends this prohibition to the states. Due process standards are applied regardless of whether the right violated is protected as a liberty under the due process clause itself, as a right reserved to the people by the ninth amendment or as a penumbral right inferred from specific constitutional guarantees. *See* Roe v. Wade, 410 U.S. 441 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

162. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973); Zemel v. Rusk, 381 U.S. 1 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Bolling v. Sharpe, 347 U.S. 497 (1954); Nebbia v. New York, 291 U.S. 502 (1934); Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Berrigan v. Sigler, 358 F. Supp. 130 (D.D.C. 1973).

163. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

164. In several cases, laws which implicitly presume a state of facts which is neither necessarily nor universally true, without allowing the opportunity to rebut that presumption, have been held to violate due process. The passport restriction invalidated in Aptheker v. Secretary of State, 378 U.S. 500 (1964), for instance, conclusively presumed that Communist Party members, if given passports, would engage in activities inimical to the security of the United States.

165. *See* Aptheker v. Secretary of State, 378 U.S. 500, 512-14 (1964).

above tests varies from case to case. Since the rejection of the doctrine of *Lochner v. New York*[166] in the 1930's, a minimal scrutiny has been applied to laws regulating private economic interests.[167] Such laws are upheld unless there is no rational relation to any appropriate state objective; debatable questions in this regard are deferred to the state legislatures.[168] Under this standard, no economic regulation has been invalidated on substantive due process grounds since 1937,[169] and most appeals raising the question are dismissed for want of a substantial federal question.[170]

Statutes denying personal or fundamental liberties, however, have been given close scrutiny, both during the *Lochner* era and presently.[171] Several of these cases have even spoken of requiring that the statute advance a compelling state interest,[172] though others have required merely a valid, legitimate, or substantial interest.[173] The difference in terminology can only be explained in relation to the difference in the result of the cases. When the state interest itself is found insufficient to support the statute, the Court requires compelling interests. When the statute is invalid because not rationally related to furthering the state interest or broader than necessary to achieve that objective, the Court merely requires legitimate state interests. Overall, the test is a strict one, though not identical to the equal protection strict scrutiny test. More emphasis is placed on the means by which the state objective is achieved than in equal protection analysis, and more weight seems to be given to state

166. 198 U.S. 45 (1905). Beginning with *Lochner*, the Supreme Court invalidated a number of state laws regulating hours of work, minimum wages, and other aspects of business on the ground that they violated the fundamental liberty of contract and exceeded the police power. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Coppage v. Kansas, 236 U.S. 1 (1915). This doctrine, always subject to vigorous dissent, not only ignored increasing disparities in bargaining power between employer and employee, but it eventually interfered with efforts to ease and end the Great Depression and thus led to President Roosevelt's court packing effort. The Court finally retreated from the excessive judicial intervention of the *Lochner* era in Nebbia v. New York, 291 U.S. 502 (1934), and adopted a hands-off posture toward "business, economic and social" legislation. *See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

167. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical, 348 U.S. 483 (1955); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941).

168. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); *see* cases cited in note 167 *supra*.

169. G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 981 (8th ed. 1970).

170. *Id.*

171. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); Cantwell v. Connecticut, 310 U.S. 296 (1940); Meyer v. Nebraska, 262 U.S. 390 (1923).

172. Roe v. Wade, 410 U.S. 113, 154 (1973) (right to privacy); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (freedom of religion); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (freedom of association).

173. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643 (1973) (right to privacy); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (freedom of association); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (freedom of religion).

interests, whether labeled compelling or legitimate.[174]

Although the due process standards contain a dichotomy between economic and personal or fundamental rights,[175] they are nevertheless more flexible than the rigid two-tier equal protection formula. Its three basic criteria of legitimate government interest, rational relation of the legislative measure to furthering the interest, and reasonableness allow more leeway for protecting both important state interests, such as growth control, and important individual rights, such as travel. More room is available for balancing competing interests to arrive at equitable results.

Insofar as the economic-personal rights dichotomy persists, the right to migrate has certain characteristics of an economic right, given its basis as a road to new opportunity.[176] To characterize it in this manner, however, is to ignore historical treatment of the right as fundamental[177] and additional purposes of the right which involve choice of lifestyle or physical surroundings and escape from social injustice or personal failures. The right to travel thus encompasses an economic right, but goes beyond this into an area of protected personal freedom as well, and should be judged under the due process standards applied to personal rights.

Local Interests Supporting Growth Restrictions

An important element in analysis under both the due process and equal protection clauses is the nature of the local interests supporting the challenged regulation. These interests have been adverted to only abstractly; a closer examination is necessary to determine their sufficiency to uphold an ordinance which has been found burdensome to travel.

The basic public interest giving rise to laws aimed at restricting growth is in having a pleasant environment in which to live—a concern for the quality of life in urban America. It has been suggested by commentators,[178] and several courts have seemed receptive to the idea,[179]

174. In one due process case, the Supreme Court recognized a state interest as compelling: the interest in protecting the health of an expectant mother and the life of the unborn child after a certain stage of pregnancy. Roe v. Wade, 410 U.S. 113, 163 (1973).

175. It is possible that the Court will eventually realize that it has gone too far in discounting due process challenges to economic regulations and will merge its substantive due process dichotomy into a single formula. On the other hand, it may declare that economic rights are no longer considered fundamental and do not merit substantive due process protection.

176. See text & notes 62-66 *supra.*

177. See text accompanying notes 31-37 *supra.*

178. *See* Beckman, *The Right to a Decent Environment Under the Ninth Amendment,* 46 L.A.B. BULL. 415 (1971); Roberts, *An Environmental Lawyer Urges: Plead the Ninth Amendment,* NATURAL HISTORY, Aug.-Sept. 1970, at 26; Note, *Toward a Constitutionally Protected Environment,* 56 VA. L. REV. 458 (1970).

179. *See* Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728, 739

that the right to a habitable environment is itself a fundamental right reserved to the people by the ninth amendment[180] to the Constitution. Whether or not this right is eventually recognized as being constitutionally guaranteed, the fact that it is sufficiently important to be considered for ninth amendment status is evidence that concern for environmental quality is indeed a compelling governmental interest. It is in recognition of the importance of this interest that the courts have been traditionally solicitous of legislation for the control of land use.

The Supreme Court first considered and upheld a zoning ordinance against a due process challenge in *Euclid v. Ambler Realty Co.*[181] Addressing itself to the increasing complexity of urban life and the need for regulation of the use of urban lands,[182] the Court recognized the need to vary the protection given to private property by the Constitution: "[W]hile the meaning of constitutional guarantees 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."[183]

Having thus given its approval to the concept of local land-use planning in a context of changing urban needs, the Court practically withdrew from the land-use arena and, since *Euclid*, has agreed to hear very few cases on the subject. A body of post-*Euclid* case law has developed in the lower courts under which a strong presumption of constitutionality is given to local land-use legislation.[184] In order to overturn a land-use ordinance, it must be shown that the legislative body has exceeded its powers or has acted in an arbitrary or unreasonable manner.[185] The burden of proof is generally an "extraordinary" one.[186] The

(E.D. Ark. 1971); Ely v. Velde, 321 F. Supp. 1088, 1094 (E.D. Va. 1971). *But see* Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972).

180. The ninth amendment states: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." Although this amendment long lay dormant, recent cases and commentary have begun to give it meaning and content. *See* Roe v. Wade, 410 U.S. 113, 210-13 (1973) (Douglas, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 488-94 (1965) (Goldberg, Warren & Brennan, JJ., concurring); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENGLAND L. REV. 215 (1972).

181. 272 U.S. 365 (1926).

182. "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." *Id.* at 386-87.

183. *Id.*

184. Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

185. Rodgers v. Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951), *quoting* B. ANDERSON, 1 AMERICAN LAW OF ZONING § 2.14, at 66-67 (1968).

186. Miami Beach United Lutheran Church v. City of Miami Beach, 82 So. 2d 880, 882 (Fla. 1955); 1 B. ANDERSON, *supra* note 185, §§ 2.15-.18.

presumption has been given even greater weight as efforts to contend with the increasing complexities of urban and suburban growth have become more sophisticated,[187] increasing the courts' feeling that they lack the expertise and familiarity with local problems necessary to make wise decisions regarding local land use.[188]

The recent Supreme Court case of *Village of Belle Terre v. Boraas*[189] reaffirmed the Supreme Court's commitment to the concept of land-use planning and indicated a predisposition to uphold land-use controls against a variety of constitutional challenges.[190] In that case, a zoning ordinance limited all land in the village to single-family dwellings and classified as a "family" any number of related individuals or two unrelated individuals. The ordinance was upheld against right to travel, right to association, right to privacy, and equal protection challenges. In judging the case, the Court relied heavily on its previous decisions in *Euclid* and *Berman v. Parker*.[191] The latter case, in upholding a condemnation aimed at eliminating substandard housing and blighted areas, endorsed a broad interpretation of the police power, not limited to the traditional areas of public safety, public health, morality, peace and quiet, and law and order.[192] The Court viewed the police power as encompassing "spiritual as well as physical, aesthetic as well as monetary" values,[193] and as a result, found that legislative power existed "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[194]

The *Belle Terre* Court carried forward this interpretation of the police power, finding the preservation of a pleasant place for families to live to be a legitimate legislative guideline in formulating land-use

187. Golden v. Planning Bd., 30 N.Y.2d 359, 376, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 150 (1972); *see* Boraas v. Village of Belle Terre, 476 F.2d 806, 822 (2d Cir. 1973) (Timbers, J., dissenting), *rev'd*, 416 U.S. 1 (1974). In *Boraas*, Judge Timbers compared land-use legislation with legislation controlling public expenditures, as to which the Supreme Court had declared, "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

188. Boraas v. Village of Belle Terre, 476 F.2d 806, 827 (2d Cir. 1973) (Timbers, J., dissenting), *rev'd*, 416 U.S. 1 (1974); *see* Welch v. Swasey, 214 U.S. 91, 105-06 (1909); *cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

189. 416 U.S. 1 (1974).

190. *See* 23 CLEV. ST. L. REV. 354 (1974). The Court also made clear, however, that it would not countenance ordinances aimed at exclusion of the poor or racial minorities. The Court noted in this connection the cases of Buchanan v. Worley, 245 U.S. 60 (1917), invalidating a city ordinance barring Blacks from acquiring real property in white residential neighborhoods, and Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), invalidating a zoning ordinance requiring the written consent of neighboring property owners before a home for the aged poor could be constructed in the district.

191. 348 U.S. 26 (1954).

192. *Id.* at 32.

193. *Id.* at 33.

194. *Id.*

plans.[195] In view of Justice Marshall's powerful dissent[196] arguing that the ordinance infringed freedom of association, it is clear that the majority, its opinion written by the usually libertarian Justice Douglas, gave considerable deference to the judgment of the local legislative body.[197] It is thus apparent that great weight is given to the environmental and land-use interests supporting growth control measures.

VALIDITY OF SPECIFIC GROWTH CONTROL MEASURES

It is evident from the foregoing discussion that there are several crucial determinations on which the validity of growth control measures depends. Initially, there is the question of whether choice of destination is protected at all; if not, no individual local growth control measure would violate the right to travel, though a multiplicity of such regulations could have the impermissible effect of closing an entire state. A second crucial determination as to any particular regulation is whether it impermissibly burdens the right to travel. If a burden is found, it is necessary to determine whether there is a state interest sufficient to justify the infringement. This entails a judgment as to what constitutional provision will be used to evaluate the statute and the type of state interest required by that provision to justify a burdensome statute. The principles developed in this Note will now be applied to five basic types of remedial measures which have been devised by communities to deal with the complex and untried problems of runaway growth. The measures discussed will be restrictions on building permits, geographical limits on expansion, public purchase and resale of developable land, population ceilings, and limitations on municipal services.

Restrictions on Building Permits

Building permit restrictions take different forms with differing effects on travel. For example, Petaluma, California placed a numerical limit on the number of permits which could be issued annually.[198] The

195. 416 U.S. 1, 9 (1974).
196. *Id.* at 12.
197. Even Marshall's dissent indicates a strong deference to local judgments on land use, as indicated by the statement:

> I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. . . . And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes.

Id. at 13-14.
198. *See* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 576-77 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975).

plans adopted by Ramapo, New York,[199] and Pleasanton and Livermore, California[200] provided for temporary limitations on the issuance of permits until adequate facilities were supplied to the land proposed for development. The laws of three states provide for issuance of permits only when certain stringent criteria, including environmental considerations, are satisfied.[201]

The most problematical of these ordinances is the ceiling on the number of building permits which can be issued. In *Construction Industry Association v. City of Petaluma*,[202] the United States District Court for the Northern District of California found such a regulation to be an unconstitutional burden on travel. According to the court, the Petaluma ordinance denied the right to travel altogether[203] because its express purpose and actual effect had been "to exclude substantial numbers of people who would otherwise have elected to immigrate into the city."[204]

Analysis under traditional principles indicates that the *Petaluma* court may have erred in finding an impermissible burden on travel. A numerical ceiling on building permits does not operate on the incident of travel itself and does not discriminate against travelers. Rather, housing is made scarce for everyone, be they long-time residents wishing to move to a new home, a newly-wed couple moving into a home of their own, or someone moving from another city. The pertinent elements of such a statute are a purpose to deter travel and a resulting deterrence, along with an artificially created housing shortage. These factors are not sufficient to establish an invalidating burden under the traditional mode of analysis.

It is more likely that a ceiling on building permits would be found burdensome under the Douglas-Rehnquist test. The *Petaluma* court bases its concern with the ordinance on the fact that, whether or not it imposes a penalty or a direct restraint on travel, it is a real and purposeful barrier to movement. The statute is not, of course, aimed particularly at travelers, for it affects travelers and nontravelers alike. It is, however, aimed at travelers in the sense that its inevitable result is limitation of the number of persons who are able to migrate to the city. Additionally, a housing shortage will hit travelers the hardest since residents are generally in a better position to acquire what housing becomes avail-

199. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 367-68, 285 N.E.2d 291, 295, 334 N.Y.S.2d 138, 143-44 (1972).
200. W. WOODS, *supra* note 10.
201. FLA. STAT. ANN. § 380.06 (1974); HAWAII REV. STAT. § 57-1 (Supp. 1973); VT. STAT. ANN. tit. 10, §§ 6001-89 (Supp. 1974). Laws imposing stringent standards on the issuance of building permits have also been passed in Britain and France. Sundquist, *supra* note 1, at 39-40.
202. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975).
203. *Id.* at 582.
204. *Id.* at 581.

able. It would appear, therefore, that under the Douglas-Rehnquist test a numerical restriction on building permits does burden the right to travel.

Having found the building permit ceiling burdensome as a real and purposeful barrier to travel, the next inquiry is whether the ordinance is supported by a sufficient state interest to prevent its being declared unconstitutional under the due process clause. As with most growth control measures, the equal protection analysis is inapplicable since no classification relating to travel is made by the challenged statute. To satisfy the requirements of due process, the means embodied in the ordinance must have a real and substantial relation to a proper legislative interest. Additionally, consideration must be given to the existence of less drastic means for achieving that objective. The state interests supporting the ceiling on building permits, as well as other growth control measures, are numerous.[205] These interests in the control of land-use and environmental quality have been accorded great deference by the Supreme Court.[206]

Other factors would also be influential in shaping a court's determination as to the validity of such a measure. The Supreme Court's holding that the Constitution does not guarantee access to dwellings, that housing is not a fundamental right, and that the assurance of adequate housing is a legislative, not judicial, function[207] might steer a court away from holding that an ordinance which burdened travel only by creating a housing shortage for the whole community was unconstitutional. Judicial consideration of less drastic alternatives may be cursory in view of the complexity of the problems facing rapidly growing urban areas and the lack of proven solutions.[208] The virtual irrevocability of judicial rulings invalidating local efforts at growth control[209] may also temper judicial intervention.

The above discussion demonstrates that a ceiling on building permits would not burden the right to travel under traditional principles, though a different result might be reached under the developing Douglas-Rehnquist standards. However, weighty considerations favor upholding such a regulation, including important local interests in land-use and environmental quality, judicial deference to the states where such interests are concerned, prior case law avoiding judicial interfer-

205. See text accompanying notes 1-13, 178-97 *supra.*
206. See text accompanying notes 181-97 *supra.*
207. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).
208. See text accompanying notes 187-88 *supra.*
209. *See* Filer, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655, 662-63 (1971). Such decisions take on an aspect of irrevocability because of the impossibility of undoing growth and its side-effects which would occur if an ordinance aimed at controlling them were invalidated.

ence in matters of housing availability, and the lack of proven solutions to the complex problems of urban growth.

The conditioning of building permits on stringent public interest criteria such as environmental factors should not face the constitutional problems faced by an absolute ceiling on permits. The thrust of such statutes is in the nature of exacting higher standards of design and location from builders, traditional zoning objectives. The statutes do not operate on the incident of travel itself, and the only apparent effect on travel would be the enhancement of the affected area as a target for migration.[210] The constitutional validity of any such regulation is, of course, a matter of degree, and would become more suspect as the regulation's effect on housing availability increased.

An example of a more stringent regulation conditioning building permits on public interest criteria is the Ramapo time-controlled growth plan, which was upheld by the New York Court of Appeals[211] without adverting to its impact on the right to travel.[212] The Ramapo plan allowed development only at such time as municipal services could be made available to a housing project, but not later than 18 years from the inception of the ordinance.[213] A schedule for developing and making available municipal services was adopted at the same time as the building restrictions. The New York court regarded this plan as an effort "to provide a balanced cohesive community dedicated to the efficient utilization of land" through the implementation of sequential development and timed growth.[214] The town's goal was seen as "population assimilation, not exclusion."[215]

These findings indicate that a Ramapo-type statute would not be regarded as burdensome on travel. It does not operate on the incident of travel itself, but rather is aimed at ensuring an adequate enviroment to all purchasers of new homes in the city. It does not discriminate against travelers. To the extent that the regulation falls on travelers most heavily, since migrants to the city are most likely to be looking for new homes, it

210. This assumes good faith, even-handed administration of the regulations. If regulations are so administered as to have an effect beyond the face of the statute, then the mode of administration, rather than the statutory language, would be the measure of validity.

211. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

212. The court did state that the rights of nonresidents "in search of a more comfortable place to live" were considered, and observed that there is "something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands." *Id.* at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149. The court found, however, that on balance, the state interests supporting the Ramapo ordinance justified the infringement involved.

213. *Id.* at 367-68, 285 N.E.2d at 296, 334 N.Y.S.2d at 143-44.

214. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

215. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

would appear to come within the rationale of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*[216] The burden imposed is in actuality a means to enhance travel by ensuring that all migrants have certain basic services in their new homes;[217] thus the ordinance may be seen as aiding rather than hindering the right to travel.

Should a court find, however, that the lessening of housing availability resulting from the regulation does create a burden on travel or a real and purposeful barrier to travel, due process standards would be applied to determine its validity. The court would then determine whether the statutory means have a real and substantial relation to a proper legislative interest, whether the statute is overbroad, and whether there are less drastic means for realizing the state's objective. The stated purpose of the Ramapo ordinance was the elimination of premature subdivision and urban sprawl.[218] More specifically, it sought to prevent new housing developments for which the provision of essential facilities and services was impossible. The same considerations already discussed in relation to state interests supporting a ceiling on building permits[219] would be equally applicable to a sequential growth ordinance. There are, in addition, several features of this type of ordinance which would particularly weigh in its favor. First, it is designed to infringe travel in the least possible way. As soon as municipal services are available to an area and the reason for denial of a permit has been extinguished, a permit may issue. Nor is there any requirement that the developer wait for the city to provide services in the area of proposed development; he may, instead, meet the requirements of the ordinance by making the services available himself.[220] It would appear, therefore, that an even stronger case may be made for the Ramapo-type ordinance than the permit ceiling. It is likely that such an ordinance would be found either not burdensome or else reasonably related to the state's legitimate interest in preventing premature and ill-equipped subdivisions.

Geographical Limits

The geographical limitation on growth most frequently discussed takes the form of an urban limit line,[221] a ring drawn around an existing urban area outside of which development is barred. This type of regula-

216. 405 U.S. 707 (1972). In this case, the Court found that the "facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense." *Id.* at 714.
217. See text accompanying notes 100-03 *supra.*
218. 30 N.Y.2d at 367, 285 N.E.2d at 295-96, 334 N.Y.S.2d at 143.
219. See text accompanying notes 178-97, 205-09 *supra.*
220. 30 N.Y.2d at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.
221. *See* W. Woods, *supra* note 10.

tion is similar in nature to traditional forms of zoning which restrict the location of certain uses of land. Unless coupled with some other type of restriction,[222] an urban limit line has no real effect on migration to the city since it allows unlimited construction within the designated urban area. In effect, it commands the city to grow up rather than out. In a city which is already heavily developed, a shortage of available land within the urban area coupled with a predominance of existing upward growth may have the effect of partially or completely stifling construction of new homes in the city. Any inquiry into such a situation would probably result in the ordinance being evaluated as if it were a restriction on building permits since this would be, in effect, what the regulation would accomplish. The regulation's similarity to traditional forms of zoning, however, would make its validity more likely than the validity of a building permit limitation.

Public Purchase and Resale

Under a program of land banking, a municipality purchases large tracts of developable land surrounding the city and sells or leases it to developers or other users at such time and place as the city feels is appropriate.[223] A program such as this would not appear on its face to be challengeable since it is not directed at travelers; nor would its effect appear to be necessarily exclusionary. Land banking is merely another way to direct the location of certain land uses so that urban sprawl is lessened and open spaces near the city are protected. If all developable land, both within and surrounding the city, were purchased, administration of the program so as to prohibit altogether or unduly restrict development[224] would encounter the same problems as an unduly low numerical limit on building permits.[225] On its face, however, this type of ordinance would seem to be free of right to travel problems.

Population Ceiling

Population ceilings are another frequently proposed growth control measure.[226] Despite the attractiveness to a growth-impacted city of

222. In *Petaluma*, an urban limit line was coupled with a numerical limit on building permits. *See* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975).

223. *See generally* Comment, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L. REV. 377 (1974). Land banking programs have been in operation in Sweden and the Netherlands for some time and have recently been adopted in St. George, Vermont, and Suffolk County, New York. Barnes, *How to Use Land*, NEW REPUBLIC, Sept. 21, 1974, at 10, 11; Bosselman, *supra* note 17, at 251; *'Stop' Signs for Developers Going Up All Over U.S.*, U.S. NEWS & WORLD REP., Jan. 21, 1974, at 40.

224. For discussion of disposition problems in a land banking scheme, see Comment, *supra* note 223.

225. See text accompanying notes 202-09 *supra*.

226. A number of cities have discussed or taken steps toward enacting population

this immediate, absolute approach, it is probably the least manageable solution, as well as the most constitutionally suspect. It requires little imagination to picture the enforcement problems which would arise, not to mention the administrative difficulties of measuring population fluctuation and determining when new residents will be admitted and whom to admit. The constitutional problems of this control are also greater than other possible measures, the right to travel of families already residing in the city being affected along with the rights of potential residents. Population is not static, even if immigration is prohibited; births and deaths are constantly occurring, and in many areas births outnumber deaths. When a birth puts the population over the limit, must the family move? Despite a footnote in *United States v. Guest*,[227] suggesting that a conspiracy to compel residents of Arizona to move out of the state would not directly involve the right to travel, it may hardly be contended that a right to migrate to any city in the United States would not inherently include protection against arbitrary expulsion.

The population ceiling also presents the clearest conflicts with nonresidents' right to migrate to the city. At some point the population limit will be reached, and further migration into the affected area will be altogether banned, the only remaining opportunity to dwell in the area being dependent on later population decreases.

This restriction would unquestionably amount to a real and purposeful barrier to travel under the Douglas-Rehnquist test, since migration to the affected city would be impossible. Additionally, in several ways such a control appears to be aimed at migrants. Although a population ceiling need not make a special exception for additions to families already living in the jurisdiction, it is certainly conceivable that such an exception might be made, leaving the entire onus of the statute on migrants. Even without the exception, migrants would be singled out in that all migrants would be subject to the ceiling, whereas only newly-born residents and their families would be affected. Migrating persons, not residents and additions to their families, would be the target of the statute, and it is they who would be primarily affected.

Under the traditional criteria for burdens, a population ceiling could not be regarded as a penalty on travel, for it exacts no price for the privilege of migrating to the town. Rather, it makes migration to the

ceilings. In 1971, voters in Boulder, Colorado, defeated an initiative measure that would have limited the city's population to 100,000. Barnes, *supra* note 5, at 10. A municipal committee in Davis, California is preparing a general plan for the city which includes a ceiling on growth, Morgan, *supra* note 6, at 66, and the Association of Bay Area Governments in the San Francisco Bay Area has adopted a regional policy aimed at halting population growth by 1980 at 5.5 million. *Drive to Curb Growth in the U.S.—Its Impact, supra* note 7, at 30.

227. 383 U.S. 745, 759 n.16 (1966).

town impossible. Although the setting of a population limit might not in itself be regarded as operating on an incident of travel, making it a direct restraint, the accompanying regulations as to adminstration and enforcement of the ceiling would undoubtedly operate directly to limit travel. Moreover, it is inconceivable that an ordinance which would operate to permanently bar all migration into the jurisdiction would not be considered to operate directly on travel, regardless of the semantics used in the ordinance.

Under the due process standard of reasonable relation to permissible state purpose,[228] the considerations governing legitimacy and weight of the state interest are the same as those outlined in relation to limits on building permits.[229] An additional consideration in this instance might be the existence of a less drastic alternative. Growth control is an experimental area with numerous types of regulations being tried by affected cities and towns, most of which utilize less stringent controls than a complete ban on migration. Under these circumstances, it seems likely that a court would disfavor a population ceiling which would eventually stem all immigration, invalidating it on grounds that there are less onerous alternatives available. At some point, and in some place, the growth problem may become serious enough, because of a limited water supply or some like concern, that no alternative to a population ceiling would be feasible. At the present, however, there do seem to be a number of measures capable of effectively tackling current growth problems without so completely infringing the right to travel.

Limitations on Municipal Services

Some towns have sought to limit their growth by restricting the availability of water and sewer services to new housing developments. This limitation may take the form of a moratorium or numerical ceiling on hookups,[230] high hookup fees,[231] or a city's failure or refusal to obtain facilities necessary to serve the projected population.[232]

Many of the same considerations applicable to a moratorium or

228. A population ceiling might be attacked under the equal protection clause, by alleging the ceiling discriminates against migrants by giving preference to present residents in allocating the available population slots in the city. The due process claim, however, is much clearer.

229. See text accompanying notes 202-09 *supra*.

230. The Marin County, California water board declared a temporary moratorium on residential water connections following a defeat at the polls of a proposal to enlarge the water supply. See Morgan, *supra* note 6, at 66; Leary, *supra* note 5, at 23.

231. For instance, Boulder, Colorado instituted a $1400 water and sewer hookup fee. See W. Woods, *supra* note 10; Barnes, *supra* note 5, at 10.

232. In Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 578 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975), the court questioned Petaluma's failure to contract for sufficient water to serve the city's projected population.

ceiling on building permits[233] also apply to utility hookups. The denial does not primarily affect travelers. It does not operate on the incident of travel itself and, indeed, affects travel and travelers even more indirectly than does the building permit restriction. It is not an absolute restriction to the same degree as a building permit limitation, since waste can be disposed of and water secured through either private companies or individual effort, despite the city's restriction on its own provision of such services. These factors would seem to negate the possibility of a moratorium or ceiling on hookups being considered a direct restraint, a penalty, or a real and purposeful barrier to travel.

These restrictions could be challenged as violative of the equal protection clause because of the differing treatment accorded those with homes already hooked into the utility systems and those moving into new homes. Such a regulation would almost certainly be given minimal scrutiny because of the tenuousness of the connection between the fundamental right to travel and the deprivation of municipal services.[234] In the resulting balance, the state interests would seem sufficient to save the regulation; the interests involved here include not only effective control of land use, water availability, and the quality of urban life,[235] but also the city's proprietary interests in the municipal water and sewer systems and the recognized limitations on its obligations in relation to such operations.[236]

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233. See text & notes 202-09 *supra.*

234. Where the existing system has not reached capacity, denial of applications from potential users might be subject to an equal protection challenge irrespective of any effect on travel. "There is a denial of the equal protection of the laws unless the water service be available to all in like circumstances upon the same terms and conditions . . . ." Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 233, 89 A.2d 667, 669 (1952).

235. *But see* Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 238, 89 A.2d 667, 671 (1952). *Reid* held that the granting of water facilities may not be used as a means of exercising planning and zoning powers by indirection:

> On the admitted facts, the extension of the water facilities was plaintiff's right; and it was an abuse of discretion to use the grant as a means of coercing the landowner into acceptance of the minimum lot-size restriction upon his lands, however serviceable to the common good. Such benefits are to be had through the channels prescribed by law.

236. These additional considerations relate to a marked distinction between building permit ceilings or moratoriums and similar limitations on municipal services: rather than the city placing a restriction on a private enterprise which is ready and willing to provide for the needs of an increasing population, here the city itself is the provider of the services, and its restrictions limit only its own activity. Several courts have indicated that a city's decisions as to increasing its water and sewer facilities may legitimately be controlled by the same considerations which would govern a private utility company, such as practicability, and the possibility of profit. *E.g.*, Crawford v. City of Billings, 130 Mont. 158, 297 P.2d 292 (1956); Reid Dev. Corp. v. Parsippany-Troy Hills Township, 31 N.J. Super. 459, 107 A.2d 20 (App. Div. Super. Ct. 1954); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex Civ. App. 1968). *But see* Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952). It is also well established that the city has no obligation to expand its facilities to serve homes outside the municipal boundaries, *e.g.*, Crawford v. City of Billings, *supra*; Montgomery v. Olley, 42 Misc. 2d 906, 249 N.Y.S.2d 205 (S. Ct. 1964); Big Spring v. Board of Control, 389 S.W.2d 523 (Tex. Civ. App. 1965), and may refuse to expand within the city limits so

In this regard, the question arises as to the constitutionality of a city's refusal to contract for or otherwise secure a water supply sufficient to serve a projected population. Where this failure or refusal is itself the challenged action, the analysis would be nearly identical to that for a ceiling or moratorium on hookups. An added factor would be the hesitance of courts to force a city into affirmative programs of this sort, the remedy in this case being in the nature of mandamus to perform a discretionary act.[237] This type of situation is generally held to be more appropriate for political than judicial remedies.[238]

The court, in *Construction Industry Association v. City of Petaluma*,[239] was less inhibited in this regard. In rejecting the city's assertion that the limited water supply was a compelling interest supporting its building permit restriction, the court noted that Petaluma had requested from its supplying agency only enough water to serve the population which the city wished to absorb, this despite an absence of any limitation imposed by the supplying agency.[240] The court stated: "where a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation."[241] The court also held that in such a situation, the ability to contract for additional water was a less onerous alternative to the housing restriction.[242] The reasoning of the court would appear to be sound in this regard, thus leading to the conclusion that an artificially created water shortage may not be used to justify a growth restriction. This conclusion does not, however, affect the validity of a city's failure to contract for additional water when that failure is itself the method chosen for limiting growth. Nor does it render invalid the use of a genuine water shortage to justify further measures aimed at controlling growth.

A high fee placed on water and sewer hookups is undoubtedly constitutional if justified by the costs of the hookup itself.[243] As in *Evans-*

long as its reasons are not totally arbitrary. Crownhill Homes, Inc. v. City of San Antonio, *supra; see* Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952).

237. *See* Smith v. United States, 333 F.2d 70 (10th Cir. 1964); Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686 (D.S.D. 1973); Lechner v. Holmberg, 165 Conn. 152, 328 A.2d 701 (1973); Seagle-Paddock Pools of Memphis, Inc. v. Benson, 503 S.W.2d 93 (Tenn. 1973).

238. Cicalo v. New York City Housing & Dev. Admin., 79 Misc. 2d 769, 361 N.Y.S.2d 263 (S. Ct. 1974).

239. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, No. 74-2100 (9th Cir., Aug. 13, 1975).

240. *Id.* at 578, 583.

241. *Id.* at 583.

242. *Id.*

243. If the fee were not commensurate with costs and were so high as to be unreasonable and prohibitive, however, the rationale applicable to moratoriums on water and sewer hookups would be applicable.

ville,[244] the fee would not be considered a burden on any constitutional right because it would merely offset the cost to the city of providing the service. There would be no discrimination in favor of old residents because of the direct relationship between the fee charged and the cost of providing service to the payor. The situation would be different if the city sought to justify the high hookup fee because of the increased cost of providing services to a larger population. All residents would be receiving the services, but only those living in new homes would be bearing the burden of the increase in cost; thus, there would be discrimination in favor of residents living in old homes. As with other types of regulation discussed, the burden is on those moving into new homes, a category not precisely correlated with new residents. The incidence of discrimination against new residents, however, might be viewed as sufficient to require at least a minimal scrutiny. Applying such a test, the state interest in a self-supporting water and sewer system seems adequate, but the classification would not appear to be rationally related to furthering that interest. The administrative convenience of charging the increase only to new users is not the type of interest generally accepted as legitimate by the courts.[245] The basic interests of controlling land use and the quality of life could support the measure if the city can show that a high hookup fee is rationally related to this purpose and it is appropriately distributed.

The major problem with restrictions on water and sewer service is their very indirectness. While limiting the number of new houses is rationally related to a city's goal of preventing urban sprawl, a sewer restriction on its face seems to call for housing which is not equipped with basic sanitation facilities, a result for which no city has a genuine desire. Thus, such restrictions are initially suspect and may be invalidated for lack of a rational relationship to the goal of growth control or for other reasons related to the regulation of public utilities.[246] Like the court in *Reid Development Corp. v. Parsippany-Troy Hills Township*,[247] courts may frown upon the use of water and sewer restrictions to accomplish what are essentially land-use goals and give them a more careful scrutiny than has been rendered in the past. Thus, cities might endanger the free-

244. Evansville-Vanderburgh Airport Authority Dist. v. Delta Air Lines, Inc., 405 U.S. 707 (1972). See text & notes 100-03 *supra*.

245. *See* Reed v. Reed, 404 U.S. 71 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

246. In one case, an ordinance requiring that developers install water mains at their own expense was invalidated because it was not within the power granted to municipalities by the state. Reid Dev. Corp. v. Parsippany-Troy Hills Township, 31 N.J. Super. 459, 107 A.2d 20 (App. Div. Super. Ct. 1954). Some problem may also arise because of the need to comply with statutes applicable to private utility companies. *See* Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952). Additionally, equal protection problems unrelated to the right to travel may arise. *See* discussion note 234 *supra*.

247. 10 N.J. 229, 89 A.2d 667 (1952).

dom with which they have been allowed to carry out their proprietary functions of providing water and sewer service if they use these functions to accomplish unrelated goals. This type of growth control measure, therefore, has certain risks not apparent on its face.

CONCLUSION

It is apparent that not all growth control measures are susceptible to invalidation on right to travel grounds. The parameters of constitutional protection of migration have not as yet been clearly defined by the Supreme Court, but the developing standards appear to allow for a variety of constitutional restrictions on growth. Such restrictions are supported by substantial public interests which could conceivably outweigh any burden imposed on travel rights, particularly in light of the current Supreme Court's deference to legislative judgment in land use as well as other areas. Although some of these measures may be open to constitutional attack on other grounds, such as exclusion of the poor, those which are limited to managing and locating growth without imposing quantitative restrictions should not run afoul of the right to travel. Numerical restrictions on housing construction starts, though troublesome, should be upheld on the strength of the state interest, but population ceilings might be invalidated due to the clear existence of less drastic alternatives.