St. Mary's Law Journal

Volume 1 | Number 2 Article 11

12-1-1969

Residence Requirements Constitute an Invidious Discrimination Denying Applicants Equal Protection of the Laws, Violate the Due Process Clause of the Fifth Amendment, and Place a Chilling Effect on the Right of Interstate Travel.

Angelo P. Parker

Appeals, whereas the appellate civil jurisdiction rests in the Texas Supreme Court. However, this division is not complete. The Texas Court of Criminal Appeals' power to issue writs is limited to issuing writs of habeas corpus. An original writ of mandamus in a criminal matter must be brought not in the court of criminal appeals, but in the supreme court. Logically, a petition for a writ of mandamus in a criminal case should be brought in the Texas Court of Criminal Appeals.

It has been the history of the Texas Legislature to narrow the jurisdiction and authority of the Texas Supreme Court, and reasonably so. The court should not be encumbered with duties which tend to clog the administration of their present duties. The best possible way of placing this burden where it properly belongs is by a constitutional revision bringing the original writ of mandamus in criminal matters under the authority of the Texas Court of Criminal Appeals.

John A. Pizzitola

CONSTITUTIONAL LAW—FREEDOM OF TRAVEL—RESIDENCE REQUIREMENTS CONSTITUTE AN INVIDIOUS DISCRIMINATION DENYING APPLICANTS EQUAL PROTECTION OF THE LAWS, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND PLACE A "CHILLING EFFECT" ON THE RIGHT OF INTERSTATE TRAVEL. *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 33 L. Ed. 2d 600 (1969).

In *Shapiro v. Thompson,* the Supreme Court consolidated appeals from three district court cases in which the residence requirements for welfare assistance were held unconstitutional. The Federal District Court of Connecticut, in *Thompson v. Shapiro,*[1] reversed a ruling of the Connecticut Welfare Department and held that a welfare claimant could not be denied assistance solely on the ground that she had not satisfied the one year residence requirement of the state of Connecticut. In *Harrell v. Tobriner,*[2] the District Court of the District of

[1] 270 F. Supp. 331 (D. Conn. 1967). Decision holding unconstitutional the provisions of CONN. GEN. STAT. REV. § 17-2c (1963). Present section 17-2c, formerly classified as § 17-2d, provides:

> When any person comes into this State without visible means of support for the immediate future and applies for aid to dependent children . . . within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement.

[2] 279 F. Supp. 22 (D.D.C. 1967). Residency statute involved (D.C. CODE ANN. § 3-203 (1962)) provides in part:

> Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately

Columbia held that the denial of welfare benefits to four residents of the District of Columbia on the grounds that they had not resided in the District for one year immediately preceding the filing of applications for welfare was a denial of the right to equal protection secured by the due process clause of the fifth amendment. In *Smith v. Reynolds*,[3] the District Court for the Eastern District of Pennsylvania held the denial of Aid to Families with Dependent Children (AFDC) to two applicants solely on the grounds that they were not residents of Pennsylvania for one year prior to their application violated the equal protection clause in that the residence requirement was without any rational basis or legitimate purpose. In each case, the district court found that the welfare applicants fulfilled the test for residence in their respective jurisdictions except for the requirement of residence for a full year prior to application for aid. The various state agencies involved appealed to the Supreme Court. Held—*Affirmed.* Residence requirements constitute an invidious discrimination denying applicants equal protection of the laws, violate the due process clause of the fifth amendment, and place a "chilling effect" on the right of interstate travel.

Residence requirements for welfare recipients are not a new concept. These laws have their antecedents in statutes prevalent centuries ago in England and the American Colonies. In 1822, *Rutland v. Mendon*[4] proclaimed there could be no question of the power of the legislature to pass a statute requiring a pauper to reside three years in a town in order to gain a settlement therein. Over one hundred years later, the Illinois Supreme Court in a case similar to *Rutland* ruled that a three year consecutive residence statute was not such an unreasonable classification as to be unconstitutionally discriminatory.[5] The view was taken that there was no common law obligation on the state or any local governmental unit to support paupers. The state, through humanitarian attributes, may voluntarily assume the support of the needy citizens.[6] Consequently, the reasoning of the Illinois Supreme Court was that the state should have a large degree of discretion when it elects to furnish relief.[7]

---

preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth . . . .

[3] 277 F. Supp. 65 (E.D. Pa. 1967). Decision holding unconstitutional the provisions of PA. STAT., tit. 62 § 432(6) (1967) that provides in part:

Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application . . . .

[4] 1 Pick (Mass.) 154 (1822).

[5] People v. Lyons, 30 N.E.2d 46 (Ill. 1940).

[6] *Id.*

[7] *Id.*

More recently, several suits have been brought in federal district courts concerning residence requirements and their application to welfare programs. The courts have been divided in their decisions and there has been no clear-cut majority on the issue of constitutionality.

In *Harrell v. Board of Commissioners of District of Columbia,*[8] a case decided in 1967, the court concluded that no substantial constitutional question was raised by the contention that a one year residence requirement for public welfare was unconstitutional. State legislatures are endowed with a wide range of discretion in enacting laws that affect some of its residents differently than others.[9] A statutory discrimination is not to be declared unconstitutional if any state of facts may reasonably justify it.[10]

Nonetheless, other district courts have found similar state residence statutes in violation of the equal protection clause of the fourteenth amendment[11] and have held that such statutes impede indigents in their right to travel and serve no legitimate purpose.[12] *Green v. Department of Public Welfare of State of Delaware*[13] found a one year residence prerequisite unconstitutional stating that it created an invidious discrimination. In these cases the courts were unable to find any "reasonable" purpose that the statutes served.

One court went so far as to state that even if it were assumed that some people moved in order to enjoy a greener welfare pasture and that a state may properly deny aid to persons who come with that intent, a one year residence requirement for state aid was not reasonable since it would have the effect of conclusively presuming that all people who need aid within a year have come to the state for that purpose.[14]

The only Texas authority concerning welfare requirements is an opinion of the Attorney General in which it was stated that the residence requirement must be fulfilled "no matter what reason for absence or intention to return."[15]

The issue of residence requirements was presented to the Supreme Court of the United States in the *Shapiro* case. The Court relied on

---

8 269 F. Supp. 919 (D.D.C. 1967); *see* Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967) involving same situation.

9 Waggoner v. Rosenn, 286 F. Supp. 275 (M.D. Pa. 1968). Using this premise and stating reasonableness of the provision, the court found the Pennsylvania residency statute constitutional.

10 Helvering v. Davis, 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307 (1937); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911).

11 Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill., E.D. 1967).

12 Robertson v. Ott, 284 F. Supp. 735 (D. Mass. 1968).

13 270 F. Supp. 173 (D. Del. 1967).

14 Ramos v. Health and Social Services Bd. of State of Wis., 276 F. Supp. 474 (E.D. Wis. 1967).

15 TEX. ATT'Y GEN. OP. No. 07064 (1946).

the landmark freedom of travel cases[16] to assert 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."[17] The observation was made that none of the statutes before the Court would discourage indigents who would enter the state solely to obtain larger benefits.[18] The statutes were held to create an irrebuttable presumption that every applicant for assistance in his first year of residence would come to the jurisdiction solely to obtain higher benefits.[19] "More fundamentally," the Court stated, "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."[20]

To the argument advanced by the appellants that the classification attempts to distinguish between new and old residents on the basis of contribution they have made to the community through the payment of taxes, the Court answered that they found it difficult to visualize how long-term residents who qualify for welfare could make a greater present contribution to the state in taxes than indigent residents who have recently arrived.[21] To further substantiate their position, the majority concluded that the reasoning of the appellants would logically permit the states to bar new residents from schools, parks, and libraries.[22] The Supreme Court ruled that the objectives advanced for the reason to have the waiting period were in reality nonexistent in that the waiting period requirement neither facilitated budgeting nor served as an administrative rule of thumb for determining residence.[23]

Appellants (Connecticut and Pennsylvania) argued that the constitutional challenge to the waiting period requirement must fail because section 402(b) of the Social Security Act of 1935, as amended,[24] expressly approves the imposition of residence requirements. The

16 United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966); Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958); Edwards v. People of State of California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); and Passenger Cases, 48 U.S. (7 How.) 283, 12 L. Ed. 702 (1849).

17 Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

18 *Id.*

19 *Id.*

20 *Id.* at ——, 89 S. Ct. at 1330, 22 L. Ed. 2d at 613.

21 *Id.* at —— ,89 S. Ct. at 1330, 22 L. Ed. 2d at 614.

22 *Id.*

23 *Id.* at ——, 89 S. Ct. at 1331, 22 L. Ed. 2d at 615.

24 42 U.S.C.A. § 602(b) (1965). Section 602(b) referred to provides that the

> Secretary shall approve any plan which fulfills the conditions specified . . . except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year . . . or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

majority viewed this statute as not approving or prescribing a one year requirement, but merely disapproving plans which have requirements that do not meet the federal standards.[25]

In the final analysis, the Supreme Court concluded that since the classification touches on a fundamental right of interstate movement and since no compelling state interest was proven, the statutes violated the equal protection clause.[26] It should be noted, however, that the Court expressly stated they did not imply a view of the validity of a waiting period or residence requirement for determining eligibility to vote, for tuition-free education, to obtain a license, to practice a profession, to hunt, to fish, or to do other activities that require a minimum residence period.[27]

Mr. Chief Justice Warren, with whom Mr. Justice Black joined, dissented from the majority opinion. The dissent argued that residence requirements were thoroughly discussed in congressional hearings on the Social Security Act.[28] The dissent also contended that the freedom of travel cases were inapplicable on the ground that residence requirements "do not create a flat prohibition for potential welfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right."[29]

Mr. Chief Justice Warren rather adamantly attacks the views and holdings of the majority:

> Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction.[30]

The *Shapiro* decision relied heavily on freedom of travel, but do the freedom of travel cases actually have any credence in the *Shapiro* situation? No argument is taken with the fact that the right to travel

---

25 Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)..
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at ——, 89 S. Ct. at 1354, 22 L. Ed. 2d at 640.

is a right that the Constitution guarantees and that it is constitutionally protected independent of the fourteenth amendment.[31] The landmark freedom of travel cases found unconstitutional a statute or prohibition that limited passports to communists who attempted to go abroad,[32] which made it a felony for a member of a communist organization to apply for a passport,[33] or which made the bringing of an indigent nonresident into a state a misdemeanor.[34] However, the Supreme Court does acknowledge that the right to travel may be limited.[35]

Edwards v. People of State of California[36] closely characterizes the *Shapiro* case. *Edwards* held that a California statute making it a misdemeanor to bring or to assist in bringing into the state any indigent nonresident was not a valid exercise of the state's "police power" and was an unconstitutional burden on interstate commerce.[37] It should be noted that the Court in *Edwards* stated, "We are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved."[38]

In an analysis of these freedom of travel cases, we find that the statute or provision was a direct barrier upon a person's right to travel. In *Shapiro,* if there is a barrier, it is merely an indirect requirement to receive welfare once a party is within the state. A party is free to move into a state with a residence requirement.

Shapiro called attention to the "chilling effect" on freedom of travel. This statement presupposes that the residence requirement not only intended to have, but that it did have, an effect on the right to travel. The suggestion that the residence requirement interferes with the freedom of travel has been called "far-fetched" and "remote."[39]

It is a misconception to state that large numbers of indigents are on the move in search of a more favorable welfare climate. It has been shown that indigents are influenced by climate, employment, and educational opportunities.[40] Welfare aid was found not to be a lure for people on the move, and there is high migration into states where

---

31 United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).
32 Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).
33 Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).
34 Edwards v. People of State of California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941).
35 Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1966).
36 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941).
37 *Id.*
38 *Id.* at 174, 62 S. Ct. at 167, 86 L. Ed. at 126.
39 Harrell v. The Board of Commissioners of the District of Columbia, 269 F. Supp. 919 (D.D.C. 1967); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967).
40 *Residence Requirements in State Public Welfare Statutes—I,* 51 IA. L. REV. 1080 (1966).

living is attractive irrespective of strict residence requirements.[41] It seems difficult to argue that residence requirements obstruct the right to travel when studies show there is little if any consideration placed upon them by people as they move from state to state.

In what direction are we proceeding? First, we are dealing with welfare; then, we apply at most an indirect restriction on the freedom of travel to determine that the restriction is unconstitutional. By this logical progression, how can residence requirements for such a basic right as voting be upheld? Is not the Court concerning itself with the wisdom and soundness of the statutes? Is it not also true that the wisdom or lack of wisdom, soundness or unsoundness of legislative judgment are irrelevant considerations in determining the issue of constitutionality?[42]

The Social Security Act of 1935 marked the beginning of federal subsidization of state programs for aid to dependent children, the aged, the blind, and the disabled. Under 42 U.S.C.A. sec. 602(b) (1)[43] the states must submit acceptable plans to the administration to qualify for funds, and the section specifically states that the administration will not accept any plan that requires residence of more than one year. This can only mean that the Congress, after all the hearings before the enactment of the Social Security Act, approved a one year requirement but not a longer one. The majority in *Shapiro* refused to declare this section unconstitutional but circumvented the argument by stating that the section does not allow residence requirements but merely states that it will reject any plan with longer requirements than one year.[44] This does not mean white is black, but it surely makes white a very dark grey. The section can be viewed only as an express authorization to the states to impose residence requirements not exceeding one year according to the stipulations in the section. The logical conclusion of ruling these residence requirements unconstitutional would be to rule the section of the Social Security Act unconstitutional, but the Court in *Helvering v. Davis*[45] upheld the Act.

The impact of *Shapiro* was bound to have its effect. *Morrison v. Vincent*,[46] decided less than two months after *Shapiro*, held a West Virginia statute unconstitutional. It is difficult to overlook the reluctance and regret of the district court in fulfilling its obligation.[47] *Board*

---

41 Kasius, *What Happens in a State Without Residence Requirements, in Residence Laws—Roads Block to Human Welfare*, 18, 19 (National Traveler's Aid Ass'n 1956).
42 Waggoner v. Rosenn, 286 F. Supp. 275 (M.D. Pa. 1968).
43 *See* note 24.
44 Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).
45 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307 (1937).
46 300 F. Supp. 541 (S.D. West Va. 1969).
47 *Id.* at 544: