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Are Residence Requirements Unconstitutional Burdens on Welfare Recipients - An Analysis of Thompson v. Shapiro and Green v. Department of Public Welfare of the State of Delaware, 1 J. Marshall J. of Prac. & Proc. 307 (1968)

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ARE RESIDENCE REQUIREMENTS UNCONSTITUTIONAL BURDENS ON WELFARE RECIPIENTS? — AN ANALYSIS OF *THOMPSON* v. *SHAPIRO* AND *GREEN* v. *DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF DELAWARE*

As more effective legal counsel has become increasingly available to the poor, the traditional conditions prefixed to welfare aid have been brought under heavy attack. A residence requirement is probably the most common of such conditions and has been the subject of recent litigation.[1] In *Thompson* v. *Shapiro*[2] a three-judge district court in Connecticut held unconstitutional the Connecticut statute[3] which required one year of residence in order to receive Aid to Dependent Children (ADC). Relying upon the privileges and immunities clause of the fourteenth amendment[4] to reach this result, the court found that the statute had a "chilling effect" on the right to travel — a right protected from state infringement by the privileges and immunities clause.[5] The court also found no reasonable purpose

[1] There are over forty states that have some type of residence requirement for receiving welfare. *See* Comment, *Residence Requirements in State Public Welfare Statutes*, 51 IOWA L. REV. 1080 (1966); American Public Welfare Ass'n, PUBLIC WELFARE DIRECTORY (1967). During the writing of this comment, there has been, in several states, litigation attacking these requirements that has resulted in preliminary injunctions. *See, e.g.*, Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), *appeal granted*, 36 U.S.L.W. 3338 (U.S. Mar. 4, 1968) (No. 1138); Harrell v. Tobriner, Civil No. 1749-67 (D.D.C. 1967), *appeal granted sub nom.*, Washington v. Harrell, 36 U.S.L.W. 3338 (U.S. Mar. 4, 1968) (No. 1134); Ramos v. Social Services Bd. of State of Wis., 276 F. Supp. 474 (E.D. Wis. 1967); Mantell v. Dandridge, Civil No. 18792 (D.Md. Oct. 24, 1967); Johnson v. Robinson, Civil No. 67C 1883 (N.D. Ill. Oct .30, 1967).

[2] 270 F. Supp. 331 (D. Conn. 1967), *appeal granted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1967) (No. 813).

[3] CONN. GEN. STAT. (Rev. 1958, 1965 Supp.) §17-2d:

> When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under Chapter 301 of general assistance under Part 1 of Chapter 308 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.*

[4] U.S. CONST. amend. XIV, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor, deny to any person within its jurisdiction the equal protection of the law.

[5] The United States Supreme Court has been reluctant to use the privileges and immunities clause as a basis for its majority opinion, reflecting the historic narrow treatment given it by the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which held that only a right inherent in *national* citizenship was protected. Only once has a majority of the Supreme Court found a violation of the clause, and that decision was overruled approximately four years later. Colgate v. Harvey, 296 U.S. 404 (1935), *overruled*

for the condition that would justify invocation of the police power of the state; consequently the statute denied plaintiff the right to equal protection of the laws.[6]

Vivian Marie Thompson moved from Boston, where she had been receiving ADC payments, to Hartford, Connecticut. Upon her change of residence, Boston discontinued aid, and Connecticut denied aid on the ground that she had not met its one-year residence requirement, although she was apparently otherwise eligible. The court enjoined enforcement of the residence requirement on the ground that every citizen has a right to travel, which includes the right to establish residence in any state, and any denial of this right or "chilling" of its exercise is a denial of a constitutional privilege.

THE RIGHT TO TRAVEL

The right of a citizen to travel among the states has been

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by Madden v. Kentucky, 309 U.S. 83 (1940). However, the court in *Thompson* pointed out that in recent opinions the Supreme Court has given strength to the privileges and immunities clause, 270 F. Supp. 331, 335 n. 2 (D. Conn. 1967).

Plaintiff also argued that such denial of ADC benefits violated her constitutional rights under the privileges and immunities clause of U.S. CONST. art. IV, §2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." However, the court pointed out the inappropriateness of this argument by stating that the plaintiff was a citizen of Connecticut and the clause only prohibits discrimination by a state against a citizen of another state. *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873); Hague v. C.I.O., 307 U.S. 496, 511 (1939) (Opinion of Roberts and Black, J.J.); New York v. O'Neill, 359 U.S. 1, 6 (1958). But consider the view of Bernard Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567 (1966):

> Residence tests for welfare programs violate the privileges and immunities clause of Article IV precisely because they impair the privilege of free interstate movement, since a potential migrant will face discriminatory treatment after he becomes a resident and therefore a citizen of the state he wishes to enter.

Id. at 608.

See Blake v. McClung, 172 U.S. 239, 256 (1898). Query whether the *Thompson* court would have acquiesced to an action by plaintiff under art. IV §2 if it were filed by plaintiff before moving to Connecticut?

[6] Thompson v. Shapiro, 270 F. Supp. 331, 336 (D. Conn. 1967). The court held that the statute, because of its arbitrary and unreasonable classification, violated the fourteenth amendment. That portion of the opinion which deals with the equal protection argument does not provide any clear or definitive analysis. The court held that the purpose of the Connecticut statute was not valid nor was the statute and the regulations promulgated under it "reasonable in light of its purpose." The court also held that the statute arbitrarily discriminates between those entering with a cash stake and those without such a stake. *Id.* at 337. This latter determination made by the *Thompson* court is a result of the peculiar phrasing of the Connecticut statute which is not common among other state statutes regarding residence requirements. For a further discussion of the equal protection argument *see* text beginning at note 70 *infra*, where the case of Green v. Dep't of Welfare of the State of Del., 270 F. Supp. 173 (D. Del. 1967) is analyzed.

It should be noted that the *Thompson* court did not expressly invalidate all residence requirements for welfare regardless of length of time, *i.e.*, those less than one year, but they did find that there was no administrative need for a residence requirement. 270 F. Supp. at 338.

recognized for many years. A series of cases has held that this right is protected by the commerce clause of the United States Constitution.[7] The first judicial indication of this proposition may be found in the case of *City of New York* v. *Miln*[8] in which the Court considered a New York statute requiring the masters of vessels to report the name, place of birth, occupation, age and last legal settlement of all passengers who landed with the intention of proceeding into New York City. Although the majority upheld the statute as a regulation under the police power of the state,[9] Justice Story, dissenting, maintained that the statute was a regulation upon commerce and, therefore, in violation of the commerce clause of the Constitution which expressly grants this power to Congress.[10]

Commerce clause protection of the right to travel was given further impetus in the *Passenger Cases*,[11] which held that a state tax on passengers arriving from foreign ports was invalid. While Justice M'Lean, writing for the Court, rested his opinion squarely on the commerce clause,[12] the three concurring Justices, in their opinions, alluded to the commerce clause, but were less clear as to whether they found the statute invalid because it was a state attempt to regulate interstate commerce. As a result of *The Passenger Cases* New York modified its statute to avoid the constitutional objection. Instead of a direct tax, the ship's owner or consignee was required to supply a $300 bond to indemnify the City of New York for any expense incurred on behalf of the passenger named in the bond, or in lieu of the bond to pay a fee of $1.50 per passenger. If the statute was not complied with, a $500 penalty was imposed upon the ship's owner for each pauper for whom expense was incurred. This revised statute was also held unconstitutional on commerce clause grounds by a unanimous Court in *Henderson* v. *New York*.[13]

The most recent consideration by the Supreme Court of the application of the commerce clause to interstate travel is found in the case of *Edwards v. California*.[14] A California statute made it a misdemeanor for residents to aid non-resident indigents in entering the state. The Court held that the statute imposed "an unconstitutional barrier to interstate commerce,"[15] reasoning

[7] U.S. CONST. art. I, §8 cl. 3: "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . ."

[8] 36 U.S. (11 Pet.) 102 (1837).

[9] *Id.* at 108.

[10] *Id.* at 115.

[11] 48 U.S. (7 How.) 283 (1849).

[12] *Id.* at 300.

[13] 92 U.S. (2 Otto.) 259 (1875).

[14] 314 U.S. 160 (1941).

[15] *Id.* at 173.

that "it is settled beyond question that the transportation of persons is 'commerce' within the meaning of that [commerce clause] provision."[16] Justice Byrnes, speaking for the Court, concluded:

> Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute.[17]

Although the states are forbidden by the commerce clause to regulate the interstate travel of persons, this power would not be denied to Congress. In fact, implementing this power, Congress has expressly authorized the states to require one year of residence as a condition of eligibility for ADC.[18] By enacting such requirements, therefore, the states have not usurped any congressional power, but have merely made use of authority delegated to them. Consequently, the commerce clause argument has little weight in such circumstances.[19] It is thus evident why the court in *Thompson* did not rely on the commerce clause nor on the majority opinion in *Edwards* v. *California.*

Even though the *Thompson* court was unable to rely upon the cases which support a right to travel under the commerce clause, it, nevertheless, found this right to travel protected by the fourteenth amendment. In the case of *Crandall* v. *Nevada*[20] the Supreme Court, although rejecting the commerce clause argument,[21] held unconstitutional a tax upon all persons leaving the state by commercial vehicle apparently on the premise that free movement was a right of national citizenship.[22] Although the opinion on this point is unclear,[23] Justice Douglas, in his concurring opinion in *Edwards,* relied upon *Crandall* for the proposition that "the right to move freely from State to State was a right

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[16] *Id.* at 172.

[17] *Id.* at 174.

[18] 42 U.S.C. §602 (6) (1959).

[19] Because Congress has delegated authority to the states to enact residence requirements does not of itself make the requirements constitutional. Congress may not have the authority to enact such requirements where they violate constitutional rights. *See* text notes 31-40 *infra.* But the arguments against the requirements are based primarily on the *state* violation of the fourteenth amendment.

[20] 73 U.S. (6 Wall.) 35 (1867).

[21] *Id.* at 43. *But see* Colgate v. Harvey, 296 U.S. 404, 444 (1935) (dissenting opinion of J. Stone).

[22] 73 U.S. at 49.

[23] *See* United States v. Wheeler, 254 U.S. 281 (1920), in which the Court limited the holding in *Crandall.* The Court stated that the statute "in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions. . . ." *Id.* at 299. *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873). *But see* Twining v. New Jersey, 211 U.S. 78 (1908), in which the Court stated in discussing the privileges and immunities of a United States citizen that "among the rights and privileges recognized by this court are the right to pass freely from state to state, Crandall v. Nevada." 211 U.S. at 97.

of *national* citizenship,"[24] arguing that the California statute in question "ran afoul of the privileges and immunities clause of the fourteenth amendment."[25] In further developing the historical basis for free movement as an incident of national citizenship, Justice Douglas also looked to Chief Justice Fuller's opinion in *Williams* v. *Fears*,[26] in which it was said:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is secured by the Fourteenth Amendment and by other provisions of the Constitution.[27]

Justice Jackson, concurring in *Edwards*, not only supported the view that the right to travel is an inherent right of national citizenship, but also concluded that it encompassed the right to remain, stating:

> [I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this it means nothing.[28]

In light of this statement, the court in *Thompson* concluded that "the right of interstate travel embodies not only the right to pass through a state, but also the right to establish residence therein."[29]

Not only is the right to travel protected from state abridgment by the fourteenth amendment, but the Supreme Court has also held that it is protected by the due process clause of the fifth amendment from congressional infringement. The *Thompson* court in order to complete their analysis of the right to travel, relied on these Supreme Court decisions. In *Kent* v. *Dulles*[30] the secretary of state was held not to have the authority to refuse to issue passports to each of two plaintiffs because of their refusal to file an affidavit concerning their membership in the Communist Party. In discussing the right of foreign travel the Court considered the right of travel generally:

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the

[24] 314 U.S. at 179. Justice Douglas found further support in Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823) which held: "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ," to be a privilege of state citizenship protected by art. IV, §2 of the Constitution. *Id.* at 552. *But see* Hague v. C.I.O., 307 U.S. 496, 511 (1939), which rejected the argument of such a right under art. IV., §2.

[25] 314 U.S. at 181.

[26] 179 U.S. 270 (1900).

[27] *Id.* at 274. But the Court in considering a tax on persons engaged in hiring laborers to be employed beyond the limits of the state, held that the tax did not amount to such an interference with the freedom of transit, or of contact, as to violate the Federal Constitution.

[28] 314 U.S. at 183.

[29] 270 F. Supp. at 336.

[30] 357 U.S. 116 (1958).

> Fifth Amendment. . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta.[31]

Continuing, Justice Douglas expressed the right of free movement as "part of our heritage,"[32] and "basic in our scheme of values."[33]

Six years later the case of *Aptheker* v. *Secretary of State*[34] raised a similar problem. Certain ranking officials of the Communist Party of the United States had their passports revoked under section 6 of the Subversive Activities Control Act of 1950.[35] Justice Goldberg, speaking for the Court, held the section to be unconstitutional in that it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the fifth amendment."[36] However, it should be noted that in *Zemel* v. *Rusk*[37] the Court indicated that Congress may restrict the right to travel in certain limited circumstances, *i.e.*, when it becomes necessary to preserve the welfare and security of the nation.[38]

In summary, the Supreme Court in the case of *United States* v. *Guest*[39] recently affirmed that:

> Although there have been recurring differences in emphasis within the court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.[40]

INFRINGEMENT OF THE RIGHT TO TRAVEL

It would seem that a direct proscription against entry into a state is an abridgment of the right to travel. However, it was contended in *Thompson* that the right "is abridged by Connecticut's practice of denying ADC to those in plaintiff's situation because it *chills their mobility;*"[41] thus implying that mere discouragement of entry constitutes an unlawful abridgment of the right to travel. To support this proposition which in effect equates mere discouragement with direct proscription of entry, the court relied upon the words of Justice Stewart in *United States* v. *Guest:*[42]

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[31] *Id.* at 125.
[32] *Id.* at 126.
[33] *Id.*
[34] 378 U.S. 500 (1964).
[35] 50 U.S.C. §785 (1959).
[36] 378 U.S. at 505.
[37] 381 U.S. 1 (1965).
[38] *Id.* at 15-16.
[39] 383 U.S. 745 (1966).
[40] *Id.* at 759.
[41] 270 F. Supp. at 334 (emphasis added). It is contended basically that residence requirements discourage the mobility of those receiving welfare in that a welfare recipient who desires to move to another state will not have any means of support until he has satisfied the residence requirement of the state into which he desires to move. Thus his movement is *discouraged.*
[42] 383 U.S. 745 (1966). Six private individuals were indicted under 18 U.S.C. §241 (1964) for conspiring to deprive Negro citizens of rights secured to them by the Constitution and laws of the United States.

> . . . [I]f the predominant purpose of the conspiracy is to *impede* or prevent the exercise of the right of interstate travel, or to *oppress* a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.[43]

The court in *Thompson* reasoned that the Court in *Guest*, "By employing the words 'impede' and 'oppress,' . . . must have contemplated that the discouragement of interstate travel is also forbidden."[44] It should be noted, however, that the facts in *Guest* are radically different from those in *Thompson*. The *Guest* indictment charged that the conspirators planned to "impede" and "oppress" free travel:

> 1. By shooting Negroes; 2. By beating Negroes; 3. By killing Negroes; 4. By damaging and destroying property of Negroes; 5. By pursuing Negroes in automobiles and threatening them with guns; 6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person; 7. By going in disguise on the highway and on the premises of other persons; 8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and 9. By burning crosses at night in public view.[45]

It is therefore tenable that the Court in *Guest* considered the violent acts and threats of murder, damage and destruction to be tantamount to proscription of the right of free travel, rather than mere discouragement. It is thus doubtful that the *Guest* Court ever contemplated the mere discouragement of the right to travel to be a violation of the privileges and immunities clause of the fourteenth amendment.[46]

However, as noted in *Thompson*, stronger support for including "mere discouragement" within the ambit of an abridgement of the right of free movement is to be found in the concurring opinions of *Edward* v. *California*.[47] The statute in that case did not directly proscribe free movement but merely discouraged the right; the sanctions were imposed on the aiding resident rather than the entering indigent. In other words, the indigent was not directly prohibited from entering the state but only discouraged from doing so by a limitation on his mode of

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[43] *Id.* at 760 (emphasis added).

[44] 270 F. Supp. at 336.

[45] 383 U.S. at 747-48, n. 1.

[46] The Court in *Guest* was dealing with a conspiracy of *individuals* who had allegedly joined to "impede" and "oppress" free mobility. The historical development of the right has been in terms of protection from *state* abridgment of interstate travel. Justice Harlan, concurring in part and dissenting in part, felt that "[w]hile past cases do indeed establish that there is a constitutional 'right to travel' between States from unreasonable *governmental* interference . . . ," there does not appear to be a constitutional protection for individual interference. 383 U.S. at 763. *But see* 383 U.S. at 759 n. 17 in which the majority in *Guest* expressed that the reasoning supports the conclusion that interstate travel is free from *any type* of interference.

[47] 314 U.S. 160 (1941).

entry. Justice Douglas and Justice Jackson in their concurring opinions held that the statute clearly abridged the right to travel.[48]

First Amendment Analogy

To strengthen its argument regarding the "chilling effect" of the statute as an unconstitutional abridgment of free mobility the court in *Thompson* found an analogy in the protection extended by the courts to the first amendment rights of freedom of speech and religion:

> Further support for the proposition that the right of interstate travel also encompasses the right to be free of discouragement of interstate movement may be found by analogy to cases proscribing actions which have a chilling effect on First Amendment rights.[49]

In developing this analogy, the court first cited the case of *Dombroski* v. *Pfister*[50] which considered the problem of a civil rights group threatened with prosecution for alleged violations of the Louisiana Subversive Activities and Communist Control Law. A three-judge district court had held that the complaint failed to allege sufficient irreparable injury to justify an injunction sought by the civil rights group.[51] Justice Brennan in writing the opinion of the Supreme Court stated:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overboard regulations risk prosecution to test their rights. . . . If the rule were otherwise, the contours of regulations would have to be hammered out case by case — and tested only by those hardy

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[48] *See* text at notes 24-28 *supra*. The *Edwards* decision still might be distinguished in such a case since the statute involved in *Edwards* was enacted with the intent of discouraging the entrance of non-resident indigents. Residence requirements arguably are not directly intended to prevent indigents from entering the state. *But see* the dissent in *Thompson*, in which it is contended that what the residence requirement "does do and is intended to do, is to deter those who would enter the state for the primary or sole purpose of receiving welfare relief allotments." 270 F. Supp. at 339. The court might also have considered the case of Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). In that case the tax which was found to inhibit free travel was not intended to do so, *see* text and notes at notes 20-23 *supra*. *See also* Bell v. Maryland, 378 U.S. 226 (1964), in which Justice Douglas and Justice Goldberg concurring, indicated, in dicta, that state action is unconstitutional even if it merely hinders interstate movement. The Court in *Bell* questioned:

> . . . Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards v. California* . . . ? Does not a right to travel in modern times shrink in value materially when there is no accompanying right to eat in public places?
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> The right of any person to travel *interstate*, irrespective of race, creed, or color is protected by the Constitution. *Edwards v. California*. . . . Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is indeed, practically indispensable to travel either interstate or intrastate.

Id. at 255.

[49] 270 F. Supp. at 336.

[50] 380 U.S. 479 (1965).

[51] The court also abstained on the grounds that a possible narrowing of the construction by the state court might avoid the constitutional issue.

enough to risk criminal prosecution to determine the proper scope of regulation.[52]

Thus the *threat* of criminal sanctions was considered to be as effective a deterent as the actual application of the sanctions in having a "chilling effect"[53] whereby the civil rights group was discouraged from exercising their first amendment rights.

To further support the first amendment analogy, the court in *Thompson* relied upon the recent selective service case of *Wolff* v. *Selective Service Local Board No. 16*.[54] The court in *Wolff* held that the mere reclassification of students from "student-deferred" to "available for military duty" because of their participation in anti-war protests gave rise to an immediate justiciable controversy which would permit a federal court to intervene and adjudicate the matter. The court declared that "the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise . . . " of first amendment rights.[55] Again, as in *Dombroski*, the mere threat of sanctions, *i.e.*, reclassification alone, effectively discouraged the exercise of free expression.[56]

Applying this first amendment analogy, the court in *Thompson* emphasized that "[d]enying to the plaintiff even a gratuitous benefit because of her exercise of her constitutional right effectively impedes the exercise of that right."[57] The court found direct support for its conclusion in the case of *Sherbert* v. *Verner*.[58] There, the Supreme Court considered a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The claimant was a member of the Seventh-Day Adventist Church and was discharged by her employer because she would not work on Saturday, her Sabbath Day. Unable to find any work that did not require her to be present on Saturday, the claimant filed for unemployment compensation. Her initial claim was refused on the ground that a claimant to be eligible for benefits, must be "[a]ble to work and . . . [a]vailable for work . . . "[59] and a claimant is ineligible if he has failed to accept suitable work offered to him.[60]

Justice Brennan, in writing the opinion of the Court, held that the denial of the claim imposed an unconstitutional burden

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[52] 380 U.S. at 486-87.

[53] "The *chilling effect* upon the exercise of first amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Id.* at 487 (emphasis added).

[54] 372 F.2d 817 (2d Cir. 1967).

[55] *Id.* at 824.

[56] Query, whether the withholding of economic welfare benefits pending fulfillment of residency requirements is comparable to the sanction of selective service reclassification? *But see* text at notes 61-63 *infra*.

[57] 270 F. Supp. at 336.

[58] 374 U.S. 398 (1963).

[59] 14 S.C. CODE ch. 3 §68-113 (3) (1962).

[60] 14 S.C. CODE ch. 3 §68-114 (3) (ii) (1962).

on the free exercise of her religion. In its analysis the Court reasoned that:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an *indirect result of welfare legislation* within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week.[61]

But the court continued:

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.[62]

In response to the view that the receipt of unemployment compensation benefits is not a matter of right but, in fact, a mere privilege, the Court in *Sherbert* stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[63] The Court cited the case of *Flemming* v. *Nestor*[64] which considered Federal Social Security benefits as a further exemplification of the concept. There, Justice Harlan declared that "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."[65] The *Sherbert* Court also found a similar assertion in *Speiser* v. *Randall*[66] in which the Court "emphasized that con-

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[61] 374 U.S. at 403 (emphasis added).

[62] *Id.* at 404. The *Sherbert* Court cited Braunfeld v. Brown, 366 U.S. 599 (1960). But the Court in *Braunfeld* found, in considering the problem of the effect of a Sunday Closing Law on those of the Jewish faith, that the law was valid because of the overriding state interest in a common day of rest.

[63] 374 U.S. at 404.

[64] 363 U.S. 603 (1960).

[65] *Id.* at 611. The Court considered the validity of section 202(n) of the Social Security Act, 42 U.S.C. §402(n) (1964), which provides for termination of benefits payable to an alien deported on the grounds of Communist Party membership. In a 5 to 4 decision, Justice Harlan, writing the opinion of the Court, found that the statute did not deprive the alien of property rights in violation of the fifth amendment nor was he deprived of protection from arbitrary government action afforded by the due process clause.

[66] 357 U.S. 513 (1958). The Constitution of California required that tax exemptions be denied persons who advocated the unlawful overthrow of the government, or who advocated the support of a foreign government engaged in hostilities with the United States. The California Supreme Court had construed this provision of the State Constitution as denying any tax exemption to any person who engaged in speech which might be criminally punished consistently with the free-speech guarantees of the Federal Constitution. To effectuate the state constitutional provision, the California legislature enacted a statute requiring a property-tax exemption claimant to sign a statement on his tax return declaring that he does not engage in the proscribed advocacy. The United States Supreme Court, in considering the case of a veteran who was denied a tax exemption because of his failure to sign the oath, assumed that the California constitutional provision was valid but held that the statute which required the oath was invalid because it denied the claimant due process. Enforcement of the constitutional provision through procedures which placed the burden of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the due process clause of the fourteenth amendment.

ditions upon public benefits cannot be sustained if they so operate, whatever their purposes, as to inhibit or deter the exercise of first amendment freedoms."[67]

A statute which merely "chills" entry into a state may be, in effect, an abridgment of the right to travel. The cases indicate that a direct proscription of the right is not necessary and thus mere discouragement may be sufficient to constitute a violation of the privileges and immunities clause. In light of the expanding recognition by the Supreme Court of the right to travel, and the parallelism found between that right and first amendment rights, the court in *Thompson* concluded that: "Because Connecticut Gen. Stat. §17-2d has a chilling effect on the right to travel, it is unconstitutional."[68]

EQUAL PROTECTION

While the opinion in the *Thompson* case is predicated primarily upon the privileges and immunities clause of the fourteenth amendment, it has not been the only constitutional provision invoked as a protection against the inequities of residence requirements. The courts have also turned to the equal protection clause.[69] In the case of *Green* v. *Department of Public Welfare of the State of Delaware,*[70] the court found the Delaware welfare residence requirements to be in violation of such clause and, therefore, unconstitutional.[71]

Green moved to Delaware in order to find construction work. Because of unexpected inclement weather causing days of unemployment, he was forced to apply for public aid. Such public assistance was temporarily granted, but when Green could not verify satisfaction of Delaware's residence requirement, the assistance was terminated. Green reapplied and was again denied aid because he had resided in Delaware for less than one year. The court held that such residence requirements, "create an in-

[67] Sherbert v. Verner, 374 U.S. 398, 405 (1963).

[68] 270 F. Supp. at 336. The court does not, however, assert that the right to travel is absolute. Even first amendment rights may be curtailed if there is an overriding state or national interest. *See* Braunfeld v. Brown, 366 U.S. 599 (1960) note 62 *supra;* "clear and present danger" rule, Schenck v. United States, 249 U.S. 47 (1919). Thus, if the first amendment analogy is to be carried through, the right to travel may be abridged in the public interest. Zemel v. Rusk, 381 U.S. 1 (1965). *But see* Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUPREME COURT REVIEW 245 (Kurland ed.). *Thompson* implicitly concedes that if the residence requirements met the "reasonableness" test, *see* text and notes at notes 78-80 *infra,* they would not have presented an unconstitutional abridgement of the right to travel. 270 F. Supp. at 338.

[69] U.S. CONST. amend. XIV, §1. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[70] 270 F. Supp. 173 (D. Del. 1967). *See* note 6 *supra.*

[71] 270 F. Supp. at 178. The court in *Thompson* also stated: "Not only does §17-2d abridge the right to travel and its concomitant right to establish residence, but it also denies plaintiff the equal protection of the law." *Id.* at 336.

vidious distinction as to the class represented by plaintiffs and are, therefore, in violation of the equal protection clause."[72] But the court placed the burden of showing that the classification made by the statute[73] was unconstitutional on the plaintiff:[74]

> Or, stated another way, in order to upset the statutory classification here involved as in violation of the equal protection clause, plaintiffs must show that it is not based on differences which are reasonably related to the purpose of the statute involved.[75]

Having emphasized the burden to be met by plaintiff, the court in *Green* next analyzed the applicable Delaware statutory provisions. Looking to the underlying purpose of the legislature in enacting the State Public Assistance Code,[76] the court found that policy to be

> to promote the welfare and happiness of all people of the State, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life. . . .[77]

With this purpose in mind the court applied the test rule enunciated by the Supreme Court in the case of *Morey* v. *Doud*,[78] *i.e.*, whether the discrimination is reasonably related to the purpose of the act which it is intended to limit,[79] and considered whether the residence requirements reasonably implemented the purpose of the Delaware Welfare Act.[80] The court concluded that the residence requirement tends to frustrate the purpose of the act in that it prevents prompt assistance to those who are in

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[72] Green v. Dep't of Public Welfare of the State of Del., 270 F. Supp. 173, 178 (D. Del. 1967). The court noted that the plaintiffs had exhausted their administrative remedies as provided under the Delaware statutes. The action was continued as a class action, *see* FED. R. CIV. P. 23. Both parties moved for summary judgment, there being no material issue of fact.

[73] DEL. C. ANN. tit. 31 §504 (Supp. 1966).

[74] The court noted, "that the equal protection clause does not preclude all discrimination by a state but only invidious discrimination." 270 F. Supp. at 176. Thus under *Green*, residency classification does not appear on its face to be inherently unconstitutional as would be the case if classification were based on race. *See* Loving v. Commissioner of Virginia, 388 U.S. 1 (1967).

[75] *Green* at 176. *See* Morey v. Doud, 354 U.S. 457 (1957); A. F. of L. v. American Sash & Door Co., 335 U.S. 538 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (concurring opinion of Justice Jackson). The court in *Thompson* applied a similar test: "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." 270 F. Supp. at 336. *See* McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

[76] DEL. C. ANN. tit. 31 ch. 5 (Supp. 1966).

[77] DEL. C. ANN. tit. 31 §501 (Supp. 1966).

[78] 354 U.S. 457 (1957). *See* text at note 76 *supra.*

[79] 354 U.S. at 465.

[80] The court in *Thompson* did not adhere to the approach of the court in *Green.* Instead, it looked to the purpose of the Connecticut residence requirement statute. 270 F. Supp. at 336-37. *See* note 75 *supra.* "[A] statutory discrimination must be based on differences that are *reasonably related to the purpose of the Act in which it is found.*" (emphasis added.) Morey v. Doud, 354 U.S. 457, 461 (1957). Thus the test is not whether the discrimination itself is reasonable, but whether the discrimination is "reasonably related" to the act which it is intended to limit. *See* text and notes at notes 88-89 *infra.*

need, "and to that extent is the antithesis of 'humane.' "[81] The statutory discrimination based on length of residence was thus found to have "no constitutional justification in the purpose declared in the statute itself."[82]

IN SUPPORT OF CONSTITUTIONALITY

The court in *Green* distinguished the Illinois Supreme Court opinion in *People ex rel. Heydenreich* v. *Lyons*.[83] In that case certain welfare claimants petitioned the court for a writ of mandamus to compel the local relief officer to give them relief funds denied them because they had not satisfied the three-year residence requirement. The court held that the petitioners had made only temporary departures from the particular governmental unit involved and, therefore, had in fact fulfilled the residence requirements.[84] The court stated that: "It is settled that the police power may be exercised not only in the interest of public health, morals, comfort and safety, but also for the promotion of the public convenience or the general welfare."[85] The Illinois court conceded that the statute regulating welfare may be the subject of judicial review since "[t]he legislative determination as to what is a proper exercise of the police power is not necessarily conclusive,"[86] but found that the legislature's desire to prevent destitute persons seeking the most advantageous program from migrating into Illinois was reasonable in method and purpose.[87]

The court in *Green*, however, noted that the Illinois decision antedated the *Edwards* case[88] and, therefore, did not consider the view presented by the concurring opinions of Justice Douglas and

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[81] *Green* at 177. The court also suggested that the residency requirement places "pressure on the solidarity of the family," and unduly presumes that those who have not fulfilled the residency requirements "are not a part of the state's needy and distressed." *Id.*

[82] *Id.*

[83] 374 Ill. 557, 30 N.E.2d 46 (1940).

[84] *Id.* at 566, 30 N.E.2d at 51.

[85] *Id.* at 562, 30 N.E.2d at 49.

[86] *Id.* at 563, 30 N.E.2d at 50.

[87] *Id.* at 566, 30 N.E.2d at 51. A similar problem was considered by a New York court in the case of *In re Chirillo*, 283 N.Y. 417, 28 N.E.2d 895 (1940). Although the majority decided the case without reaching the constitutional question, the dissent did reach the constitutional question and found the statute valid, stating:

> Freedom of residence is restricted as to citizens only while on relief. . . . No interference is had with the right of any citizen to choose and establish a home. What is controlled is the unrestricted imposition of indigent persons and families without settlement upon a community and State where they cannot establish a home because of their indigent status. . . . Such conditions restrict individual rights and freedom in the interest of the right, security and freedom of the rest of the State.

Id. at 424, 28 N.E.2d at 904.

[88] Edwards v. California, 314 U.S. 160 (1941).

Justice Jackson in *Edwards*.[89] Consequently the *Green* court concluded that: "The protection of the public purse, no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State of Delaware."[90]

Voting Analogy:

State statutory residence requirements as prerequisites for becoming a qualified voter have been judicially tested on several occasions[91] and in each case have been affirmed. In the latest case of *Drueding* v. *Devlin*,[92] a resident of Pennsylvania moved to Maryland and after residing there for several months at-

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[89] *Id.* at 177-86. The State of California in the *Edwards* case argued that its interest in protecting the state treasury justified its statute under its police powers, alleging that:

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions, and the care of the criminal, the indigent sick, the blind and the insane.
>
> Should the States that have so long tolerated, and even fostered, the social conditions that have reduced these people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.

314 U.S. at 168. Justice Douglas and Justice Jackson, concurring in *Edwards*, stated that the state's desire to protect its treasury is not a valid reason to "curtail the right of free movement of those who are poor or destitute." 314 U.S. at 181. Similarly, the *Thompson* court concluded: "Here, as there, [in *Edwards*] the burden on the state treasury does not justify an enactment with an invalid purpose." 270 F. Supp. at 337.

While the concurring opinions in *Edwards* rest on the privileges and immunities clause, the court in *Green* apparently considered that their rationale was also applicable to the equal protection clause.

But it should also be noted that the *Green* court did not discuss the intrinsic merit of the contention in *Heydenreich* regarding the alleged need to discourage entry by those seeking higher welfare benefits, which argument was also urged by the dissent in the *Thompson* case. The contention that residence requirements are necessary to discourage indigents from entering the state for the sole or primary purpose of seeking higher benefits ignores the generally accepted premise that most indigents move to another state for other reasons, *e.g.*, to be closer to their families, to look for better jobs, etc. Ramos v. Health & Social Services Bd. of State of Wis., 276 F. Supp. 474, 476 (E.D. Wis. 1967). *See* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567 (1966); LoGatto, *Residence Laws — A Step Forward or Backward?*, 7 CATH. L. REV. 101 (1961).

[90] *Green* at 177. The court in *Green* also considered the possibility that the one-year residence requirement may be considered as a test for "intention to remain indefinitely," which is an element for establishing domicile in Delaware. The domiciliary, "is defined as one who is physically present in Delaware with an intention to remain indefinitely." *Id.* *See* New York Trust Co. v. Riley, 24 Del. Ch. 354, 16 A.2d 772 (1940), *aff'd*, 315 U.S. 343 (1942). However, in *Green* the court found length of residency to be an unreasonable test for determining intention to remain. But the court pointed out that it did not reach the problem of whether a state may validly limit its welfare benefits to its own domiciliaries. 270 F. Supp. at 178.

[91] Blake v. McClung, 172 U.S. 239 (1898); Pope v. Williams, 193 U.S. 621 (1904); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

[92] 234 F. Supp. 721 (D. Md. 1964) *aff'd per curiam*, 380 U.S. 125 (1965).

tempted to register to vote in a national election. He was refused registration because he had not fulfilled the one year Maryland residence requirement. The court held that the requirement was not an irrational or unreasonable discrimination and therefore did not abridge the equal protection clause of the fourteenth amendment.[93]

Drueding also indicated that the residence requirement fulfilled certain administrative purposes which generally help to prevent fraud and provide some means of assuring a concern for community problems on the part of the voter.[94] Similarly, the Court in *Carrington* v. *Rash*,[95] while it held unconstitutional a Texas statute that prevented servicemen from voting, emphasized that, "Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirement of bona fide residence."[96] However, because of the differences in purpose between residence requirements for voting and welfare payments, and the need for immediacy in granting welfare payments as compared to granting the right to vote, the court in *Green* concluded that an analogy between the two was improper.[97]

Other Residence Requirements:

The dissenting judge in *Thompson* pointed out that "Connecticut has always freely exercised its sovereign right as a state, to legislate and administer controls governing a myriad of comparable state services."[98] These controls include the fulfillment of a residence requirement as a condition precedent to receiving

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[93] *Id.* at 723. The affirmance by the Supreme Court should be considered in light of the fact that the Maryland legislature was then considering a reduction of the residency period. The affirmance was also made at a period when voting rights legislation was under consideration by Congress. *See* Christopher, *The Constitutionality of Voting Rights Act of 1965*, 18 STAN. L. REV. 1136 (1965). *See also* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[94] 234 F. Supp. at 725. *See also* Schmidhouse, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 828 (1963).

[95] 380 U.S. 89 (1965).

[96] *Id.* at 96. The majority in *Thompson* considered the possible relation between voting residence requirements and welfare residence requirements and concluded:

> [I]f there were here a time limit applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid. Connecticut's Commissioner of Welfare frankly testified that no residence requirement is needed for any of these purposes.

Thompson at 338. The court in *Green* also pointed out that one year was an unreasonable length of time to withhold welfare payments for administrative purposes. *Green* at 177.

[97] *Green* at 178. The *Green* court points out that the residence requirement for voting does not inflict any physical hardships on an individual. Denial of welfare payments, however, does involve physical hardships — the extreme being starvation. The need for welfare aid is *immediate*.

[98] 270 F. Supp. at 340.

a particular service or benefit. For example, in order to receive a Connecticut student scholarship, a student must reside within the state for the twelve months prior to his application.[99] To qualify for aid for the instruction of a blind child, both the parent and child must reside within the state one year before application.[100] In order to vote, one must reside in the state for six months.[101] As a corollary to this requirement, in order to hold a liquor permit, one must be an elector.[102] In fact, the captains and crews of boats who wish to take oysters[103] or scallops[104] from state waters must satisfy a one-year residence requirement.

The question arises whether under its police power a state may attach conditions to the benefits and services it provides. The *Thompson* dissent seems to imply an affirmative answer and, indicating that the majority by its decision has effectuated the erosion of the police power of the state, concluded that if all these established residence requirements were struck down as unconstitutional: "Such a decree by judicial fiat would go far toward completing the annihilation of the police powers, which were reserved to the several states and to the people under the tenth amendment to the Federal Constitution."[105]

This conclusion suffers from the fact that the imposition of conditions under a state's police power has always been subject to a judicial test of "reasonableness."[106] Such a test was applied

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[99] CONN. GEN. STAT. (Rev. 1958) §10-116c.
[100] CONN. GEN. STAT. (Rev. 1958) §10-295(b).
[101] CONN. GEN. STAT. (Rev. 1958) §9-12.
[102] CONN. GEN. STAT. (Rev. 1958) §30-45(3).
[103] CONN. GEN. STAT. (Rev. 1958) §26-212.
[104] CONN. GEN. STAT. (Rev. 1958) §26-288.
[105] 270 F. Supp. at 340 (dissenting opinion). It should also be noted that the dissenting judge felt that the majority had made their decision in light of the social evils of the residence requirements rather than the constitutional issues involved. However, the dissent fails to particularize this objection. A better presentation of this argument may be found in Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967) (dissenting opinion).
[106] *See* text and notes at notes 79-80 *supra;* Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *appeal granted,* 36 U.S.L.W. 3294 (U.S. Jan. 22, 1967) (No. 949), wherein a three-judge district court held unconstitutional the Alabama "substitute father" statute on equal protection grounds, while Justice Black originally granted a stay of judgment he has now vacated such stay, 88 S. Ct. 842 (1968); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Frost & Frost Trucking Co. v. Railroad Comm'n of Calif., 271 U.S. 583 (1926), in which the Court considered conditions for receiving certain licenses. The Court noted that the licenses were privileges and not rights and therefore the state could attach conditions. However, the Court went on to state:

> [T]he power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94. As to state courts, *see also* Collins v. State Board of Social Welfare, 248 Ia. 369, 81 N.W.2d 4 (1957); Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885 (1946). *See generally* Reich,

by the Supreme Court of Florida in the case of *Mercer* v. *Hemmings*[107] which held unconstitutional a section of a Florida statute insofar as it required two years of residence within the state as a prerequisite for certification as a public accountant. The court, in holding that the restriction on the plaintiff violated his right to the equal protection of the law, stated:

> A statute enacted in the exercise of the police power must have been passed to prevent some manifest evil or to preserve public health, morals, safety or welfare. The test is always whether the regulation is reasonable within those limits.[108]

The courts in *Thompson* and *Green* seem merely to have implemented this test in striking down statutory residence requirements.

Thus conditions may be attached as prerequisites to the receipt of services and benefits from the state, but such conditions must be reasonable and thus not deny equal protection of the law or other rights guaranteed by the Constitution.

CONCLUSION

The courts have, in effect, found that the right of the individual to travel freely is more socially desirable than the state's right to regulate its welfare program in order to protect its treasury. Residence requirements go beyond the limits of the police power. Therefore to cure the abuses seemingly inherent in welfare programs it would appear that states must look to new modes of protection, more limited in scope than residence requirements.[109]

Whether there will now be a greater influx into those states which offer high welfare benefits remains to be determined. Studies made thus far of this question with respect to those states which do not condition their welfare programs on residence

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Unconstitutional Conditions, 73 HARV. L. REV. 1595 (1960); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

[107] 194 So.2d 579 (Fla. Sup. Ct. 1966).

[108] *Id.* at 585. *See* Rinaldi v. Yeager, 384 U.S. 305 (1966), in which the Court stated:

> This court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free from unreasonable distinctions that can only impede open and equal access to the courts.

Id. at 310. *Cf.* Parrish v. Civil Service Comm'n, 57 Cal. Rptr. 623 (1967).

[109] *See* Plaintiff's Brief in Support of its Cross-Motion for Summary Judgment at 37, Green v. Dep't of Public Welfare of the State of Del., 270 F. Supp. 173 (D. Del. 1967), which suggests that statutes might be passed that are less restrictive of individual rights. They might bar any person whose sole or primary purpose in entering the state is to obtain higher welfare benefits. Certain rebuttable presumptions might be raised regarding intention and a list of factors to be considered might be provided. *See, e.g.*, NEW YORK WELFARE ABUSE LAW, NEW YORK SOCIAL WELFARE LAW, §139a (McKinney 1965).

requirements[110] have been inconclusive.[111] Any present lack of increase, however, could be attributed to a lack of awareness on the part of indigents as to what states pay high benefits and do not have residence requirements. Increased awareness of such information by the indigent population may very well precipitate an unduly burdensome imigration into the higher paying industrial states. It can therefore be anticipated that there will be a strong clamor by these industrial states for federal intervention to impose minimum benefit standards upon all states to help equalize the availability of benefits and thereby discourage oppressive migration.[112]

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[110] American Public Welfare Ass'n, PUBLIC WELFARE DIRECTORY (1967).

[111] *See* Altmeyer, *People on the Move: Effect of Residence Requirements for Public Assistance*, 9 SOCIAL SEC. BULL. 3, 5 (Jan. 1946); LoGatto, *Residence Laws — A Step Forward or Backward?*, 7 CATH. L. REV. 101, 106-07 (1961); Comment, *Residence Requirements in State Public Welfare Statutes*, 51 IOWA L. REV. 1080, 1084 (1966).

[112] *See* Chicago Sun-Times, Nov. 10, 1967, at 26, Col. 1.