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Constitutional Law—One Year Residence Requirement to Be Eligible for State Welfare: a Denial of Both Equal Protection and Freedom of Travel

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civil commitment as a proper exercise of the state's police power?[80] If the rationale of *James* is correct, will the exercise of fifth amendment rights to suppress the alleged addict's case history create difficulties of proof that will emasculate the certification proceeding? If *Miranda* is applicable to commitment proceedings for addicts, should its safeguards be extended to insanity commitment proceedings where an individual may lose his freedom of action, but where no taint of criminality attends his confinement? If an addict proves that he would receive superior treatment from a private physician, must he nonetheless be committed?[81]

The preceding policy questions emphasize the complexity of the task of developing a civil proceeding for the compulsory commitment of narcotic addicts which is at once constitutional and practicable.

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CONSTITUTIONAL LAW—ONE YEAR RESIDENCE REQUIREMENT TO BE ELIGIBLE FOR STATE WELFARE: A DENIAL OF BOTH EQUAL PROTECTION AND FREEDOM OF TRAVEL

Defendant, the Commissioner of Welfare for the state of Connecticut, denied plaintiff's application for assistance under Aid to Dependent Children[1] on November 1, 1966, for the sole reason that she had not met the statutory one year residence requirement.[2] Until September, 1966, plaintiff had been receiving

80. A persuasive argument that involuntary commitment of narcotic addicts is not justified on the basis of existing knowledge about addicts, and methods of treatment is presented by Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 Colum. L. Rev. 405 (1967).

81. *See* A. Lindesmith, The Addict and the Law 270-77, 290-94 (1965).

1. Social Security Act, tit. IV, 49 Stat. 627 (1935), *as amended*, 42 U.S.C. §§ 601-09 (1964), *as amended*, 42 U.S.C. §§ 602-06 (Supp. I, 1965).

2. Conn. Gen. Stat. Rev. § 17-2d (1965):

> "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 or general assistance under part I 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."

As impemented by 1 Conn. Welfare Man. ch. II, § 219.1.

1. Persons or families who arrive in Connecticut without specific employment.
2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.
3. "Immediate future" means within three months after arriving in Connecticut. NOTE: Support from relatives or friends, or from a public, private, or voluntary agency for three months after arrival will not satisfy the requirements of the law, which relates to self-support rather than to dependency.

And also implemented by *id.* § 219.2.

In accord with the above, the regulations further provide:

1. If the application for assistance is filed within one year after arrival in

such assistance in Boston, Massachusetts, where she had resided prior to moving to Connecticut. The plaintiff brought an action in the United States District Court for the District of Connecticut,[3] seeking a declaration that the Connecticut statute was unconstitutional, an injunction to prevent its enforcement, and payment of monies withheld. The court granted the relief sought. *Held*, the statute is unconstitutional as applied since it "chills free travel" and also denies equal protection of the law in violation of the fourteenth amendment by creating classifications not reasonable in light of its purpose. *Thompson v. Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *appeal docketed*, 36 U.S.L.W. 3214 (U.S. Nov. 13, 1967) (No. 813).

Plaintiff alleged her right to travel had been abridged by the statutory requirement of one year residency in the state to qualify for welfare assistance. The right to free travel has had a long history. It was specifically granted in the Articles of Confederation: "[T]he people of each state shall have free ingress and regress to and from any other state."[4] Although not expressed in the Constitution, the right was recognized early by the courts,[5] and includes both interstate[6] and international[7] travel. In 1837, the Supreme Court rejected the argument that the commerce clause applies to the right of free travel on the ground that "persons are not the subject of commerce."[8] Twelve years later, in a 5-4 decision, the Supreme Court[9] accepted the proposition that persons could be the subject of commerce, and held state taxes on passengers arriving from foreign ports invalid under the commerce clause.[10] In the case of *Crandall v. Nevada*,[11] in 1867, the Supreme Court held that a tax imposed on all persons leaving the state by commercial vehicle did not itself institute any regulation of commerce of a national character or which had an unfavorable operation over the whole

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Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or

2. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or
3. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would normally be without employment while actively seeking work. Personal resources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of establishing residence in Connecticut. Connecticut Welfare Manual.

3. The action was brought under 28 U.S.C. §§ 2881, 2884.
4. U.S. Art. of Confed. art. IV.
5. Corfield v. Coryell, 6. F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823).
6. United States v. Guest, 383 U.S. 745 (1966).
7. Kent v. Dulles, 357 U.S. 116, 125-27 (1958); Aptheker v. Sec'y of State, 378 U.S. 500, 505-06 (1964); Zemel v. Rusk, 381 U.S. 1, 14-16 (1965).
8. City of New York v. Miln, 36 U.S. 102, 135 (1837).
9. The Passenger Cases, 48 U.S. 283 (1849).
10. *See* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 584-85 (1966).
11. 73 U.S. 35 (1867).

country, and hence it did not violate the commerce clause.[12] The Court, however, ruled the tax unconstitutional as a violation of the right to travel freely.[13] The Court reasoned that this right was necessary for the federal government to carry on its work,[14] since, if a state could prevent a person from traveling, it could prevent persons from going to federal offices and thus destroy the functioning of the federal government.[15] The Supreme Court, in *Henderson v. New York*,[16] once again resolved a free travel issue using the commerce clause. The statute under attack required a shipmaster to post a bond for each passenger in order to protect the city in the event that a passenger had to be supported by city aid.[17] A unanimous court held the statute violated the commerce clause since only Congress could regulate incoming passengers from other states and countries.[18] In *Edwards v. California*,[19] a California law making it a crime to transport an indigent into California was held unconstitutional as a violation of freedom of travel. Five of the judges, relying on the commerce clause, held the exclusion of paupers as a moral pestilence was not a valid justification for sustaining interference with interstate commerce.[20] The four concurring judges, relying on the privileges and immunities clause of the fourteenth amendment, suggested that the right to pass freely from state to state is an incident of national citizenship, and a state can not impinge on this right solely to protect its treasury.[21] Thus, although courts have differed as to the basis of the right of freedom of travel, the existence of the right has never been denied.[22] Freedom to travel outside of the United States has recently been analogized to the freedoms of the first amendment, thus giving it the preferred status accorded to such rights as freedom of speech and freedom of assembly.[23]

The Connecticut statute was intended to discourage indigents seeking welfare from entering the state. The welfare regulations implementing the statute set up three categories: indigents with a cash stake, those with a job offer, and

12. *Id.* The concurring opinion of Clifford, J., suggested otherwise. *Id.* at 49.
13. *Id.* at 43-44.
14. *Id.*
15. *Id.* The Court, in United States v. Wheeler, 254 U.S. 281 (1920), tried to limit *Crandall* to free travel for governmental purposes.
16. 92 U.S. 259 (1875).
17. *Id.* at 268.
18. *Id.* at 274.
19. 314 U.S. 160 (1941).
20. *Id.* at 176-77.
21. *Id.* at 177 (Concurring opinion of Douglas, J.).
22. United States v. Guest, 283 U.S. 745, 759 (1966).
23. Aptheker v. Sec'y of State, 378 U.S. 500, 505-06 (1964); *see also* Kent v. Dulles, 357 U.S. 116, 125-27 (1958); Zemel v. Rusk, 381 U.S. 1, 14-16 (1965).
It has been suggested that "there are a variety of devices . . . which enable the courts to express the constitutionally mandated preference for freedom of speech and thought. Among these are the clear and present danger test; narrowing of the presumption of constitutionality; strict construction of statutes to avoid limitation of first amendment freedoms; the prohibitions against prior restraint and subsequent punishment; relaxation of the requirement of standing to sue where first amendment issues are involved; and generally higher standards of procedural due process where these freedoms are in jeopardy. Not one, but the sum total of these—and more—make up the preferred position concept. "McKay, *The Preference for Freedom*, 34 N.Y.U.L. Rev. 1182, 1184 (1959).

those with neither. Only indigents falling into the last category were required to fulfill the residence requirement.[24]

Violation of the equal protection clause of the fourteenth amendment of the United States Constitution by creating classifications not reasonable in light of the statute's purpose was the second ground relied upon by the court in the instant case. The equal protection clause of the fourteenth amendment[25] was adopted in order to insure recently freed Negroes the full protection of the law.[26] It has not been restricted to merely assuring the protection of the law, but has also been interpreted to guarantee equal substantive rights.[27] "[T]he equal protection of the law is a pledge of the protection of equal laws,"[28] and the clause has been extended to all citizens,[29] aliens[30] and corporations.[31] Since the fourteenth amendment protects an individual from the actions of a state but not from those of another individual,[32] there must be "state action"[33] in order to invoke its protection.[34] Recognizing that any classification has to create inequality, for classification itself means inequality,[35] the courts have interpreted the fourteenth amendment to prohibit only those classifications which are unreasonable[36] in light of the statute's purpose.[37] In general, if any state of facts could reasonably sustain the classification, courts have assumed that such facts existed when the statute was enacted.[38] Since a statute ordinarily is presumed to be constitutional, the burden of showing that the classification is arbitrary, and does not in fact rest upon a reasonable basis, falls on the person challenging the classification.[39] It has been held that showing a legislature has not done everything possible to cure an evil will not prove that the statute is arbitrary, for the legislature may attack a problem in piece-meal fashion.[40] The application of these rules of reasonableness depends upon the subject matter of the legislation. When dealing

24. The Conn. Stat. is set forth in footnote 2 *supra.*
25. U.S. Const. amend. XIV, § 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States where in they reside. 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 the law; nor deny to any person within its jurisdiction the equal protection of the laws."
26. Tressman & Tenbrock, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341 (1949). *See also* R. Harris, The Quest for Equality, 57 (1960).
27. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
28. *Id.* at 369.
29. Slaughter House Cases, 83 U.S. (16 Wall.) 35, 80 (1873).
30. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
31. County of Santa Clara v. Southern Pac. R. R., 118 U.S. 394 (1886).
32. 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 the law; *nor deny* to any person *within its jurisdiction* the equal protection of the laws." (Emphasis added.)
33. *See* Lewis, *The Meaning of State Action,* 60 Colum. L. Rev. 1083 (1960).
34. Civil Rights Cases, 109 U.S. 3 (1883).
35. Atchison, Topeka & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899).
36. Gulf Colorado & S.F.Ry. v. Ellis, 165 U.S. 150, 165 (1897).
37. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
38. Lindsley v. Natural Carbonic Gas. Co., 220 U.S. 61, 78-79 (1911).
39. *Id.*
40. Mo. K. & T. Ry. v. May, 194 U.S. 267 (1904).

with statutes pertaining to railroads,[41] securities[42] or taxes,[43] courts have generally accepted the legislature's decisions of what are necessary and reasonable classifications.[44] On the other hand, statutes infringing on personal or individual rights[45] and those basing classification on color, race[46] or nationality,[47] have been subjected to higher standards.[48] Courts have not presumed the constitutionality of statutes with classifications based on race, creed or nationality.[49]

Since the purpose of the fourteenth amendment was to protect the rights of freed Negroes,[50] it was natural that courts used the amendment to invalidate classifications based solely on color.[51] It has been stated that in the absence of a strong overriding public interest "racial classifications . . . are reduced to an invidious discrimination."[52] Some Supreme Court justices have gone so far as to state that any classification based on color or race is "invidious *per se*."[53] This interpretation of equality was used when the Court overruled the "equal but separate" doctrine,[54] holding that separate facilities for Negroes and whites were "inherently unequal."[55] Similar high standards have been applied to classifications based on nationality.[56] A statute, valid on its face, has not satisfied the fourteenth amendment if it is applied with nationality as the basis of classification.[57] Courts begin "with the proposition that only the most exceptional circumstances can excuse discrimination on the basis [of nationality] in the face of the equal protection clause . . . ."[58]

Courts have recently expressed the view that classification based on wealth is to be treated as similar to that based on race or color. Mr. Justice Jackson in his concurring opinion in *Edwards v. California*[59] stated that "the mere being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."[60] In another case, *Harper v. Virginia Board of Elections*,[61] a poll tax was held unconstitutional because it discriminated against the poor without a valid justification. The court stated that, "Lines drawn on the basis of wealth or property like those of race . . . are traditionally disfavored."[62]

41. Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 368 (1940).
42. Hall v. Giger-Jones Co., 242 U.S. 539 (1917).
43. Davidson v. New Orleans, 96 U.S. 97 (1877).
44. Tressman & Tenbrock, *supra* note 26; *see* R. Harris, *supra* note 26.
45. Thomas v. Collins, 323 U.S. 516, 530 (1945).
46. Brown v. Board of Educ., 347 U.S. 483, 490 (1954).
47. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
48. Tressman & Tenbrock, *supra* note 26, at 353-56.
49. *Id.*
50. *Id.*
51. Brown v. Board of Educ., 347 U.S. 483 (1954).
52. McLaughlin v. Florida, 379 U.S. 184 (1964).
53. *Id.* at 198 (concurring opinion of Stewart, J., joined by Douglas, J.).
54. Plessy v. Ferguson, 163 U.S. 537 (1896).
55. Brown v. Board of Educ., 347 U.S. 483 (1954).
56. Takahashi v. Fish and Game Comm'r, 334 U.S. 410, 425 (1948).
57. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
58. Oyama v. California, 332 U.S. 633, 646 (1948).
59. 314 U.S. 160, 181 (1941).
60. *Id.* at 184-185.
61. 383 U.S. 663 (1966).
62. *Id.* at 668.

Courts also have set high standards in applying the equal protection clause where fundamental rights and liberties are asserted.[63] "[T]he usual presumption supporting legislation is balanced by the preferred place given . . . to . . . freedoms secured by the First Amendment . . . . [I]t is the character of the right, not the limitation, which determines what standard governs."[64] The standards applicable to fundamental rights and freedoms have been used, for example, in cases involving freedom of speech,[65] freedom of assembly,[66] voting rights,[67] and the right to work.[68] Once a statute has been categorized as impinging on an individual or natural right, it does not satisfy the equal protection clause merely by having a classification reasonably related to the purpose of the act.[69] The purpose itself must have a strong justification, and courts have not assumed the existence of facts which would make such classifications reasonable.[70] Even the degree of discrimination has been held immaterial when fundamental rights are involved.[71]

In the instant case, the Connecticut statute[72] was held to chill free travel[73] and to violate equal protection of the laws as guaranteed by the fourteenth amendment.[74] After tracing the various bases for the right of free travel, the court accepted without question the existence of the right: "In short, whatever it's source, the right to travel exists . . . ."[75] The court considered any discouragement or chilling as an abridgement of this right,[76] relying on *United States v. Guest*,[77] *Edwards* and an analogy to first amendment cases for support of this proposition. The court, in the instant case, interpreted the words "impede" and "oppress," as used by the Court in *Guest*,[78] to mean that the discouragement of interstate travel is also forbidden.[79] The court supported its statement by emphasizing that the statute in *Edwards* penalized the sponsor of the indigent rather than the indigent himself.[80] Therefore the statute in *Edwards* did not

63. *Id.* at 670.
64. Thomas v. Collins, 323 U.S. 516, 530 (1945).
65. *Id.*
66. Cox v. Louisiana, 379 U.S. 536 (1965).
67. Harper v. Board of Elections, 383 U.S. 663 (1966).
68. Traux v. Raich, 239 U.S. 33 (1915).
69. Reynolds v. Sims, 377 U.S. 533, 575 (1964).
70. Skinner v. Oklahoma, 316 U.S. 535 (1942).
71. Harper v. Board of Elections, 383 U.S. 663 (1966).
72. Conn. Gen. Stat. Rev. § 17-2d quoted *supra* note 2.
73. Thompson v. Shapiro, 270 F. Supp. 331, 336 (1967) [hereinafter cited as instant case].
74. *Id.* at 338.
75. *Id.* at 336.
76. *See*, Dombroski v. Pfister, 380 U.S. 479 (1965); Wolf v. Selective Service, 372 F.2d 817 (2d Cir. 1967).
77. 383 U.S. 745 (1966).
78. "[I]f . . . 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. . . ." *Id.* at 760.
79. Instant case at 336.
80. *Id.* at 336. Thus the freedom of travel for an indigent was comparable to the right of a Negro to buy land in Barrows v. Jackson, 346 U.S. 249 (1953). In that case a party

proscribe the exercise of the indigent's right to travel, but only discouraged it to the extent that a person aiding him would be penalized. The court also relied on the first amendment cases:

> 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.[81]

The defendant had contended that the plaintiff was not discouraged from moving into nor settling in Connecticut as long as she did not seek welfare benefits,[82] thus presenting the question of whether conditioning benefits on the non-exercise of constitutionally guaranteed rights abridges the right. The court employed the solution used in "conditional benefit" cases involving first amendment rights.[83] For example, it relied on *Sherbert v. Verner*,[84] in which conditioning the receipt of unemployment insurance on the taking of any available jobs, even if such a job required work on the recipient's day of worship, was held to impede the freedom of religion and thus was unconstitutional.[85] In the instant case, the court held that "denying to the plaintiff even a gratuitous benefit, because of her exercise of her constitutional right, effectively impedes the exercise of that right."[86] An essential step in the court's reasoning was the proposition that the right to travel includes the right to establish a residence.[87] A residence requirement does not inhibit, impede or chill the actual crossing of a state line. What is interfered with is the right to remain in the newly entered state. By including the right to remain within the right to travel, the court eliminated any possible distinction between the two rights. The court thus concluded that "because [the statute] has a chilling effect on the right to travel, it is unconstitutional."[88]

The court held the statute, in addition to abridging the right of travel, denied the plaintiff equal protection of the laws.[89] In order to determine whether the equal protection clause of the fourteenth amendment was violated, the court did not presume the constitutionality of the statute, but placed on the defendant the burden of proving that the classifications created in the statute were reasonable in light of the statute's purpose.[90] The defendant did not prove that there would be in the long run less of a drain on the treasury by the class of indigents not required to reside in the state for one year than by those who

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to a restrictive covenant was permitted to assert the rights of a Negro as a defense to an action for breach of the contract by selling to the Negro.

81. *Id.* at 336.
82. *Id.* at 335.
83. *See* O'Neil, *Unconstitutional Conditions: Welfare With Strings Attached*, 54 Calif. L. Rev. 443 (1966).
84. 374 U.S. 398 (1963).
85. *Id.* at 405-06.
86. Instant case at 336.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*, *citing* McLaughlin v. Florida, 379 U.S. 184 (1964).

had to meet the residence requirement.[91] The court therefore concluded that the classifications were unreasonable.

The court in the instant case found the statute chilled free travel and thus held it unconstitutional. The fact that a right has been abridged is not enough to conclude that the abridgment is unconstitutional. It must first be shown that the abridgment was unjustified, which requires a balancing of interests. Underlying the decision in the instant case, although not completely expressed, was a balancing between the state's interests and the individual's right to free travel. The state was trying to protect its treasury and its social composition by restricting the ingress of indigents. The desire to limit the number of indigents in the state can be given no weight in the balancing process, for this is an invalid purpose. Mr. Justice Jackson in *Edwards*[92] discussed this point and held that discrimination on the basis of wealth was in violation of the principles underlying the foundation of the country. The *Edwards* Court also held that prohibiting the indigent's entrance into the state was not entitled to justification as a health regulation, for indigents as such were not a "moral pestilence."[93] Therefore the court in the instant case, to determine justification, had to balance only the state's interest in protecting its treasury against the individual's right to travel. The Court in *Edwards* suggested that a state does not have the right to protect its treasury from the burden of a national problem, such as the plight of the indigent, by isolating itself from the rest of the states.[94] Since states must solve these problems together, no state can isolate itself from national problems by preventing the ingress of indigents. Therefore when balancing the state's interest in protecting its treasury against the right of an individual to travel freely, the right of the individual is clearly to be placed above that of the state. The state's interest alone cannot justify abridging the right of freedom of travel.

There is a second reason why the state's interest in protecting its treasury should not justify an abridgment of the individual's freedom of travel. Since the court in the instant case has treated this right as a preferred freedom, the state must have a stronger justification to abridge it than would be needed if lesser rights were involved. To hold that the protection of the state treasury justifies the violation of a preferred right would also justify interference with other "lesser rights." A state's power to violate constitutionally guaranteed rights would thus be almost unlimited, for the protection of individual rights frequently is expensive for a state.

The court does not reach the really critical equal protection question: Is a statute which discriminates solely on the basis of wealth, without justification, constitutional in light of the equal protection clause of the fourteenth amendment? The court, after a thorough examination of the constitutionality of a residence test, decided the case not on the invidious discrimination created by

91. *Id.* at 337-338.
92. 314 U.S. 160, 185 (1942) (concurring opinion).
93. *Id.* at 174-75, 177.
94. *Id.* at 173-74.

the statute, but rather on the constitutionality of the application of the residence test. In other words, the court decided that the classification within the statute was unconstitutional. If the statute did not have these classifications but required all applicants to have had resided in the state for one year, the court's decision would not have held it unconstitutional on equal protection grounds. The court agreed with and followed *Edwards v. California*[95] to the extent that it found the purpose invalid, the justification inadequate, and the right to travel abridged: "Here, as [in *Edwards*], the burden on the state treasury does not justify an enactment with an invalid purpose."[96] While the Court in *Edwards* invalidated the statute on this ground, the court in *Thompson* did not. It abandoned its argument, assumed *arguendo* the validity of the statute's purpose and decided the case on the narrow grounds of the particular application of the statute. The purpose of the Connecticut statute was solely to discourage indigents, who would need welfare assistance, from entering the state. The justification for this discrimination was the protection of the state treasury.[97] Thus the court was presented with a statute intended by the legislature to discriminate against a class of people, indigents, without a valid justification. This is an invidious discrimination.[98] The court reached this point but failed to declare the statute unconstitutional on this ground.

An aspect of this type of welfare problem, not considered in *Thompson*, is the implication of the use of federal funds in the welfare program. Federal statutes[99] provide for federal financial aid to state welfare programs. These statutes allow a state to set residence requirements, within certain time limits, and still be eligible for federal financial aid.[100] It has been suggested that these statutes violate the equal protection of the law implicit in the due process clause of the fifth amendment.[101] This equal protection argument is similar to one under the fourteenth amendment discussed above. The federal action invoking the fifth amendment is the providing of financial aid, which is analogous to state action invoking the fourteenth amendment.[102] Where there has been racial discrimination in federal programs the fifth amendment has been applied.[103] But the fifth

95. Edwards v. California, 314 U.S. 160 (1941).

96. Instant case at 337.

97. This distinction between purpose and justification was confused in parts of the decision; *e.g.*, "the purpose of § 17-2d [is] to discourage entry by those who come needing relief. . . ." *Id.* at 337. And "the purpose of § 17-2d is to protect its fisc. . . ." *Id.* at 336-37. The court must have meant that the purpose was to discourage the entrance of indigents. Otherwise its conclusion that "the burden on the state treasury does not justify an enactment with an invalid purpose" would not make sense. *Id.* at 337. A burden on the state treasury does not justify an enactment to protect the state treasury.

98. Edwards v. California, 314 U.S. 160, 177, 181 (1941) (Douglas, Jackson, J.J., concurring).

99. For a list of statutes *see* Harvith, *supra* note 10.

100. *Id.*

101. Harvith, *Federal Equal Protection and Welfare Assistance*, 31 Albany L. Rev. 210 (1967).

102. *See* Lewis, *supra* note 33.

103. Bolling v. Sharpe, 347 U.S. 497 (1954).

amendment has not been limited to racial discrimination[104] and could be applied in the present case.

The court in the instant case treated freedom of travel as a preferred freedom. The case adopts the position of Mr. Justice Douglas in *Edwards*, developed more recently in the passport cases. In *Edwards*, Mr. Justice Douglas argued that the right to travel is a right of national citizenship,[105] fundamental in national character,[106] and therefore deserves a more protected position in the constitutional system than does movement of goods.[107] Mr. Justice Jackson, in a separate concurring opinion, also considered the right to be a "fundamental" one:

> This court should, however, hold squarely that it 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.[108]

The preferred position of the right to travel was further developed in *Kent v. Dulles*[109] and *Apetheker v. Secretary of State*.[110] The Court in *Kent* recognized that because free travel is a basic freedom, powers which curtail or dilute the right must be narrowly construed.[111] The *Apetheker* decision clearly raised this right to a preferred position by analogizing the right to that of free speech and association: "Freedom of movement is considered the very essence of free society . . . [and,] once curtailed, . . . all other rights suffer."[112] Both passport cases dealt with freedom of association and beliefs, and international travel. Therefore they can not be relied upon to reveal the actual position to be given to the freedom of interstate travel. *Zemel v. Rusk*,[113] a third passport case, dealt with the denial of a passport to a person requesting one to visit Cuba. The majority upheld the validity of prohibiting travel to Cuba on the grounds of national defense, and did not discuss the preferred position of the right to travel. Mr. Justice Douglas, in his dissent, clearly stated and expanded the position that the right to travel is a preferred right, albeit peripheral, under the first amendment.[114] Restrictive legislation must be narrowly drawn,[115] and unnecessarily broad standards can not be used to invade the area of the protected freedom.[116]

104. Harvith, *supra* note 94.
105. 314 U.S. 160, 178 (1942).
106. *Id.* at 178.
107. *Id.* at 177.
108. *Id.* at 183 (Jackson, J. concurring).
109. 357 U.S. 116 (1958).
110. 378 U.S. 500 (1964).
111. 357 U.S. 116, 129 (1958).
112. 378 U.S. 500, 520 (1964).
113. 381 U.S. 1 (1965).
114. *Id.* at 24 (dissent by Douglas, J.).
115. *Id.* at 25.
116. *Id.* at 26.

Thompson v. Shapiro must take its place among the growing number of recent cases affirming the basic rights of welfare recipients. In *Parrish v. Civil Service Comm'n of Cal.*[117] early morning surprise inspections of the welfare recipient's home by the welfare department were held unconstitutional as a violation of the recipient's right to privacy. In Iowa, *Collins v. State Board of Social Welfare*[118] held the welfare department could not discriminate against large families. In addition to *Thompson*, there have been at least seven other actions to contest residence requirements for welfare assistance.[119] In *Green v. Department of Public Welfare*,[120] a statute requiring one year residence for welfare eligibility was held invalid as a violation of the equal protection clause. The case was decided on lack of justification and the unreasonableness of a one year period without welfare assistance rather than on the narrow classification ground employed in *Thompson*. The United States District Court for the District of Columbia used both equal protection and free travel grounds to hold a one year residence requirement for welfare unconstitutional.[121] Since the purpose of the welfare statute was to help the applicant and the recipient attain self-support, a residency requirement created a classification unreasonable in light of this purpose. To deny assistance to a six-month resident, while providing it for a one-year resident, was held to deny the former equal protection of the laws. The concurring opinion stated that to deter the indigent from settling in the District of Columbia violated the indigent's right to travel freely. A preliminary injunction has been issued in *Smith v. Reynolds*,[122] restraining the Commonwealth of Pennsylvania from denying public assistance to the plaintiff because she failed to meet the state residence requirement. A three judge court has also been convened in *Waggoner v. Gunderman*[123] to decide a similar question.

It appears that one year residency requirements for welfare assistance will be held unconstitutional since there is no valid justification for depriving an individual of assistance for such a long period. There will be many more cases dealing with the problem of residency requirements. Because of the preferred position given to the freedom of travel and the recent concern for the poor, the decisions will be similar to that of *Thompson*. If there is no federal legislation

117. Parrish v. Civil Service Comm'n of Cal., 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

118. Collins v. State Bd. of Soc. Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957).

119. Green v. Dep't of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Alexander v. California Dep't of Soc. Welfare, Civ. No. 47041 (N.D. Cal., filed May 10, 1967); Smith v. Reynolds, Civ. No. 42419 (E.D. Pa., June 1, 1967), 9 Welfare L. Bull. 10 (July 1967); Waggoner v. Gunderman, Civ. No. 67-40 (W.D. Pa., Jan., 1967), 9 Welfare L. Bull. 10 (July, 1967); Harrel v. Tobriner, 36 U.S.L.W. 2283 (D.D.C., 1967); Barley v. Board of Comm'n, Civ. No. 1579-67 (D.D.C., filed June 20, 1967), 9 Welfare L. Bull. 10 (July 1967); B. v. S., 5 Welfare L. Bull. 3 (Oct., 1966).

120. Green v. Dep't of Welfare, 270 F. Supp. 173 (D. Del., 1967).

121. Harrel v. Tobriner, 36 U.S.L.W. 2283 (D.D.C., 1967).

122. Smith v. Reynolds, Civ. No. 42419 (E.D. Pa., 1967), 9 Welfare L. Bull. 10 (July, 1967).

123. 9 Welfare L. Bull. 10 (July, 1967).

to clarify the federal laws which authorize states to enact residence requirements, a direct attack on these federal statutes will probably be the only way to finally resolve the residency requirement problem.

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CONSTITUTIONAL LAW—THE SERVICEMAN'S RIGHT TO COUNSEL IN A SPECIAL COURT-MARTIAL

Petitioner was convicted in two separate court-martials and sentenced to confinement with forfeiture of two-thirds of his pay for six months. Prior to trial, the petitioner had requested the appointment of legally qualified civilian or military defense counsel. The request was denied. The court then appointed, as defense counsel, an officer who was not legally trained but who had training comparable to that of trial counsel as required by the Uniform Code of Military Justice, sections 827 and 828.[1] After exhausting military appellate review, the petitioner filed a writ of Habeas Corpus in the United States District Court, which was dismissed.[2] Appeal was then taken to the Court of Appeals, which affirmed the district court decision and *held:* The appointment of non-legally trained counsel in a special court-martial was not violative of the sixth amendment right to counsel or of the fifth amendment right to a fair trial under the due process clause. *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967).

The judicial system of the Army, Navy and Air Force is defined by the Uniform Code of Military Justice.[3] The Code provides for a General Courts-Martial, Special Courts-Martial and Summary Courts-Martial.[4] The officer in a defendant's chain of command decides before which of the three courts a defendant will be tried. The Courts-Martial jurisdictions are differentiated by the extent of the punishment that may be applied to a convicted defendant. A General Court-Martial may prescribe any punishment, including a penalty of

1. *See* 10 U.S.C. § 827 (1964) which provides:
   (a) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate. . . .
   (c) In the case of a special court-martial—
      (1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and
      (2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing. . . .

   Id. § 838 provides:
   (b) The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under Section 827 of this title (article 27). . . .
2. 258 F. Supp. 967 (D. Kan. 1966).
3. 10 U.S.C. §§ 101-2771 (1964).
4. *Id.* § 816.