Marquette Law Review

Volume 53
Issue 3 *Fall-Winter 1970*

Article 7

Constitutional Law: Residency Requirements

James L. Kirschnik

RECENT DECISIONS

Constitutional Law: Residency Requirements. To what extent may states restrict the rights of their citizens by imposing minimum residence requirements? Such requirements generally are imposed with respect to voting eligibility, occupational licensing, welfare and aid programs, divorce and higher education.

In *Shapiro v. Thompson*[1] the Supreme Court held that State and District of Columbia residency requirements for welfare assistance are unconstitutional. Affirming the judgments of three United States Districts courts,[2] the Court said that basing eligibility for welfare assistance on one year of residency discriminated against a class of people and impinged on their constitutional right to travel. In an opinion expressing the view of six members of the court, Mr. Justice Brennan said the residency requirements divided needy families into two groups—(1) those who have resided in the state for more than one year and are eligible for welfare assistance, and (2) those who have resided in the state for less than one year and are ineligible.

In the first case, appellee Thompson, a 19-year-old unwed mother applied for assistance under the Aid to Families with Dependent Children (hereafter AFDC). She moved to Connecticut in June, 1966 and applied for aid in August, 1966. She was denied aid solely on the ground that she had not lived in the State for a year as required by Connecticut law.[3] A three-judge District Court held that the Connecticut provision was unconstitutional because it had a "chilling effect on the right to travel,"[4] and also violated the Equal Protection Clause of the Fourteenth Amendment by denying aid for the impermissible purpose of "discouraging entry of those who come needing relief."[5]

The second case, also decided by a three-judge District Court, involved four appellees. Appellees Harrell, Brown and Legrant had applied for AFDC which was denied them because they had not resided in the District of Columbia for the required one year.[6] Appellee Barley had lived in the District of Columbia one month in 1941 when she was committed to a hospital for mentally ill. She remained in the

[1] 394 U.S. 618 (1969).

[2] Thompson v. Shapiro, 270 F. Supp. 331 (D.C. Conn. 1967); Legrant v. Washington, 279 F. Supp. 22 (D.D.C. 1967); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967).

[3] CONN. GEN. STAT. REV. § 17-2d (1965 Supp); *Cf.* CONN. GEN. STAT. REV. § 17-2c (1970 Supp.), which provides: "When any person comes into this state without visible means of support . . . and applies for aid . . . within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, . . ."

[4] Thompson v. Shapiro, 270 F. Supp. 331, 336 (1967).

[5] *Id.*, at 336-337.

[6] D.C. CODE ANN. § 3-203 (1967) provides in part: "Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of application or (b) who was born within one year immediately preceding the application. . . ."

hospital until 1965 when she was eligible for release contingent upon her obtaining welfare assistance for her support. She was denied Aid to the Permanently and Totally Disabled because the twenty-four years spent in the hospital did not count toward the one year residency requirement. The District Court held the one year requirement unconstitutional because it violated the Due Process Clause of the Fifth Amendment.[7]

The third case involved a Pennsylvania one year residency requirement for AFDC.[8] Two appellees, Smith and Foster, were denied aid on the ground that they had not resided in the state for one year immediately preceding their application. A three-judge District Court held that the requirement violated the Equal Protection Clause of the Fourteenth Amendment by infringing on their right to travel.[9]

Early decisions of the Supreme Court recognized the right of a citizen to travel freely among the states.[10] Some decisions based the right on the *privileges and immunities* clause of the United States Constitution.[11] Other decisions based the right on the *equal protection* clause of the Fourteenth Amendment.[12] The *privileges and immunities* clause of the Fourteenth Amendment has also been applied where the right to travel was an issue.[13]

In more recent decisions the Court has held that the due process of the Fifth Amendment is the source of the right to travel.[14] In the Supreme Court case of *Kent v. Dulles*,[15] it was stated: "The right to

---

[7] Legrant v. Washington, 279 F. Supp. 22 (D.D.C. 1967).

[8] PA. STAT., TIT. 62, § 432(6) (1968) provides: "Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided herein for at least one year immediately preceding the date of application . . ."

[9] Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967).

[10] Ward v. Maryland, 12 Wall. 418, 430 (1870); Paul v. Virginia, 8 Wall. 168, 180 (1868); Edwards v. California, 314 U.S. 160 (1941).

[11] Ward v. Maryland, 12 Wall. 418, 430 (1870); Paul v. Virginia, 8 Wall. 168, 180 (1868).

[12] *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941); Passenger Cases, 7 How. 122, 283 (1849). *See, Social Security Act* of 1935 § 402(b), as amended 42 U.S.C. § 602(b), which provides that: "The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth." Appellants argued that this section approved a residence requirement of up to one year. The court disagreed and felt the language did not prescribe or approve the one year waiting period, but merely directed the Secretary of Health, Education, and Welfare not to disapprove such plans.

[13] *See* Edwards v. California, 314 U.S. 160, 177, 181 (1941) (Douglas and Jackson, JJ., concurring); Twining v. New Jersey, 211 U.S. 78, 96 (1908) (*dictum*).

[14] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Rusk, 378 U.S. 500, 505-506 (1964); and Kent v. Dulles, 357 U.S. 116, 125 (1958).

[15] 357 U.S. 116, 125 (1958).

travel is a part of the 'Liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." It seems the due process clauses of the Fifth Amendment could have been applied in the *Shapiro* case, but the Court applied a different standard.

The Court in the *Shapiro* case did not base the right to travel on any particular clause of the United States Constitution, nor upon any of the amendments thereto. The Court simply stated:

> "This Court long ago recognized that the nature of our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which reasonably burden or restrict this movement."[16]

Instead of analyzing the source of the right, the court cited *United States v. Guest:*[17]

> "The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."
>
> "[The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

By calling the right to travel a fundamental right which was infringed upon, the court did not apply the traditional equal protection standard in judging the constitutionality of the laws. Instead the relatively new *"compelling interest"* doctrine was applied.[18] By this standard, if the residency requirement protected a compelling state interest, the equal protection clause is held subordinate to the interest involved. Under the traditional equal protection test the classification need only have a reasonable basis.[19]

The *"compelling interest"* doctrine is normally used if a fundamental right is affected or if the classification is based on suspect criteria such as race or wealth. The doctrine requires the court to determine the purpose of the statute and to decide whether the classifications drawn are reasonable in light of the purpose to be served. Thus there are two criteria which the legislation must meet: (1) It must serve a valid state purpose, and (2) It must be reasonable in attaining its pur-

---

[16] Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
[17] 383 U.S. 745, 758 (1966).
[18] *See* Korematsu v. United States, 323 U.S. 214, 218 (1955). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964).
[19] *See, e.g.,* Lindsley v. National Carbonic Gas. Co., 220 U.S. 61, 78 (1911). *See also* Flemming v. Nestor, 363 U.S. 603 (1960).

pose. Using this doctrine the court found the residence requirements served an invalid purpose or were unreasonable.

The following arguments were made by appellants in support of a waiting period but were rejected by the court. (1) the waiting period protects the fiscal integrity of the state by discouraging immigration of indigents. This has the constitutionally impermissible effect of preventing the exercise of the right to travel. (2) It discourages those who come to the state only to seek higher benefits. However, such waiting requirement assumes all who enter a state do so with this purpose. The court also noted nothing is wrong with seeking higher benefits. (3) A waiting period distinguishes between old and new residents on the basis of the contribution they have made to the state. Such an argument violates the equal protection clause and if allowed, the same reasoning could be used to deny other state services and benefits. (4) It allows budget planning, but none of the appellants could show the requirement was being used for this purpose. (5) It serves as an objective test of residency. The court distinguished between residence and length of residence, which is not the only criterion available. (6) It minimizes fraud but other less drastic means are available to prevent fraud. (7) It encourages indigents to enter the work force. The same logic would require a waiting period for all residents. After rejecting the various arguments made by the apellants the court stated:

> "We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause."[20]

The decision will have a significant effect on many state welfare programs. At the time of the decision approximately forty states had residence requirements of some sort.[21] In order to retain a residence requirement, a state has to show some compelling interest is served by the requirement which can not reasonably be attained in any other way. In light of the arguments set forth and rejected, it is apparent that it will be quite difficult to show how a compelling state interest is best served by imposing a durational residence requirement for welfare eligibility.

---

[20] Shapiro v. Thompson, 394 U.S. 618, 638 (1969).
[21] Thompson v. Shapiro, 270 F. Supp. 331 (D.C. Conn. 1967).

As far as Wisconsin is concerned, the decision affirms *Ramos v. Health and Social Services Board*[22] which declared the Wisconsin one year residency requirement unconstitutional as applied to AFDC. In that case, Loretta Ramos was denied AFDC because she had not resided in Wisconsin for one year preceding her application. Mrs. Ramos was born in Wisconsin and lived here until her marriage in 1957. Thereafter she and her husband lived in Illinois. In June 1967 her husband deserted her and she moved to Wisconsin with her five children to be near relatives. The district court held that the one year requirement denied equal protection of the laws. The *Ramos* decision specifically declared residence requirements which denied aid to the blind, aid to dependent children, aid to totally or permanently disabled and old age assistance were invalid. In the later case of *Denny v. Health and Social Services Board,*[23] the same court held that the one year residence requirement was unconstitutional as applied to general welfare. Although *Shapiro* dealt with special categories of aid, the same reasoning applies to general welfare, and so appears to affirm the *Denny* decision as well. The Attorney General of Wisconsin is of the opinion that *Shapiro* holds all durational residence requirements unconstitutional whether applied to specific categories of welfare programs or to general reilef.[24]

In response to *Shapiro,* the Wisconsin legislature has repealed and recreated Sections 49.18 (2) (a), 49.19 (4) (b), 49.22 (1) (c) and 49.61 (2) (b)[25] which all deal with special categories of welfare aid. Where the old sections required one year's residency for eligibility, the new sections generally provide for 15 to 30 days to process an application for aid. But, the legislature left untouched Section 49.01 (7) which requires one year of residence to be eligible for general aid as distinguished from the so called categorical aids such as *AFDC* and *Old Age Assistance.* There seems to be no valid reason for a distinction, and *Shapiro* indicates that the legislature should remove the unconstitutional residency requirement from Section 49.01 (7) to conform with the other recent changes.

CONCLUSION

The *Shapiro* decision certainly makes it possible for indigent persons to travel throughout the United States and establish a residence wherever they please, but it is apparent that some problems may result and the decision may encourage a standardization of welfare among the states. For instance, one of the arguments made by the appellants to justify the waiting period was that it discouraged persons who moved

[22] 274 F. Supp. 474 (E.D. Wis. 1967).
[23] 285 F. Supp. 526 (E.D. Wis. 1968).
[24] OP. ATT'Y GEN. (Wis. June 26, 1970).
[25] Wis. Laws 1969, ch. 154. These sections deal with the categorical aids: Aid to the Blind, Aid to Dependent Children, Old Age Assistance, and Aid to Totally and Permanently Disabled Persons.

only to obtain higher benefits. The rejection of this argument by the court could result in placing an unfair burden on the taxpayers of the states which have the most extensive welfare programs. On the other hand, this decision could provide the groundwork for acceptance of a federalized welfare program which would provide uniform payments and distribute the burden of its support among all the states.

The *Shapiro* decision did not express any opinion as to the effect of the holding on residency requirements imposed by states in other areas. It may have opened a Pandora's box. If the requirement restricts a "fundamental right" and the state cannot demonstrate a "compelling interest," then it would seem logical and consistent to argue that such restrictions are unconstitutional. Certainly the right to vote has been regarded as a "fundamental right" and residency requirements which severely restrict the exercise of that right are subject to attack.[26]

A recent challenge to Colorado's six-month residency requirement for voting in a national election was held to be a moot question after Colorado changed the waiting period to two months while the case was on appeal.[27] As pointed out in the dissenting opinions of Justices Marshall and Brennan, this type of challenge may never reach the Supreme Court, since the normal period for the judicial process and review generally exceeds the required residence period, thus rendering all challenges moot. Justice Marshall did suggest that the *"compelling interest"* test was appropriate if the question ever does reach the court, because the right to vote in a national election is a fundamental right.[28]

A strong argument can be made against residence requirements which restrict employment. A three-judge District Court has held the twelve-month residency required before taking the North Carolina bar exam is unconstitutional.[29] Citing *Shapiro,* the court used much the same argument. The state offered three reasons for the law which were all rejected: (1) An application would absorb knowledge about the state governmental structure and local customs; (2) The community would have an opportunity to observe the applicant's moral character; and

---

[26] Opposite results have been reached in two recent decisions. In Affeldt v. Whitcomb, Civil § 70-H-220 (N.D. Ind. Oct. 20, 1970) a three-judge panel held Indiana's six-months' requirement unconstitutional. The Wisconsin six-months' requirement, however, was upheld in Piliavin v. Hoel, Civil § 70-C-255 (E.D. Wis. Oct. 27, 1970).

[27] Hall v. Beals, 396 U.S. 45 (1969).

[28] *Id.* at 52.

[29] Keenan v. North Carolina Board of Law Examiners, October 2, 1970 (E.D. N.C.). (held one-year requirement before being allowed to write the bar exam unconstitutional, citing *Shapiro* and finding a burden on interstate travel. The court rejected the following reasons offered by the state: 1) applicant should absorb knowledge about state governmental structure and local customs; 2) Residence gives opportunity for community to observe applicant's moral character; and 3) one-year residence evidences intent to become a permanent resident of the community.)

(3) The residence for one year would evidence an intent to become a permanent resident of the community. These appear to be very weak arguments to show a compelling state interest.

Residence requirements for divorce actions could also be attacked using *Shapiro* logic. The questions are whether the right to adjudicate marital status is a fundamental right, and whether a compelling state interest is served which justifies such a requirement.

When state universities charge a higher tuition to non-resident students, is a fundamental right affected? What if an indigent student is only accepted by an out-of-state school? If his right to obtain a higher education is called a fundamental right, it is burdened by the requirement that he pay more. Are there state compelling interests which outweigh the burden?

JAMES L. KIRSCHNIK

Criminal Law: Alcoholism as a Defense. In *Roberts v. State,*[1] the Wisconsin Supreme Court stated its position on chronic alcoholism as an independent affirmative defense to a murder charge. The defendant, Richard Roberts, had broken into a house and shot to death its inhabitant. During the 24 hours prior to the killing, Roberts had consumed five large glasses of beer, two to four bottles of beer, a pint of brandy and another 16 to 29 drinks containing brandy. To the charges of first degree murder and burglary, Roberts pleaded not guilty, not guilty by reason of insanity, and not guilty by reason of chronic alcoholism. The trial court found that Roberts was not intoxicated at the time of the shooting and adjudged him guilty. On appeal, the Supreme Court affirmed and, in *dicta,* discussed the limited circumstances under which chronic alcoholism might be interposed as a defense to criminal liability.[2]

On his appeal, the defendant argued that chronic alcoholism is an affirmative defense to criminal liability. The argument was based largely on the assumption that chronic alcoholics, like those suffering from insanity, lack the normal capacity to control their conduct. Two cases decided by different United States courts of appeals and one earlier Wisconsin case were offered in support of the defendant's argument.

In both federal cases, *Driver v. Hinnant*[3] and *Easter v. District of Columbia,*[4] convictions of public intoxication were reversed on the theory that alcoholism is a disease to which no criminal sanctions should attach. The appellant in *Driver* had been found guilty of violating a North Carolina statute which prohibited any intoxicated person from be-

---

[1] 41 Wis. 2d 537, 164 N.W.2d 525 (1969).
[2] *Id.* at 543, 164 N.W.2d at 527.
[3] 356 F.2d 761 (4th Cir. 1966).
[4] 361 F.2d 50 (D.C. Cir. 1966).