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RECENT DEVELOPMENTS

ESCALATION OF WELFARE WARFARE: THE CASE OF THE RECENT RESIDENT

Vivian Marie Thompson, plaintiff, migrated from Boston, Massachusetts to Hartford, Connecticut to be near her mother. She arrived without prospect of specific employment or sufficient funds to maintain herself and her child while attempting to locate work. During her residency in Boston, she received financial support under a jointly-funded state-federal program of Aid to Dependent Children (ADC).[1] When she applied for similar assistance in Hartford her request was denied by defendant, Connecticut's Commissioner of Welfare, because she had not been a resident of the state for one year as required by Connecticut law.[2] Plaintiff brought suit in the United States District Court for the District of Connecticut[3] seeking to have the residency

[1] Social Security Act, Title 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). General or public assistance is financed and administered by state and local governmental units. Categorical public assistance is financed by state funds supplemented by matching federal contributions. The states administer categorical public assistance; however, all state plans must be approved by the Secretary of Health, Education and Welfare who has established guidelines within which a state must operate in order to qualify for federal payments. Other forms of categorical assistance are: Old Age Assistance, Aid to the Blind, Aid to the Disabled, Medical Assistance for the Aged, combinations of programs for the aged, and Medical Assistance. *See generally* Wedemeyer and Moore, *The American Welfare System*, 54 CALIF. L. REV. 326 (1966).

[2] CONN. GEN. STAT. ANN. § 17-2d (1965). Eligibility for temporary aid pending return of nonresidents.

> 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 for temporary aid or care until arrangements are made for his return, provided ineligibility shall not continue beyond the maximum federal residence requirement.

The maximum allowable state residence requirement under federal law is one year. 49 Stat. 627 (1935), *as amended*, 42 U.S.C. § 602(b) (1959).

[3] The suit was brought under 28 U.S.C. §§ 2281 and 2284. An attempt was made by counsel for the defendant to have the court apply the doctrine of equitable abstention on the basis of plaintiff's failure to exhaust her administrative remedies, and her failure to bring suit in the state court which might have interpreted the statute so as to avoid any constitutional conflict. The court in exercising its discretion did not choose to apply the doctrine because (1) there was no protection available to plaintiff from irreparable harm pending administrative proceedings, and (2) the statute permits of only one interpretation so that a state court could not obviate the constitutional issues. *See* Dombrowski v. Pfister, 380 U.S. 479, 490-91 (1965), *but see* Smith v. Board of Commissioners of the District of Columbia, 259 F. Supp. 423 (D.D.C. 1967). For a discussion of judicial review of state welfare practices and further case citation see 67 COLUM. L. REV. 84 (1967). Of particular interest

requirement declared unconstitutional.[4] The district court *held*: A one year residency requirement for categorical[5] public assistance is invalid because it inhibits the exercise of the constitutionally protected right to travel, and alternatively, the protection of state funds is not a legitimate purpose for infringing upon the right to travel of a class of citizen possessing neither cash assets, probability of specific employment, nor residence of one year. *Thompson v. Shapiro,* 270 F. Supp. 331 (D. Conn. 1967) *prob. juris. noted,* 36 U.S.L.W. 3286 (U.S. Jan. 16, 1968).

The origin of state and local statutes in the United States dealing with indigent citizens can be traced to the English Poor Laws.[6] Like its English counterpart American statutes required residency for a stated term of years as a prerequisite for aid. This requirement was intended to ensure that each community's burden of supporting the poor was confined to the maintenance of its own inhabitants. It also protected industrial cities from being overrun with unemployed agricultural laborers, provided a steady labor supply for the seasonal-crop farmers, and shielded a state from itinerant poor who were merely seeking a higher level of support.[7]

The *Thompson* controversy presents the problem of weighing the state's interests in protecting its financial position[8] against the individual's interest in being free to travel. Unable to discern the legal source of the right to travel, the court analogized the right to first amendment freedoms.[9] This analogy permitted the court to conclude

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see *id.* at 92 n.56 in which reference is made to the refusal of the Connecticut welfare administration to entertain petitions challenging the validity of state regulations on federal constitutional grounds.

[4] Plaintiff brought suit as an individual additionally seeking to have an injunction issued against the continued enforcement of the statute and for payment of monies unconstitutionally withheld. A discussion of issues raised by defendant concerning the alleged inability of plaintiff to obtain a money judgment against the state is beyond the scope of this casenote. Thompson v. Shapiro, 270 F. Supp. 331, 338, 341-42 (D. Conn. 1967) [hereinafter cited as *Thompson*]. Neither will the casenote cover the question of mootness which stems from the qualification of plaintiff for ADC at the time judgment was finally entered. *Thompson* at 342 (dissenting opinion).

[5] *See* note 1, *supra* for the definition of categorical public assistance.

[6] For an historical summary see Mandelker, *The Settlement Requirement in General Assistance,* 1955 WASH. U.L.Q. 335, 356-58. *See also* THE HERITAGE OF AMERICAN SOCIAL WORK (R. Pumphrey and M. Pumphrey ed. 1961).

[7] Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 164-67 (1956).

[8] The state's financial position was being defended in terms of the state's abilities to fund the entire spectrum of its assistance programs, not merely in terms of total dollars and cents.

Thompson at 339 (dissenting opinion):

> Uncontrolled demands upon Connecticut's welfare program could effect an overall reduction of aid paid to eligible beneficiaries.

[9] *Thompson* at 336.

that the right to travel must be free from state action which tends to inhibit or have a "chilling effect" upon one who exercises the right. Apparently unwilling to base its decision on this assertion alone, the court found that the state could not circumscribe the right to travel by invoking its police power to protect the public purse.[10] Plaintiff in *Thompson* could have qualified for public assistance if she had entered the state with a specific job opportunity or with sufficient resources to sustain her family while seeking employment prior to becoming otherwise eligible.[11] The *Thompson* court ruled that Connecticut had failed to establish[12] that individuals not possessing jobs or cash stakes presented more of a drain on available funds than those who do. The classifications were not reasonably suited to accomplish the statute's purpose, and were both overly broad and an arbitrary discrimination denying plaintiff the equal protection of the law.[13]

The organization of this casenote will follow that of the *Thompson* decision: (1) a discussion of the possible sources of the right to travel, (2) an investigation of the court's analogy of the right to travel to first amendment freedoms, and (3) an examination of the denial of equal protection resulting from the court's view of the protection of Connecticut's treasury as an invalid purpose for excluding needy persons. While discussing the *Thompson* equal protection argument a comparison will be made of the treatment given an essentially identical fact pattern by the Delaware District Court in *Green v. Department of Public Welfare of the State of Delaware.*[14]

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[10] *Id.*

[11] The phrase "without visible means of support for the immediate future" as used in CONN. GEN. STAT. ANN. § 17-2d (1965) has been defined by the Connecticut Welfare Department to mean:

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.

1 CONNECTICUT WELFARE MANUAL, Ch. II, § 219.1 as cited in *Thompson* at 333. Plaintiff in *Thompson* did not qualify under either 1 or 2 above.

[12] The constitutionality of a statute is ordinarily presumed so that it is incumbent upon the plaintiff to come forward with rebutting evidence. It appears that the court in *Thompson* shifted the burden of proof to the state. If the court was really convinced of its analogy of the right to travel to first amendment freedoms, (*see* text accompanying note 36-42 *infra*), once the allegation of overbreadth was made, the defendant would bear the burden of establishing the validity of the legislation. *See, e.g.,* Schneider v. Irvington, 308 U.S. 147 (1939); Thomas v. Collins, 323 U.S. 516 (1945); *but see* KOVACS v. COOPER, 336 U.S. 77, 89 (1949) (concurring opinion of Frankfurter, J.).

[13] *Thompson* at 336.

[14] 270 F. Supp. 173 (D. Del. 1967) [hereinafter cited as *Green*]; for other cases involving attacks on state residency requirements for categorical assistance eligibility still pending see 9 WELFARE L. BULL. 10 (July 1967).

I. SOURCES OF THE RIGHT TO TRAVEL

The source of the right to travel is critical in ascertaining the scope of protection afforded the individual in exercising the right. There are three potential sources of law from which the right to travel may be derived: (1) the commerce clause,[15] (2) the privileges and immunities clause of the fourteenth amendment,[16] and (3) the basic liberties inherent in national citizenship.[17]

There is considerable case authority supporting the position that the commerce clause is the exclusive source of the right to travel.[18] If the right to travel is derived solely from the commerce clause, however, plaintiff can not challenge as an infringement on the right to travel the residency requirements in categorical public assistance laws. The Social Security Act of 1935, *as amended*,[19] specifically states that plans for ADC programs submitted for approval will not be accepted if they contain eligibility requirements in excess of one year. The language of the Connecticut statute[20] demonstrates that it was enacted in order to comply with the federal legislation. Since Congressional power in the area of interstate commerce is plenary,[21] a state law properly implementing a Congressional program is beyond constitutional question on commerce clause grounds.

The commerce clause is an inappropriate source of the right to travel in the factual context of residence requirements for two reasons. First, the commerce clause is traditionally a means of attacking state laws that conflict with, rather than implement, federal law or policy.[22] Second, the right of an individual to travel does not lend itself to normal concepts of commerce.[23] A more appropriate source must be

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[15] U.S. CONST. art. I, § 8, cl. 3; Edwards v. California, 314 U.S. 160 (1941).

[16] U.S. CONST. amend. XIV, § 1, cl. 2; New York v. O'Neill, 359 U.S. 1 (1959).

[17] U.S. CONST. amend. V, cl. 3; U.S. CONST. amend. XIV, § 1, cl. 3; Kent v. Dulles, 357 U.S. 116 (1958). For a judicial survey of these sources see United States v. Guest, 383 U.S. 745, 762-71 (1966)(opinion of Harlan, J. concurring in part and dissenting in part); *see also* Z. CHAFEE, *supra* note 7, at 184-213.

[18] *See e.g.*, Passenger Cases, 48 U.S. (7 How.) 283 (1849); Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (concurring opinion).

[19] 49 Stat. 627 (1935), *as amended*, 42 U.S.C. § 602 (b) (1964).

[20] CONN. GEN. STAT. ANN. § 17-2d (1965):

> [P]rovided ineligibility for aid to dependent children shall not continue beyond *the maximum federal residence requirement.* (emphasis added).

[21] *See, e.g.*, Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939); Leisy v. Hardin, 135 U.S. 100 (1890); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[22] *See generally* Note, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

[23] *See* Justice Jackson's concurring opinion in Edwards v. California, 314 U.S. 160, 181 (1941), in which he contends that the right of a human being to cross the

located for a right which all agree has occupied such a primary position in the development of this country.

A better source of the right to travel has been found in the privileges of national citizenship.[24] The early case of *Corfield v. Coryell*[25] defined a privilege as being a fundamental right which belongs to the citizens of all free governments. Included among these privileges is "[t]he right of a citizen of one State to pass through, or to reside in any other State. . . ."[26] The very concept of a nation as a unified political entity must necessarily rely upon the ability of its individual citizens to freely move about within its borders.[27] In *Edwards v. California*,[28] where one state attempted "to isolate itself from difficulties common to all of them by the simple expedient of shutting its gates to the outside world,"[29] concurring opinions of four Justices interpreted the right to travel as a fundamental right of national citizenship protected by the privileges and immunities clause.[30]

If the right to travel is protected by the privileges and immunities clause, then it is possible to argue that the portion of the Social Security Act on residency requirements is a Congressional implementation of the right, as permitted by section five of the fourteenth amendment.[31] Assuming the validity of such an interpretation, the

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continent should be placed on a higher plane than that of a railway carload of sheep. *Id.* at 182:

> But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions of what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.

[24] *See* U.S. CONST. amend. XIV, § 1, cl. 2; Twining v. New Jersey, 211 U.S. 78 (1908); Williams v. Fears, 179 U.S. 270 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

[25] 4 Wash. C. C. 371 (U.S. Cir. Ct., E. D. Pa., 1825).

[26] *Id.* at 380-81.

[27] United States v. Guest, 383 U.S. 745, 757 (1966).

[28] 314 U.S. 160 (1941).

[29] *Id.* at 173; *See* Mandelker, *supra* note 6 at 358-66; Note, *Interstate Migration and Personal Liberty*, 40 COLUM. L. REV. 1032, 1032-35 (1940).

[30] The majority, focusing on the need for a unified national policy relied upon the commerce clause to strike down the statute. In the face of such a single policy as exists under the Social Security Act, the majority view would no longer be applicable while the minority position remains viable.

314 U.S. at 177, 178 (concurring opinion of Douglas, J. in which Black, J. and Murphy, J. join):

> The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.

[31] In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that the McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) test of necessary and proper would be applied to appropriate legislation under section five of the fourteenth amendment. *See* Comment, *Fourteenth Amendment Enforcement and Congressional Power to Abolish*

residency requirements could be subjected to constitutional attack in only one way.[32] A court would have to conclude that while *Katzenbach v. Morgan*[33] allowed Congress to *expand* the rights protected by the fourteenth amendment, the opinion did not indicate that Congress would be allowed to *curtail* such rights.[34] A decision striking the residence requirement provision would not impinge the essential validity of the Act since it contains a severability clause.[35] However, the possibility that under *Katzenbach v. Morgan* Congressional power might be plenary demonstrates the weakness of finding the source of the right to travel in the privileges and immunities clause.

Since the commerce clause will not and the privileges and immunities clause may not protect the right to travel from Congressional action, the best choice of the source of the right to travel is that it is an inherent right of national citizenship. Thus, the right to travel would be protected from precipitous federal and state interference[36] by the due process clauses of the fifth[37] and fourteenth amendments.

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the States, 55 CALIF. L. REV. 293 (1967). Thus Congress has the power to pass legislation implementing the privileges and immunities clause.

The conclusion that the Social Security Act implements the privileges and immunities clause would require Congress to have anticipated (1) the concurring opinions of Edwards v. California, 314 U.S. 160 (1941) by six years, (2) the conclusion that those opinions would eventually become accepted by the majority of the Court (which still has not happened), and (3) the McCulloch v. Maryland interpretation of section five of the fourteenth amendment by 31 years. Such foresight is unlikely.

[32] The fact that residency requirements are permissive, 49 Stat. 627 (1935), *as amended*, 42 U.S.C. § 602 (b) (1964), would be irrelevant.

[33] 384 U.S. 641 (1966).

[34] This interpretation would dispose of issues raised by Mr. Justice Harlan's dissent in *Katzenbach v. Morgan*. *See, id.* at 659.

[35] 49 Stat. 648, 42 U.S.C. § 1303 (1964); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[36] Assuming the continued validity of Fleming v. Nestor, 363 U.S. 603 (1960) (a 5-4 decision; only two majority Justices still on the Court), even the due process clause might not protect a plaintiff in the context of residency requirements under the Social Security Act. In *Fleming* the Court upheld termination of Social Security benefits to aliens deported for being past members of the Communist Party. This seems to indicate that there is sufficient scope for Congressional resonableness to enable the exercise of Congressional authority in permitting residency requirements.

[37] Z. CHAFEE, *supra* note 7 at 209; Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 at 125 (1958) "The right to travel is part of the 'liberty' of which the citizen be deprived without due process of law under the Fifth Amendment."

The scope of protection under due process is considerably broader than the protection afforded by the privileges and immunities clause. In the past the Supreme Court has been reluctant to define what constitutes a privilege of national citizenship, and once defined the privilege has been narrowly construed so as to leave the state with as much freedom of action as possible. *Compare* Aptheker v. Secretary of State, 378 U.S. 500 (1964) *with* Colgate v. Harvey, 296 U.S. 404, 436 (1935) (Stone, J. dissenting) and Railway Express Agency v. New York, 336 U.S. 106, 113 (1949) (Jackson, J. concurring); *see also* Bell v. State of Maryland, 378 U.S. 226, 242 (1964) (Douglas, J. concurring); Hague v. C.I.O., 307 U.S. 496, 520 n.1 (1939) (Stone, J. concurring).

II. The Right to Travel and the First Amendment

Not only is the source of the right to travel difficult to ascertain, but also in the context of residence requirements and Congressional legislation, it is a spurious issue.[38] The controversy could have been resolved without recourse to such an inconsequential argument. *Thompson* connected the right to travel (from whatever source derived) and the welfare residency requirements by analyzing *United States v. Guest*[39] and analogizing to first amendment cases. The conclusions reached do not survive analysis.

In *Guest* the defendants were charged with a violation of a federal criminal statute[40] for having sought to intimidate a citizen because he had exercised his right to travel by entering the state of Georgia. *Guest* discusses the discouragement of the right to travel in terms of the specific statute, rather than by dealing with the right in an abstract fashion. The *Thompson* court, lacking such a statutory prohibition, did not have the basis from which it could justify the striking down of a presumptively valid act merely tending to discourage an indefinite constitutional right. Although the denial of welfare benefits would seem to be of a different class than threats of violence, such a denial of funds could have an equally potent deterrent effect upon those without means of maintaining themselves. An additional distinction between *Guest* and *Thompson* is that the defendant in *Guest* had the specific intent to discourage the exercise of the right, while the Connecticut statute was an indirect inhibition.

In an effort to buttress its argument that the right to travel is protected against state inhibition, the court in *Thompson* drew an analogy between the discouragement of the right to travel and the

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Plaintiff attempted to raise article IV of the Constitution as a means of attacking the Connecticut statute, but the court correctly discounted the attack since article IV is designed to protect the citizen of one state from being subjected to a condition of alienage while temporarily within the boundaries of another state. U.S. Const. art. IV, § 2; U.S. Const. amend. XIV, § 1, cl. 1; *Thompson* at 334.

[38] Furthermore, the right to travel cases involve situations where either the state or federal government attempted to *totally* prohibit the travel of certain individuals. *See; e.g.,* Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles. 357 U.S. 116 (1958) (passports); Edwards v. California, 314 U.S. 160 (1941); City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (transporters subjected to criminal statutes); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (taxes which could be extended to exclude). Plaintiff in *Thompson* did, however, exercise her right to travel.

[39] 383 U.S. 745 (1966). The case involved a direct attempt on the part of private citizens to bar the use of interstate highways by Negro citizens through overt and covert intimidations.

[40] 18 U.S.C. § 241 (1964). The statute denounces the conspiring to intimidate a citizen in the exercise of a constitutionally secured right or privilege.

"cases proscribing actions which have a chilling effect on First Amendment rights."[41] Although in *Aptheker v. Secretary of State*[42] the right to travel was declared to be closely related to the rights of free speech and association, the interests being guarded there were substantially different from those confronting the *Thompson* court. The statute[43] held invalid in *Aptheker* prevented from travelling overseas those who exercised these first amendment freedoms by being members of the Communist Party. The Supreme Court was not considering the right to travel separately, but rather as a means of protecting the plaintiff's rights of free speech and association. In *Thompson* there were no first amendment freedoms with which the right to travel might be linked. By intimating that the right to travel is a first amendment freedom through analogy, and then using first amendment cases to show that such a right may not be infringed by the qualifying of a benefit,[44] the *Thompson* court lifted itself by its bootstraps, although the approach did succeed in avoiding the question of legislative power posed by focusing on the sources of the right to travel.

The difficult issue which the court overlooked in *Thompson* was this: If state residency requirements discourage the right to travel, a state which offers no assistance would present an even greater discouragement.[45] The court's reasoning, extended to its logical conclusion, leads to the incredible outcome of a grant in aid by one state

[41] *Thompson* at 336 citing Dombrowski v. Pfister, 380 U.S. 479 (1965) and Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967). Both of these cases involved the protection of the freedom of speech and in *Dombrowski* the protection of the freedom of association as well.

[42] 378 U.S. 500 (1964) (dictum); *see The Supreme Court, 1963 Term,* 78 HARV. L. REV. 179, 195 (1964). The factual context of *Aptheker* presented a controversy involving the right to travel outside of the nation, and not the right to interstate travel. For a discussion of the right of United States citizens to travel abroad see Comment, *Judicial Review of the Right to Travel: A Proposal,* 42 WASH. L. REV. 873 (1967).

[43] § 6 of the Subversive Activities Control Act of 1950. 64 Stat. 993, 50 U.S.C. § 785 (1950), which makes it a criminal offense for any member of the Communist Party to apply for, renew or be issued a passport; or to use or attempt to use a previously obtained passport.

[44] Since "[t]here is no legal obligation on the State... to support its poor," the gratuitous benefit of public assistance could not be classified as a right. Heydereich v. Lyons, 374 Ill. 557, 30 N.E.2d 46 at 51 (1940). In this case the Illinois court sustained a statute calling for a *three* year period of residency in order to qualify for public assistance. The reasoning was that so long as the state was not obligated to furnish aid for the benefit of *any* of its citizens, it had a large degree of discretion in conditioning who should receive that aid which it chose to grant. *See also* the dissent in *In re* Chirillo, 238 N.Y. 417, 28 N.E.2d 895 (1940); *but see* Sherbert v. Verner, 374 U.S. 398 (1963); Braunfield v. Brown, 366 U.S. 599 (1961); Speiser v. Randall, 357 U.S. 513 (1958).

[45] *Contra,* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 CALIF. L. REV. 567, 593-96 (1966); Harvith, *Federal Equal Protection and Welfare Assistance,* 31 ALBANY L. REV. 210 (1967).

to a class of indigents constitutionally requiring an equal or greater grant by all states. The end result is that the federal judiciary, sitting as if it were a state legislature, would determine the benefits a state must provide.

III. Equal Protection

Perhaps recognizing the weakness of basing its decision on the right to travel and the tenuous grounds of analogy, the court in *Thompson* proceeded to hold that the Connecticut statute was a violation of the equal protection clause of the fourteenth amendment. It was this argument which was successful in *Green*. In both cases joint state-federal assistance was denied because the applicant had not resided within the state for one year. In *Thompson* the legislative classification consisted of those who had arrived within the state without visible means of support and who applied for assistance within one year from arrival;[46] in *Green* the legislative classification was those who otherwise met all qualifications for eligibility yet had not resided within the state for one year prior to application.[47] The purpose of the Connecticut statute was candidly admitted to be the protection of the state purse "by discouraging entry of those who came needing relief;"[48] the purpose of the Delaware statute as enunciated in a preamble was the promotion of the "welfare and happiness of all of the people of the State;"[49] however, the Deputy Attorney General suggested that the principle purpose was the discouragement of "needy persons from entering Delaware and thereby to protect the public purse."[50] In both states the classes of similarly situated persons were those who were in need of assistance. Both *Thompson* and *Green* concluded that for a statute which operates in an unequal manner to be valid, the legislative purpose for which it was enacted must be drawn in such a way as to reasonably accomplish the legitimate purpose.[51]

[46] The method of analysis employed is that of Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif L. Rev. 341 (1949). *Thompson* at 332-33; *see* note 2, *supra* for the Connecticut statute; *see* note 11, *supra* for the definition of "without visible means of support for the immediate future" as used in the statute.

[47] *Green* at 176; 31 Del. Code § 501 et seq. (1967); Wash. Rev. Code § 74.12.030 (1962) is analogous to the Delaware statute in establishing the criteria for eligibility.

[48] *Thompson* at 336-37.

[49] *Green* at 177.

[50] *Id.*

[51] Both district courts also recognized that the respective state legislatures had not drawn their states' classifications along inherently suspect grounds such as race, creed and color. Neither did Connecticut draw its classifications on the basis of wealth. Justice Jackson, concurring in Edwards v. California, 314 U.S. 160, 184-85

Before reaching the issue of the purpose of protecting the public purse, the *Green* court held that discrimination based on residence of one year could find no constitutional support from the declaration of legislative intent to promote welfare and happiness, because in operation the requirement denied what it sought to promote. The Delaware statute was invalid because the manner in which it was applied frustrated its purpose.

Thompson and *Green*, relying on *Edwards v. California*,[52] held that the burden on the state treasury is not a valid justification for discouraging the entry of those in need of assistance.[53] The *Green* decision recognized that the protection of the public purse was a worthy goal, at least in the abstract, but that it was not a permissible ground for differentiating between similarly situated persons.[54] The *Thompson* decision confused the purpose of the statute, the protection of the state fisc, with the means by which it was to be attained, the exclusion of the needy. The *Thompson* court, in effect, condemned the means as an invalid purpose.[55] The net results were identical; both statutes were held to deny equal protection of the law because the legislative purposes for which they were enacted were not legitimate.

The courts in *Thompson* and *Green* distinguish the cases involving the lawful use of residence requirements as prerequisites for the right to vote.[56] The state has a legitimate interest in limiting the franchise to qualified citizens educated in local affairs and affected in common by subsequent legislation. "But certainly it takes little logic to conclude" as did the court in *Green*[57] "that the need for food, clothing and lodging has an aspect of immediacy which differentiates it in kind from the right to vote." Nevertheless the voting cases do illustrate

(1941), argued that the "mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color." His position would result in indigence being a fourth forbidden or inherently suspect criteria. *See also* Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

[52] 314 U.S. 160 (1940).

[53] *Thompson* at 337; *Green* at 177.

[54] *Green* at 177.

[55] *Thompson* at 337.

[56] The Supreme Court has sustained a one year residency requirement on the right to vote in state elections. Pope v. Williams, 193 U.S. 621 (1904); *cf.* Carrington v. Rash, 380 U.S. 89 (1965). Their use in federal elections has also been sustained, Brueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965), but this case has been subjected to a narrow interpretation. Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs, supra* note 45, at 623-26. It is to be noted that the states determine the qualifications for franchise under the Constitution, art. I, §§ 2 and 5 but that there is no explicit grant of power to the states to establish criteria for eligibility to receive aid. *But see* U.S. CONST. amend X.

[57] *Green* at 178.

that there is nothing inherently suspect about the use of residency tests in appropriate circumstances.

It would seem absurd to say that a state legislature could not be legitimately concerned with the protection of funds obtained from its own citizens. If the state has a legitimate interest in protecting its financial resources, and the use of residency tests are acceptable in some situations, the invalidity of the Connecticut and Delaware laws must depend upon the means by which the purpose was to be accomplished. Therefore, one must search for other available means.

The Delaware District Court provided a clue as to a possible means by which the purpose might be attained when it declined to reach the question "as to whether a state could constitutionally confine the benefits of its public assistance programs to its own domiciliaries."[58] Those who are domiciliaries within the common law definition of the term[59] would most likely have either been in the state long enough to have contributed to the funds out of which they would receive aid should they become in need of assistance, or they would have demonstrated an intention to remain indefinitely so that they might later be in a position to contribute taxes. In either case the state treasury receives a small degree of insulation from those who would come into the state in a transitory capacity while making a journey to another state.

Admittedly this is an extremely narrow area of protection,[60] but any enlargement would lead to a similar equal protection infringement controversy as existed under the residency requirements. Confining benefits to domiciliaries does enable those who enter the state with genuine purposes to qualify for assistance even though they have not necessarily contributed to the state in economic terms.[61] In *Thompson* Connecticut's classification included some people who did not represent a disproportionate drain on the treasury and excluded some who did. A statute confining benefits to those who meet the common law

[58] *Id.* at 179.

[59] For the purpose of this discussion the Delaware common law definition of domiciliary "as one who is physically present in [the state] with an intention to remain indefinitely..." will be used. *Green* at 177.

[60] The area of protection is confined to that period of time in excess of three months but short of the time necessary to determine whether the applicant is a qualified domiciliary. This is because of the common provision in state public assistance laws granting temporary aid to those in need up to a maximum of 90 days. *See* note 2 *supra* for the reference Connecticut's statute makes to temporary aid recipients.

[61] Plausible purposes which the court felt were legitimate included: hope of employment, returning to a previous residence, and a desire to be near relatives. *Thompson* at 337.

definition of a domiciliary would not be subject to a similar attack on overbreadth. Determination of intent to remain could be made in the time which is currently required to eliminate fraud through investigation of the applicant's eligibility.[62] There would be no undue periods of deprivation.

The Supreme Court will hear the appeal of the *Thompson* decision. It is probable there will be a definitive answer to the legitimacy of state residency requirements for categorical assistance.[63] It is not likely that the Court will allow itself to become immersed in inconclusive arguments attempting to discover the source of the right to travel. The argument that should be persuasive is that classifications drawn by the Connecticut legislature in attempting to accomplish the protection of the public purse were not drawn in such a way as to make purpose and classification coterminous. The Court cannot help but consider the impact which its decision will have on pending welfare litigation throughout the nation and on the ability of the states to continue as financially viable units. It is estimated that the cost of welfare could increase by as much as three times its present national level if the pending litigation covering the entire spectrum of public assistance is resolved in favor of the would-be recipients.[64] The Supreme Court ought to recognize a state's legitimate interest in its fiscal posture while demonstrating that there are constitutional limits on methods of protecting that interest.

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[62] The *Thompson* court appreciated that there were reasons for which a state would need a pause between application and payment of funds:

> [I]f there were here a time applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid.

Id at 338.

[63] N.Y. Times, Jan. 19, 1968, at 20, col. 8.

[64] N.Y. Times, Jan. 21, 1968 § 4 (The Week in Review), at 13, col. 8.