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Constitutional Law - Residency Restrictions upon Teachers' Right of Travel - O'Melia v. Sweetwater County School District No. 1

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CONSTITUTIONAL LAW—Residency Restrictions Upon Teachers' Right of Travel. O'Melia v. Sweetwater County School District No. 1, 497 P.2d 540 (Wyo. 1972).

The contracts of two teachers, Joseph O'Melia and Joseph Roush, were terminated for violation of a school board policy that asserted, "New teachers being hired by the district will be expected to reside in the community [of Wamsutter] at least five days a week . . . ." The school board maintained teacherages at minimal rental in the town of Wamsutter. Initially, the plaintiffs occupied the teacherages full time, but after their marriages they moved to Rawlins, 40 miles away. The District Court ruled against both teachers. The Wyoming Supreme Court found for the continuing contract teacher, Roush, and against the initial contract teacher, O'Melia. The Court held that the residency requirement did not violate their constitutional right of travel since they "voluntarily contracted to abide by a rule with a resultant waiver."[1]

Right of Travel

The constitutional right of every citizen to live where he chooses and to travel without restriction is fundamental to our concept of liberty. The right of travel was explicitly granted in the Articles of Confederation.[2] Although the right of travel is not mentioned in the Constitution, the courts have consistently recognized it as a basic freedom. Apparently the founding fathers thought the right so elementary that acknowledgment was unnecessary.[3]

The history of the right of travel can be characterized by the search for a specific constitutional provision supporting it.[4] At various times the courts have relied upon the privi-

1. O'Melia v. Sweetwater County School District No. 1, 497 P.2d 540, 542 (Wyo. 1972).
2. "The people of each state shall have free ingress and regress to and from any other state . . ." The Articles of Confederation art. IV.
3. United States v. Guest, 383 U.S. 745, 757-58 (1966); quoted in Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969).
4. For an excellent analysis of the history of the right of travel see Comment, *The Right to Travel—Its Protection and Application Under the Constitution*, 400 U.M.K.C. L. Rev. 66 (1971).

leges and immunities clauses of article IV, section 2[5] and the fourteenth amendment,[6] the due process clause of the fifth amendment[7] and the commerce clause.[8] The courts felt comfortable dealing with these standard constitutional provisions. As a result, the right of travel has often been treated incidentally.

In the 1969 welfare residency case of *Shapiro v. Thompson*[9] the Supreme Court eliminated this recurring problem of finding a supporting provision. The Court simply sidestepped the issue by commenting, "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."[10] Within a relatively short period of time, the right to travel was utilized to overturn residency requirements for voter registration,[11] low rent public housing,[12] state bar examinations[13] and hospitalization and medical care.[14]

There is a basic factual distinction between *Shapiro* and *O'Melia*. *Shapiro* deals exclusively with interstate travel, while *O'Melia* concerns the right to travel intrastate. A number of courts have construed this right and all have held the right to travel intrastate "fundamental within the meaning of *Shapiro*."[15] In the *Krzewinski* decision the court reasoned:

5. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); 75 U.S. (8 Wall.) 168, 180 (1868).
6. "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. . . ." *See, e.g.*, Edwards v. California, 314 U.S. 160, 178, 181 (1941) (Douglas and Jackson, JJ., concurring); Twining v. New Jersey, 211 U.S. 78, 96 (1908).
7. *E.g.*, Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Rusk, 378 U.S. 500, 505-6 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958).
8. Edwards v. California, *supra* note 6, at 173.
9. 394 U.S. 618 (1969).
10. *Id.* at 630.
11. Dunn v. Blumenstein, ... U.S. ....., 92 S. Ct. 995 (1972). Tennessee's one year residency prerequisite for voter registration was held to be unconstitutional.
12. Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970).
13. Keenan v. North Carolina Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970). *Contra*, Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972). A three-judge U.S District Court, by a two-to-one vote, upheld the constitutionality of a six-month residence requirement. The Court found that the state had a compelling interest in the quality and integrity of persons whom it permitted to practice law.
14. Crapp v. Duval Hospital Auth., 314 F. Supp. 181 (M.D. Fla. 1970); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970).
15. Krzewinski v. Kugler, 338 F. Supp. 492, 498 (D.N.J. 1972); King v. New Rochelle Municipal Housing Auth., 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Auth. of the City of Newport, 435 F.2d 807, 811 (1st Cir. 1970).

> It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state. [Citation omitted] The soundness of this conclusion is even more apparent when it is considered together with the refusal of the Supreme Court in *Shapiro* to link the right to travel with any specific clause of the Constitution, commerce or otherwise.[16]

It would be an anomaly if the Constitution protected a teacher's right to live in Utah, but not his right to live in another town in Wyoming.

CONTRACTUAL WAIVER OF CONSTITUTIONAL RIGHTS

In *O'Melia* the Court dismissed the teachers' contention that their right to live in places of their choosing was being violated. The Wyoming Court held that O'Melia and Roush had waived their right by voluntarily contracting to abide by the school residency policy.[17] The fact that the teachers signed a contract should not automatically eliminate their constitutional rights. To give such magic to a contract clause would tear down all constitutional restraints upon public employers and completely discard protection of fundamental rights.[18] If the board's contractual power was absolute, it could compel teachers to vote for a particular political candidate, attend a specific church or obey any unconscionable condition.

In examining the *O'Melia* case, the Wyoming Court dwelled upon the contractual relationship between the teachers and the board. But the court's focus should have been centered upon the key question of whether or not the school board has the constitutional power to restrict its employees' right of travel. Faced with a similar public employment situation the Federal District Court of New Jersey in *Krzewinski*

16. Krzewinski v. Kugler, *supra* note 15, at 498.

17. O'Melia, *supra* note 1, at 542.

18. For insight into the innovative method of deciding constitutional cases on the basis of a determination as to the "requisite conditions for a functioning political system" see BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

v. Kugler stated that the essential question is not whether a man can be a policeman or fireman and simultaneously assert his right to live where he chooses, "but rather whether the interests of a municipality in asking a policeman or fireman to surrender his constitutional right to travel . . . are sufficiently compelling to justify the creation of a working class of immobiles."[19]

There is ample proof that the courts do not automatically honor all contract provisions. As early as 1926 the U. S. Supreme Court in *Frost and Frost Trucking Co. v. Railroad Comm.*[20] recognized that a state agency can not grant a benefit contingent upon the acceptance of an unconstitutional condition.

The Court held:

> Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. . . .
>
> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.[21]

The *Frost* decision has been modified by the requirement that the Courts examine the justification for the restrictive

19. *Supra* note 15, at 499.
20. 271 U.S. 583 (1926).
21. *Id.* at 593-94. *See* Midwest Video Corp. v. United States, 441 F.2d 1322, 1327 (8th Cir. 1971); Lemieux v. Robbins, 294 F. Supp. 1171, 1174 (S.D. Me. 1968); Bynum v. Schiro, 219 F. Supp. 204, 210 (E.D. La. 1963); Bruns v. Pomerleau, 319 F. Supp. 58, 66 (D. Md. 1970); United Gas Pipeline Co. v. Terrebonne Parish Police Jury, 319 F. Supp. 1138, 1143 (E.D. La. 1970); Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 260 (7th Cir. 1948); City of Colorado Springs v. Kitty Hawk Developing Co., 392 P.2d 467, 482-83 (Colo. 1964); Downs v. Conway School Dist., 328 F. Supp. 338, 345 (E.D. Ark. 1971); Johnson v. Branch, 364 F.2d 177, 180 (4th Cir. 1966).

condition.[22] The Supreme Court of California dealt with the issue of a public employment contract waiving constitutional rights in *Bagley v. Washington Township Hospital District.*[23] The Court found that without a compelling state interest, fundamental constitutional rights "*are not subject to destruction by a public employer's insistence that they be waived by contract* [Emphasis added]."[24] Hence, the school board in *O'Melia* should not be allowed to do by contract that which the state is constitutionally prohibited from doing by statute. Naturally, any public employment contract will restrict an employee's rights to some extent. The function of the court is to determine the validity of the particular contractual restraint upon the individual's rights and to establish parameters within which the school board may operate.[25]

THE COMPELLING STATE INTEREST DOCTRINE V. RATIONAL DOCTRINE

The Wyoming Supreme Court cited the District Court's conclusion of law that "the [residency] policy was a valid and *reasonable* contractual condition of employment."[26] [Emphasis added] This reference seems to imply that the "rational" doctrine was used to evaluate the constitutional validity of the board's policy. As set out in *Lindsley v. Natural Carbonic Gas Co.*,[27] this doctrine states that the policy must be rational, bear a reasonable relationship to a proper governmental purpose and treat all persons controlled by the policy equally.

22. For a more thorough analysis of the doctrine of unconstitutional conditions see Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); and French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961).

23. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966). A nurse's aide was discharged by defendant township hospital district for violation of statutory and contractual restrictions upon her political activities relating to the recall of certain hospital directors. The court found no "compelling" justification for the contract clause and declared it unconstitutional.

24. *Id.* at 415; see Purdy & Fitzpatrick v. State, 79 Cal. Rptr. 77, 456 P.2d 645, 653 (1969); City of Carmel-By-The-Sea v. Young, 85 Cal. Rptr. 1, 466 P.2d 225, 229-230 (1970); People v. Mason, 97 Cal. Rptr. 302, 488 P.2d 630, 634 (1971).

25. This article is directed exclusively towards public employers and does not concern itself with contracts between private parties.

26. O'Melia, *supra* note 1, at 542.

27. 220 U.S. 61, 78 (1911). *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Metro Casualty Ins. Co. of N.Y. v. Brownell, 294 U.S. 580 (1935).

The party alleging unconstitutionality must meet the heavy burden of proving the statute or policy either "unreasonable," "irrelevant," "irrational," "arbitrary," or "invidious."[28]

The "rational" doctrine would have been applicable in *O'Melia* if the U.S. Supreme Court had not labelled the right to travel as "fundamental."[29] The Supreme Court only uses the adjective "fundamental" in reference to rights requiring the highest possible degree of protection under the Constitution. Other rights, not enumerated in the Constitution, which the court has recognized as being "fundamental" include voting,[30] criminal procedural rights,[31] marriage,[32] procreation,[33] and education.[34]

Normally, courts recognize a presumption which operates in favor of the reasonableness of governmental action.[35] This favorable presumption is not applied to restrictions upon fundamental rights.[36] Thus, the *O'Melia* Court should have placed a "very heavy burden of justification"[37] upon the board's residency policy. The term "fundamental" necessitates the use of the "compelling state interest" doctrine. In *Shapiro* the U.S. Supreme Court asserted:

> 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.[38] [Court's emphasis]

Under this doctrine the school board would have been required to demonstrate that the interest used to justify the residency restraint was compelling, not merely "rational" or "legitimate." The search for a compelling interest to support the board's policy is limited to *present* interests func-

28. Harper v. Virginia Board of Elections, 383 U.S. 663, 673-74 (1966) (Black, J., dissenting).
29. Shapiro, *supra* note 3, at 630.
30. Harper v. Virginia Board of Elections, *supra* note 28.
31. Griffin v. Illinois, 351 U.S. 12 (1956).
32. Loving v. Virginia, 388 U.S. 1 (1967).
33. Skinner v. Oklahoma, 316 U.S. 535 (1942).
34. Brown v. Board of Education, 347 U.S. 483 (1954).
35. Lindsley v. Natural Carbonic Gas Co., *supra* note 27.
36. Kramer v. Union Free School Dist., 395 U.S. 621, 633 (1969).
37. Loving v. Virginia, *supra* note 32, at 9.
38. Shapiro, *supra* note 3, at 638.

tioning as an *actual* basis for the restriction.[39] This means that the school board must produce an existing justification and demonstrate that it actually furthers its compelling interest. The board must also show that its restrictions are no greater than necessary and are the constitutionally optimum solution to the stated purpose of the policy. In *Dunn v. Blumenstein* the U. S. Supreme Court prohibited the state of Tennessee from choosing "means which unnecessarily burden or restrict constitutionally protected activity."[40] The means must be tailored to serve their legitimate objectives. Thus, the restrictions on the teacher's right of travel can be no greater than absolutely necessary to further the school board's legitimate interests. There must be no other acceptable method to achieve the desired objective.

Some courts have distinguished situations of mere "incidental" infringements on the right to travel. The courts which follow this line of reasoning[41] speak in terms of deterrent intent or actual deterrence upon the fundamental right of travel. They interpret *Shapiro's* fundamental right as being the right to food, clothing and shelter[42] rather than the right to travel. The California Court in *Kirk v. Board of Regents* distinguished *Shapiro* by maintaining that residency requirements for tuition-free education are not important enough to inhibit interstate travel and are not as "fundamental" to survival and subsistence as welfare benefits.[43] Based upon this finding the *Kirk* Court held that it is not proper to consider the issues under the stringent compelling state interest doctrine. Instead, the "rational" doctrine of reasonableness is the standard employed to examine the residency requirement for tuition.[44]

The *Kirk* line of reasoning was specifically rejected in *Carter v. Gallagher*.[45] The *Carter* court held that the U.S. Supreme Court utilized the compelling state interest doc-

39. Krzewinski v. Kugler, *supra* note 15, at 501.
40. Dunn v. Blumenstein, *supra* note 11, at 1003.
41. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); Kirk v. Bd. of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).
42. Starns v. Malkerson, *supra* note 41, at 238.
43. Kirk v. Bd. of Regents, *supra* note 41, at 266.
44. *Id.* at 267.
45. 337 F. Supp. 626 (D. Minn. 1971).

trine in *Shapiro* because the welfare residency restrictions "impinged upon the fundamental right of interstate movement" rather than the right to the fundamental necessities of life.[46] Citing numerous cases, the *Carter* court found no need to establish a deterrent effect or intent upon the exercise of the right of interstate movement.[47] They maintained that "it is sufficient that the statute [or policy] merely operate as a penalty upon the exercise of the right [of travel]"[48] to necessitate the use of the compelling state interest doctrine.

The school board's residency policy in *O'Melia* would require the application of the compelling state interest doctrine under either the *Kirk* or the *Carter* decisions. Obviously, the residency restrictions *penalize* the teacher's exercise of their right to live in a place of their own choosing. Thus, the *Carter* standards for employing the compelling state interest doctrine have been fulfilled. The *Kirk* court labelled the right to establish a domicile wherever one chooses as "fundamental" within the meaning of *Shapiro's* necessities of life (*i.e.*, shelter).[49] Being fired for violation of the board's policy also has a definite deterrent effect upon the exercise of the right to travel. Hence, the *O'Melia* situation would not be included under the *Kirk* type of exception to *Shapiro*.

In the past, the "public coffer" theory and the "right-privilege" dichotomy have been employed as compelling bases for residency requirements. The public coffer theory maintains that money paid to employees should remain within the municipality (or school district) which pays their salaries.[50] The right-privilege rationale holds that public employment

46. *Id.* at 632; citing Dandridge v. Williams, 397 U.S. 471 (1970); Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970); King v. New Rochelle Municipal Housing Auth., 442 F.2d 646 (2d Cir. 1971); *cf.* Keppel v. Donovan, 326 F. Supp. 15, 19-20 (D. Minn. 1970).

47. *Id.* at 631-32; Cole v. Housing Auth. of the City of Newport, *supra* note 46; Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970); King v. New Rochelle Municipal Housing Auth., *supra* note 46; United States v. Jackson, 390 U.S. 570, 582-83 (1968); Sherbert v. Verner, 374 U.S. 398, 403-4 (1962); Oregon v. Mitchell, 400 U.S. 112, 238 (1970).

48. *Id.* at 632.

49. Kirk v. Bd. of Regents, *supra* note 41, at 266-67.

50. People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.*, Crane v. New York, 239 U.S. 195 (1915).

is a privilege rather than a right.[51] Courts which followed this rationale found that a public employer could place any restriction upon such employment because the employee had no "right" to his job.

Both theories were rejected by the Supreme Court in *Shapiro*.[52] As policy rationale they "have lost not only their compelling nature, but also their constitutionality."[53] Similarly, the fear expressed at a board meeting "that if there were empty teacherages district taxpayers might question the need for lodging . . ."[54] would be rejected using the *Shapiro* reasoning.

The school district obviously has a significant interest in insuring that its teachers arrive at classes on time. Having teachers available in the local community and fully participating in the school situation is equally important. However, most courts would hold these not to be compelling interests.[55]

The Fifth Circuit Court of Appeals established a useful standard in *Battle v. Mulholland*[56] for determining questions of compelling state interest in the field of public employment tenure. In that case a black policeman rented rooms in his house to white women employed on an antipoverty project. For this reason he was dismissed from the police force. In reversing the lower court's decision against the policeman, the Appeals Court held there must be a finding that the "conduct would materially and substantially impair his usefulness as a police officer."[57] Applied to *O'Melia,* the *Mulholland* rule would require the school board to prove that Roush's and O'Melia's conduct of not living in Wamsutter "materially and substantially" impaired their usefulness as teachers.

51. Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959).
52. Shapiro, *supra* note 3, at 632-33; *see* Goldberg v. Kelly, 397 U.S. 254 (1970); Sherbert v. Verner, 374 U.S. 398 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).
53. Krzewinski v. Kugler, *supra* note 15, at 498.
54. O'Melia, *supra* note 1, at 543.
55. Krzewinski v. Kugler, *supra* note 15, at 499 n.6; Donnelly v. City of Manchester, 274 A.2d 789, 791 (N.H. 1971). *Contra,* Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1969); Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966). However, these courts applied the "rational" doctrine of reasonableness.
56. 439 F.2d 321 (5th Cir. 1971).
57. *Id.* at 325; *see also,* Comment, *Teachers and the First Amendment,* 7 WILLAMETTE L. J. 435, 449 (1971).

One of the most convincing arguments nullifying the compelling nature of the school board's policy is that it was limited to "new teachers." If the board's purpose was actually compelling, the restriction would have included all teachers. Finally, the "failure to enforce the rule at the time Roush commenced his employment"[58] and the school superintendent's "lack of sympathy with the rule"[59] both indicate the policy's non-compelling nature.

CONTRACT STATUS

After dismissing the teachers' constitutional contentions the Wyoming Supreme Court based its decision upon the plaintiffs' contractual status. Roush was a continuing contract teacher,[60] while O'Melia was an initial contract teacher.[61] The Court reversed the District Court as to the continuing contract teacher, Roush, and held that he had an "expectancy of continued employment."[62] Also, the words "new teachers" were found to be ambiguous in reference to Roush (but apparently not to O'Melia). The Court ruled that it would be unjust and unreasonable to hold Roush to the contract and remanded his action.

In the recent U.S. Supreme Court case of *Perry v. Sindermann*[63] the Court maintained that the teacher's "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech cliam."[64] In the companion case, Justice Stewart stated that tenure or continuing contract

58. O'Melia, *supra* note 1, at 542.

59. *Id.* at 543.

60. WYO. STAT. § 21.1-152(b) (Supp. 1971). *"Continuing contract teacher:* (i) Any initial contract teacher who has been employed by the same school district in the State of Wyoming for a period of three (3) consecutive school years, . . . and has had his contract renewed for a fourth consecutive school year; or (ii) A teacher who, . . . has achieved continuing contract status in one district, and who has taught two (2) consecutive school years and has had his contract renewed for a third consecutive school year by the employing school district."

61. WYO. STAT. § 21.1-152(d) (Supp. 1971). *"Initial contract teacher:* Any teacher who has not achieved continuing contract status."

62. The Wyoming Supreme Court made this ruling based upon the following language of Wyo. Stat. § 21.1-154 (Supp. 1971): "A continuing contract teacher shall be employed by each school district on a continuing basis from year to year without annual contract renewal. . . ."

63. ..... U.S. ....., 92 S. Ct. 2694 (1972).

64. *Id.* at 2698.

rights[65] were relevant in procedural questions but not in substantive rights cases.[66] Thus if the Wyoming Court had recognized the validity of the teachers' constitutional claim, their contractual status would have been irrelevant.

RESIDENCY REQUIREMENTS FOR PUBLIC EMPLOYMENT

Prior to *Shapiro,* residency requirements for public employment were generally found to be constitutional. Residency restrictions upon political candidates,[67] city attorneys,[68] firemen,[69] policemen,[70] court employees[71] and municipal employees generally[72] were upheld. In all of these decisions the courts utilized the "rational" doctrine of reasonableness to determine the validity of the restraints.[73]

Since the *Shapiro* decision many residency requirements have been upheld, but their validity has been tested using the compelling state interest doctrine.[74] A notable exception to this general trend is *Donnelly v. City of Manchester.*[75] This 1971 decision interpreted a statutory requirement that all classified employees of the city, including school teachers, be residents of the city. The New Hampshire Supreme Court used the "rational" doctrine of reasonableness instead of the

65. O'Melia, *supra* note 1, at 542. The Wyoming Court modified Monahan v. Board of Trustees, 486 P.2d 235, 236-37 (Wyo. 1971) by stating. "[W]e there perhaps overstated in our effort to give a correct interpretation of the section [Wyo. Stat § 21.1-154 (Supp. 1971)] and in so doing denominating the right given therein as being tenure. . . ."

66. The Board of Regents v. Roth, ____ U.S. ____, 92 S. Ct. 2701 (1972).

67. Huey v. Etheridge, 234 Ala. 264, 175 So. 268 (1937); People v. Mertz, 2 Cal. 2d 136, 39 P.2d 422 (1934); State v. Williams, 99 Mo. 291, 12 S.W. 905 (1889); Jack v. Power, 282 App. Div. 831, 124 N.Y.S.2d 433, *aff'd* 306 N.Y. 555, 114 N.E.2d 776 (1953).

68. Warnock v. Town of Maryville, 16 Wash. 2d 710, 134 P.2d 710 (1943).

69. Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1969).

70. State v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

71. Marcellus v. Kern, 170 Misc. 281, 10 N.Y.S.2d 73 (1939).

72. Archer v. Civil Service Comm., 1 Cal. 2d 357, 34 P.2d 1023 (1934); Kennedy v. Newark, 29 N.J. 178, 148 A.2d 473 (1959); Dierssen v. Civil Service Comm., 43 Cal. App. 2d 53, 110 P.2d 513 (1941).

73. For a complete review of similar decisions see MCQUILLIN, 3 MUNICIPAL CORPORATIONS § 12.59, pp. 270-75 (3rd ed. 1963).

74. Krzewinski v. Kugler, *supra* note 15 (upheld residency restrictions upon policemen and firemen); Lawrence v. Cleveland, 13 Cal. App. 3d 127, 91 Cal. Rptr. 863 (1971) (declared a five-year requirement for office of city councilman was not justified by a compelling interest, but upheld a one-year requirement).

75. 274 A.2d 789 (N.H. 1971).

compelling state interest doctrine, and still held the residency restriction invalid as to teachers. The court could not find a "reasonable" justification for the restrictions upon the teachers' right to travel.[76]

Until the Wyoming Supreme Court makes a clear determination as to the constitutional validity of public employment residency restrictions, such restraints must be assumed to be enforceable. The Court's emphasis upon strict adherence to contract provisions and its use of the waiver concept must be important considerations in any public employment contract case in Wyoming. Under the *O'Melia* ruling expectancy of continued employment and its resulting property right are vital in establishing a constitutionally protectible interest in a public employment situation.[77]

CONCLUSION

Shapiro established the right of travel as a "fundamental" right independent of any supporting constitutional provision. The right of travel *intrastate* is correlative to the right of *interstate* movement and "fundamental" within the meaning of *Shapiro*. The standard which the U. S. Supreme Court has established for examining restrictions upon such rights is the compelling state interest doctrine. When determining the validity of restrictions upon a teacher's fundamental constitutional rights, contractual status or purported contractual waiver are irrelevant. The relevant question is whether or not the school board has some compelling justification conferring the power to restrict the right of travel.

Under the compelling state interest doctrine, any substantial restriction upon the "fundamental" right of travel must meet two criteria.[78] First, the existing state interest utilized to justify the residency requirement must be "compelling," not merely "rational" or "legitimate." Second, the residency restriction must be no greater than necessary and

76. *Id.* at 791.

77. O'Melia, *supra* note 1, at 542.

78. These criteria are articulated in Singer, *Student Power at the Polls*, 31 OHIO ST. L. REV. 703, 715 (1970).

accomplished by using the constitutionally optimum solution. In addition, the public employer has the burden of demonstrating that the compelling state interest doctrine standards have been met.

America is a society in motion. Freedom of movement is vital to the very existence of a dynamic industrial society. *Shapiro* and its offspring simply give legal recognition to these modern realities. The boundaries of the right of travel have not been firmly established but the weight of authority clearly favors invalidations of residency requirements upon teachers.

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