DURATIONAL RESIDENCY REQUIREMENTS AND THE EQUAL PROTECTION CLAUSE: *ZOBEL v. WILLIAMS*

The right to migrate[1] often clashes with state regulation, especially

1 The Articles of Confederation explicitly recognized the right to migrate by granting a citizen the right of "free ingress to and from any other state," yet the Constitution contains no such provision. *Compare* ARTICLES OF CONFEDERATION art. IV, sec. 2, *with* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"). Nevertheless, courts recognize the right to migrate. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

The potential for a court to invoke the right to migrate and strike down state legislation illustrates the power of judicial review. In short, the right to migrate acts as a sword which a court can unsheath when necessary to trim the legislative power of states. The sharpness of the sword depends on the applicable constitutional provision governing judicial review, whether the court invokes the privileges and immunities clause in article IV, the commerce clause, or the fourteenth amendment.

Under the Constitution, courts first examined the right to migrate in the context of state discrimination against non-residents. Early cases suggested that discrimination against non-residents contravened the privileges and immunities clause in article IV. *See* Campbell v. Morris, 3 H. & McH. 288, 293 (Md. 1797) (required treating similarly the property of a non-resident with that of a resident). In Corfield v. Coryell, 6 F Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), Justice Bushrod Washington read the privileges and immunities clause as securing "the right of a citizen of one state to pass through, or to reside in, any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.* at 552. Additionally, some courts read the clause as only preventing a state from discriminating in favor of its own citizens and imposing a burden on citizens of other states. *See* Wiley v. Parmer, 14 Ala. 627, 629 (1848); Douglas v. Stephens, 1 Del. Ch. 465, 472-73 (1821).

Even in *Corfield*, however, Justice Washington added an important caveat when he noted that a state could, in furtherance of the general welfare, regulate immigration. 6 F. Cas. at 552. Justice Washington's caveat in *Corfield* reflected a tradition of allowing communities to exclude paupers. *See* Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 855-56 (1981). Fourteen years after *Corfield*, the Supreme Court in New York v. Miln, 36 U.S. 102 (1837), recognized New York's right to fenceout unwanted aliens. *See also* Passenger Cases, 48 U.S. (7 How.) 283 (1849) (while health laws excluding criminals, vagabonds, and paupers might pass constitutional muster as valid public welfare regulations, such laws implicate the commerce clause); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842) (dicta that states may exclude paupers). Dissenting in the *Passenger Cases*, Chief Justice Taney agreed that states could close off their borders.

[T]he several States have a right to remove from among their people, and to

when that regulation distinguishes among citizens according to the

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prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government.

48 U.S. (7 How.) at 467. But Chief Justice Taney added that a state could not enact a tax on American citizens migrating into the state. *Id.* at 492.

These cases, however, only illustrate the Court's reliance on the commerce clause. Specifically, the Court asked whether migrating people constituted commerce. *Id.* at 476-77. After the Court resolved the question affirmatively, the commerce clause proved a potent weapon for protecting the right to travel. *See* Edwards v. California, 314 U.S. 160 (1941); Colgate v. Harvey, 296 U.S. 404, 436 (1935) (Stone, J., dissenting); Helson v. Kentucky, 279 U.S. 245, 251 (1929); Henderson v. Mayor of New York, 92 U.S. 259 (1875); The Case of the State Freight Tax 82 U.S. (15 Wall.) 232 (1873); the License cases, 46 U.S. (5 How.) 504 (1847); Erie Railway Co. v. State, 31 N.J. 531 (1864); Lin Sing v. Washburn, 20 Cal. 534 (1862).

In 1868, the Supreme Court adopted an alternate rationale for protecting the right to travel. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). In place of the commerce clause, the *Crandall* Court revitalized the earlier individual rights argument under the privileges and immunities clause. *Id.* at 40-44. *See, e.g.*, United States v. Wheeler, 254 U.S. 281, 296 (1920) (privileges and immunities clause in article IV is similar to provision in the Articles of Confederation); Williams v. Fears, 179 U.S. 270, 274 (1900) ("undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of a free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by the Constitution"); Blake v. McClung, 172 U.S. 239, 256 (1898) ("The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the right that commonly appertains to those who are part of the political community."); Morris v. Gilmer, 129 U.S. 315 (1889) (privilege of a United States citizen to transfer his citizenship from one state to another); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871) (right to travel found in the privileges and immunities clause in article IV); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) (right to travel in privileges and immunities clause in article IV). *But cf.* Railroad Co. v. Husen, 95 U.S. (5 Otto) 465, 470 (1877) (apparently construing the taxation of persons interstate as a burden on commerce). *See generally* C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888 1302-07 (1971).

Although not tied to a single provision in the Constitution, freedom to travel received increasing support during the twentieth century. *See* Zobel v. Williams, 102 S. Ct. 2309, 2312 n.6 (1982) (although repeatedly recognized, the source of the right to travel is obscure); Jones v. Helms, 452 U.S. 412 (1981) (found only a "qualified" right to travel once an individual commits a certain crime); Califano v. Torres, 435 U.S. 1, 4 (1978) (recognized that the denial of vital benefits unconstitutionally burdened the right of interstate travel); Mathews v. Diaz, 426 U.S. 67, 86 n.26 (1976) (while states may not burden a citizen's right to travel interstate, Congress may deter the travel of aliens into the United States); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (the right to travel need not be limited to a particular constitutional provision). For a

length of their residency.[2] Quite often states impose durational residency requirements[3] on newly arrived migrants. These requirements

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discussion of *Shapiro* and similar cases, see *infra* notes 22-91 and accompanying text. For additional cases prior to *Shapiro*, see United States v. Guest, 383 U.S. 745, 757-58 (1966) (freedom to travel a fundamental right); Zemel v. Rusk, 381 U.S. 1, 14 (1965) (freedom to travel abroad is a fundamental right protected by the due process clause in the fifth amendment); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964) (freedom to travel abroad); Kent v. Dulles, 357 U.S. 116, 25-26 (1958) (freedom to travel abroad); Edwards v. California, 314 U.S. 160 (1941) (commerce clause prohibits California from closing its borders to indigents). In short, the Supreme Court has read into the rights of United States citizenship the freedom to travel. *See generally* Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956); J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978); A. LIEN, PRIVILEGES AND IMMUNITIES OF THE UNITED STATES (1913); Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967); Berger, *supra*; Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405; Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORNELL L.Q. 489 (1944); Roback, *Legal Barriers to Interstate Migration*, 28 CORNELL L.Q. 286 (1943); Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129 (1975).

2. For some recent examples, see *In re* United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982) (one-year residency requirement under the student athlete transfer eligibility rule); Akron v. Bell, 660 F.2d 166 (6th Cir. 1981) (one-year residency requirement for city councilman); Walsh v. Louisiana High School Ass'n, 616 F.2d 152 (5th Cir. 1980) (student transfer rule); Joseph v. Birmingham, 510 F. Supp. 1319 (E.D. Mich. 1981) (one-year residency requirement for city commissioner). *See also* IND. CODE ANN. § 7.1-3-21-3 (Burns 1982) (residency requirement for individuals or corporations applying for a permit to sell alcoholic beverages); KY. REV. STAT. §§ 243.105-243.107 (1980) (residency requirements for wholesalers of an alcoholic beverage). Additionally, legislation can distinguish among citizens on the basis of a specific date of residency. *See, e.g.*, Amador Valley Joint High School Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (change from current value system of taxation to acquisition value method of taxation—new residents pay a greater property tax than do old residents).

3. Simple residency requirements differ from durational residency requirements. In the former, a state requires only actual residency; in the latter, a state requires the resident to wait a specified period before receiving certain public benefits. *See, e.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (simple residency requirements are constitutional).

Both types of requirements, however, may have the same practical effect on individuals. For instance, a simple residency requirement for admission to the bar places the same burden on the non-resident seeking to practice law in the state as does a durational residency requirement. In both cases, the lawyer must overcome an obstacle before practicing his profession in the state. Because simple residency requirements distinguish non-residents from residents, while durational residency requirements differentiate among residents based on the time of their arrival in the state, courts sometimes employ different constitutional provisions. *Compare* Stalland

create a waiting period before newcomers receive the full panoply of state benefits. As states begin to play a more active role in providing benefits and services,[4] these requirements—classifications between recent migrants and others—take on added significance. Reviewing a novel type of durational residency requirement, the Supreme Court in *Zobel v. Williams*[5] displayed its dislike for certain durational residency requirements when it seemingly applied a new standard of review and struck down an Alaska statute as violative of the equal protection clause.

In *Zobel*, petitioners challenged the constitutionality of Alaska's permanent fund income distribution statute.[6] Unparalleled in the American tradition,[7] the Alaska statute provided for the distribution

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v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982) (simple residency requirement) *with* Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (durational residency requirement) *and* Kennan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (durational residency requirement).

4. On January 26, 1982, President Reagan delivered his State of the Union Address in which he outlined a new era of federal-state relations. Reagan, *State of the Union Address*, VITAL SPEECHES OF THE DAY, Feb. 15, 1982, at 258. Initially, President Reagan proposed transferring such programs as Aid to Families with Dependent Children (AFDC) and Food Stamps to the state level. *Id.* at 260, 262. While Congress has thus far balked at such transfers, the executive policy foreshadows the prominent role the states may play in providing benefits and services.

5. 102 S. Ct. 2309 (1982).

6. ALASKA STAT. §§ 43.23.010-.100 (Supp. 1980). The Alaska legislature developed a distribution scheme based solely on length of residency. *Id. See infra* note 8. For a discussion of the distribution plan as a privitization statute, see generally Note, *Public Wealth, Privitization and the Constitution: The Alaska Example*, 61 B.U.L. REV. 969 (1981). See *infra* note 7, for further discussion of privitization theory.

Additionally, Alaska used the durational residency requirement in other situations, and some of the requirements were challenged in the Alaska Supreme Court. Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (invalidating a tax exemption statute discriminating against new residents); Castner v. Homer, 598 P.2d 953 (Alaska 1979) (sustaining a one-year durational residency requirement for a city officer); Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518 (1978) (one-year durational residency requirement for employment on the Alaska pipeline violative of the equal protection clause); Gilbert v. State, 526 P.2d 1131 (Alaska 1974) (three-year residency requirement for state senator upheld); State v. Adams, 522 P.2d 1125 (Alaska 1974) (one-year residency requirement for bringing divorce action unconstitutional); State v. Wylie, 516 P.2d 142 (Alaska 1973) (one-year residency requirement for public employment unconstitutional); State v. Van Dort, 502 P.2d 453 (Alaska 1972) (seventy-five day residency requirement for voting unconstitutional). See generally *infra* note 8, for a description of the "Alaska experience."

7. Williams v. Zobel, 619 P.2d 448, 463 (Alaska 1980), *rev'd*, 102 S. Ct. 2309 (1982). The distribution plan marks a radical step toward recognizing the viability of privitization theory. "Privitization involves a transfer to the private sector of wealth

of earnings from the fund to residents based on their length of residency since statehood.[8] The Zobels, recent migrants to Alaska, alleged that the state plan denied equal treatment to bona fide citizens because it treated newcomers differently than long-term residents.[9]

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previously controlled by the public sector. Yet privitization is more than a grandiose giveaway scheme. Rather, it is a philosophy of political economy that uses a broad range of measures to enhance the private sector's role through minimal governmental presence." Note, *supra* note 6, at 971. Privitization can take many forms. For instance, "a state may simply forego tax collection or reduce tax rates, and use resource rents to purchase public goods and services normally funded by tax levies. Alternatively, a mineral-rich state like Alaska may transfer excess income and rents directly to state residents." *Id.* In a less drastic form, privitization may entail governmental divestiture of governmental operations. *Id.* Whatever form it takes, privitization theory "rests upon an unquestioned faith in free enterprise." *Id.* at 972. A key problem with privitization plans, however, comes during the distribution stage—just who gets how much? A state must account for the possible massive immigration which could occur if the benefits are distributed equally to old and new residents. *Id.* at 972-73.

8. The rationality of Alaska's distribution scheme must be judged in light of Alaska's peculiar history. "After literally centuries of non-existent governmental services and widespread poverty," the state discovered a large oil field in 1967 which promised "economic salvation for the State." Brief for Appellee at 3, Zobel v. Williams, 102 S. Ct. 2309 (1982). See generally C. NASKE, AN INTERPRETIVE HISTORY OF ALASKA STATEHOOD (1973), and E. GRUENING, THE STATE OF ALASKA (1968) for a historical background. The promise proved gratifying when the state began to receive "a massive infusion of revenue." Brief for Appellee at 3, Zobel v. Williams, 102 S. Ct. 2309. As Alaska became wealthier, people flocked to the state, many to work on the pipeline. In fact, between 1972 and 1973, Alaska's population increased by eleven percent. Note, *Durational Residency Requirements: The Alaska Experience*, 6 U.C.L.A.-ALASKA L. REV. 50, n.2 (1976). The situation changed dramatically by 1975, unforeseen problems had halted construction on the pipeline, and the state began facing a large budget deficit. Thus sensitized to the problems of an economy based on finite natural resources, Alaskans passed a constitutional amendment establishing a permanent fund designed to outlive Alaska's oil reserves. Brief for Appellee at 4-5, Zobel v. Williams, 102 S. Ct. 2309.

The statute at issue in *Zobel v. Williams* distributes a percentage of the interest from the permanent fund to Alaska residents, eighteen years or older, and "state resident[s] during all or part of the year for which the permanent fund dividend is paid." ALASKA STAT. §§ 43.23.010-.100, 43.23.020 (Supp. 1980). Each eligible person receives "one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959." *Id.* Additionally, the plan provides for distributing funds to residents of less than a year on a prorated basis. *Id.* § 43.23.010(8). For the 1979 fiscal year, each dividend was worth fifty dollars. *Zobel*, 102 S. Ct. at 2311.

While the constitutionality of Alaska's distribution scheme was pending before the United States Supreme Court, the Alaska legislature passed a new act in the event the Court declared the initial plan unconstitutional. The Governor signed the new act on June 16, 1982, two days after *Zobel* was handed down. Alaska's new plan provides for equal dividends to all State residents who have been a resident for the immediately preceding six months. 1982 Alaska Sess. Laws Ch. 102 §§ 1-30.

9. *Zobel*, 102 S. Ct. at 2312. Appellant's brief argued, *inter alia*, that recent mi-

Furthermore, they claimed that the statute penalized their exercise of the right to travel.[10] The Alaska Supreme Court rejected these arguments,[11] but the United States Supreme Court reversed, declaring the

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grants belong to a "suspect" class. Brief for Appellants at 18-20, 46, Zobel v. Williams, 102 S. Ct. 2309. *See* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 1007 (1975). Language in the opinions prior to *Zobel* suggests that recent migrants may comprise a suspect class. *See, e.g., infra* text accompanying note 64. *But cf. infra* note 56. If the Court views recent migrants as a suspect class, explaining why penalties imposed on recent migrants might not trigger strict scrutiny poses a problem. *Id.*

10. *Zobel*, 102 S. Ct. at 2311.

11. Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (Zobel II), *rev'd*, 102 S. Ct. 2309 (1982). *Zobel II* was an appeal from the summary judgment of a superior court. *Id.* at 450. The superior court declared the plan a denial of equal protection of the laws and an infringement on the right to interstate migration. *Id.* The Alaska Supreme Court reversed the summary judgment and upheld the statute under a balancing test. *Id.*

The Zobels also challenged Alaska's tax exemption statute. Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Zobel I). The Alaska legislature passed the tax exemption statute during the same session as the permanent fund income distribution statute. *Id.* at 423-24. The exemption "completely exempts from taxation the income of those individuals who have filed an Alaska income tax return and reported gross income from sources within Alaska for three or more years." *Id.* Furthermore, "[t]hose who have filed tax returns in two previous years are exempt from two-thirds of the tax that would ordinarily be levied under the existing structure, and those that have filed in one previous year are exempt from one-third of their tax." *Id.* at 424. The Zobels argued that the statute denied them equal treatment under the Alaska Constitution. *Id.*

In striking down the exemption, the Alaska Supreme Court analogized the tax exemption to a durational residency requirement: "[D]iscrimination against new residents created by the series of exemptions is apparent from the statute. Therefore, the legal question presented is whether Alaska may selectively impose an income tax on new residents." *Id.* at 425. Quite aptly, the court drew the connection between the equal protection clause and the right to travel.

> The relationship between these two constitutional protections, which may not be immediately clear, is that a durational residency requirement does not treat equally those individuals who have recently exercised their constitutional right to travel and those who have not. Individuals who belong to that class of people who have recently migrated to a state are denied certain rights and benefits granted to other residents. In effect, the argument is that a durational residency requirement impermissibly penalizes those who have exercised a constitutional right.

Id.

The *Zobel I* court found no federally protected fundamental right and therefore applied a balancing test to the exemption. *Id.* at 427. Under this test, the court held that the statute violated the state constitution. *Id.* at 429. For commentary on the case, see Note, *Balancing Test in Durational Residence Equal Protection Analysis*, 56 WASH. L. REV. 763 (1981); Note, *supra* note 6.

As in *Zobel I*, the Alaska Supreme Court in *Zobel II* measured the permanent

distribution scheme a violation of the equal protection clause of the fourteenth amendment.[12]

When Congress drafted the fourteenth amendment,[13] the amend-

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fund income distribution statute against a balancing test. In previous cases, the Alaska court had interpreted United States Supreme Court decisions as mandating the application of strict scrutiny analysis when the state imposes a durational residency requirement. *Zobel II*, 619 P.2d at 452. Subsequently, however, the Alaska Supreme Court abandoned the old two-tier approach to equal protection analysis and adopted a balancing test. *Id.* at 452.

The *Zobel II* court began by noting that the United States Supreme Court recognized that not all durational residency requirements penalized the exercise of the right to interstate migration. *Id.* at 454. Absent such a penalty, strict scrutiny analysis was inapplicable. *Id.* After concluding that the statute—though a multi-stage durational residency requirement—fell within the principles governing two-stage durational residency requirements, the *Zobel II* court considered whether the statute operated as a penalty triggering strict scrutiny. *Id.* at 454-55. The *Zobel II* court measured the penalty indirectly by examining four factors which the United States Supreme Court indicated might trigger strict scrutiny: 1) state justification of administrative convenience; 2) benefit denied considered a basic necessity; 3) state merely delaying receipt of benefit; and 4) state denies fundamental right to new resident. *Id.* at 455-57. The court held that the distribution plan fell outside each factor. *Id.* Finding the balancing approach applicable, the court then examined the objectives of the distribution plan and sustained the act.

12. *Zobel*, 102 S. Ct. 2309.

13. At first, the passage of the fourteenth amendment meant little in the development of securing more rights. The amendment merely broadened the class of effected individuals and did not interfere with the well established triparte classification of rights: 1) civil rights which the amendment covered; 2) social rights which the amendment did not cover; and 3) political rights which the amendment did not reach. *See* R. BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). The amendment, by making national citizenship independent from state citizenship, secured the pre-existing rights of national citizenship against state attack. *See* Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 1 (1954). For a general survey of the literature on the history of the fourteenth amendment, see R. BERGER, *supra*; R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); C. FAIRMAN, *supra* note 1; H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); R. HARRIS, THE QUEST FOR EQUALITY (1960); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); B. KENDRICK, JOURNAL OF JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914); R. KLUGER, SIMPLE JUSTICE (1976); L. LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975); J. TENBROEK, EQUAL UNDER LAW (1965); Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39; Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65 (1974); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U. L.Q. 19 (1938); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Currently, some scholars are engaged in re-examining history. *See, e.g.*, Curtis, *The Bill of Rights as a*

ment scarcely embraced the corpus of meaning engrafted into the provision by subsequent generations.[14] In particular, the equal protection clause served only a secondary purpose until the demise of substantive due process.[15] During the Stone and Vincent Courts,

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Limitation on State Authority: A Reply to Professor Berger, 16 WAKE FOREST L. REV. 45 (1980); Diamond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982).

14. The scope of current equal protection analysis far exceeds the treatment that the clause received during the nineteenth century. A survey of the major articles on equal protection is illustrative. *See generally* Blattner, *Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L. Q. 777 (1981); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981); Miller & Bowman, *Toward an Interstate Standard of Equal Protection of the Laws: A Speculative Essay*, 1981 B.Y.U. L. REV. 275; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19 (1979); Park, *Thinking About Equal Protection*, 57 U. DET. J. URB. L. 961 (1980); Perry, *Constitutional "Fairness:" Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Torke, *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279 (1982); Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

15. Following the Civil War, and until the middle 1930's, the due process clause in the fourteenth amendment overshadowed the equal protection clause. Generally, the Court's inquiry centered on two areas. First, the Court examined the scope of the state's police power. In McLean v. Arkansas, 211 U.S. 539 (1909), the Court articulated its attitude toward state regulation.

> If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government.

Id. at 547-48. Second, the due process clause served as the strongest barrier against state regulation. The Court invoked the due process clause when a state threatened to take private property. For a discussion of the use of the due process clause, see A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1976); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). Rate regulation during the turn of the century illustrates the primary importance of the due process clause. If the state levied an unreasonable rate against a company, the Court treated the issue as a deprivation of property without due process. Only secondarily would the Court add that "in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Cotting v. Kansas City Stock Yards Co. & C., 183 U.S. 79 (1901).

however, the equal protection clause began its climb toward becoming a potent constitutional hurdle.[16] By the end of Chief Justice Warren's tenure on the Court, equal protection review embodied three tenets. First, the Court deferred to legislative judgments concerning social and economic programs.[17] Second, the Court examined closely certain suspect classifications.[18] Third, the Court applied a strict scrutiny analysis to classifications impinging upon the exercise of a fundamental right.[19] The Burger Court purportedly follows this triparte model.[20]

Shortly before Warren Burger replaced Earl Warren as Chief Justice, the Court enlarged the fundamental rights strand of equal protection analysis by retrieving right to travel analysis from the commerce clause and the privileges and immunities clause in the fourteenth amendment[21] and bringing it within the ambit of the equal protection clause. The Court has developed three approaches

16. *See generally* R. MCCLOSKEY, THE MODERN SUPREME COURT 28-126 (1972).

17. An early case illustrating judicial deference concerning social and economic regulation is Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). In *Lindsley*, Justice Van Devanter stated the appropriate guidelines for equal protection review.

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

Id. at 78. Virtually intact, the Warren Court adopted this approach toward economic and social regulations. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *But cf.* Morey v. Doud, 354 U.S. 457 (1957), *overruled by* New Orleans v. Dukes, 427 U.S. 297 (1976); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW at 677-78 (10th ed. 1980) (the Warren Court required a modicum of rationality).

18. *See* G. GUNTHER, *supra* note 17, at 671.

19 *Id.*

20. The Burger Court purportedly follows this triparte model. *See, e.g.*, G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-94 (1979); Vance v. Bradley, 440 U.S. 93, 111 (1979); United States Trust Co. v. New Jersey, 431 U.S. 1, 54 n.17 (1977) (Brennan, J., dissenting); New Orleans v. Dukes, 427 U.S. 297 (1976). See *supra* note 14 for secondary material concerning the equal protection clause.

21. *See infra* notes 22-40 and accompanying text.

for evaluating the constitutionality of durational residency requirements under the equal protection clause: (1) does the statute operate as a penalty on the exercise of the right to travel; (2) does the statute operate as an irrebuttable presumption; and (3) does the balance of interests weigh more heavily in favor of the individual than in favor of the state? The *Zobel* Court departed from these approaches, but a look at the Court's meandering path back to the beginning is warranted.

The Court demonstrated use of the first two approaches in *Shapiro v. Thompson*.[22] In *Shapiro*, the Court reviewed the constitutionality of three statutes conditioning the receipt of public assistance benefits on a one year residency requirement.[23] The challengers of the stat-

22. 394 U.S. 618 (1969).

23. *Id.* at 622, 623, 625. *Shapiro* involved statutes from the District of Columbia, Massachusetts, and Connecticut. *Id.* For commentary on the case, see Rosenheim, *Shapiro v. Thompson: "The Beggars are Coming to Town,"* 1969 SUP. CT. REV. 303; Samford, *The Burger Court and Social Welfare Cases*, 57 U. DET. J. URB. L. 813, 815 (1980); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41; *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 118 (1969); Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134 (1970); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U. L. REV. 989 (1969); Comment, *supra* note 1.

Contemporaneous with *Shapiro*, courts began invalidating residency requirements conditioning the allocation of public assistance benefits. *Compare* People *ex rel.* Heydenreich v. Lyons, 374 Ill. 557, 30 N.E.2d 46 (1940) (upholding the state's interest in protecting the "public purse" by allowing the state to impose a durational residency requirement to discourage indigents from entering the state) *with* Green v. Department of Public Welfare, 270 F. Supp. 173, 177 (D. Del. 1967) (discouraging indigents an impermissible purpose). *See, e.g.*, Baxter v. Birkins, 311 F. Supp. 222 (D. Colo. 1970) (one-year residency requirement for welfare assistance held unconstitutional); Bryson v. Burson, 308 F. Supp. 1170 (N.D. Ga. 1969) (one-year residency requirement for public assistance benefits held unconstitutional); Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969) (court held unconstitutional a statute which created a presumption that residents of less than one year entered the state for the purpose of obtaining public assistance benefits and were therefore ineligible), *aff'd sub nom.*, Wyman v. Bowers, 397 U.S. 49 (1970); Burns v. Montgomery, 299 F. Supp. 1002 (N.D. Cal. 1968) (injunctive relief available against statute imposing a one-year residency requirement for public assistance benefits); Denny v. Health & Social Serv. Bd., 285 F. Supp. 526 (E.D. Wis. 1968) (one-year residency requirement for assistance a violation of equal protection); Robertson v. Ott, 284 F. Supp. 735 (D. Mass. 1968) (one-year residency requirement for AFDC benefits,lacks a reasonable basis and thus contravenes the equal protection clause); Harrell v. Tobiner, 279 F. Supp. 22 (D. D.C. 1967), *aff'd sub nom.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Ramos v. Health and Social Serv. Bd., 276 F. Supp. 474 (E.D. Wis. 1967). *But cf.* Waggoner v. Rosenn, 286 F. Supp. 275 (M.D. Pa. 1968) (one-year residency requirement for public assistance grants constitutional). Prior to *Shapiro*, courts invalidating durational residency

utes argued that the denial of Aid to Families with Dependent Children (AFDC) benefits solely because of a failure to satisfy the one year waiting period deprived bona fide citizens of equal protection of the law.[24] In response, the proponents offered four justifications for

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requirements for public assistance benefits generally relied upon the lack of reasonableness in the statutes. *Ramos* is illustrative:

> By definition, the one-year residence requirement is not a waiting period required of all applicants. Whatever arguments might be legitimately made in favor of a waiting period required of every applicant, regardless of length of residence, they can not reasonably be used to support a provision whereby aids are denied to all needy and otherwise eligible applicants who have resided in the state less than one year and granted to applicants similarly situated with respect to need and eligibility, but who have resided here for more than one year.

Ramos, 276 F. Supp. at 477. Additionally, the *Ramos* court admitted the incidental effect on interstate travel created by the durational residency requirement, but added that "it is significant that the majority [in Edwards v. California, 314 U.S. 160 (1941), discussed *supra* note 1] concluded that the state's desire to protect its treasury from applications for aid by recent arrivals, did not justify interference with interstate movement." *Id.* For residency requirements prior to *Shapiro*, see Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567 (1966); LoGatto, *Residence Laws—A Step Forward or Backward?*, 7 CATH. LAW. 101 (1961); Mandelker, *The Settlement Requirement in General Assistance*, 1955 WASH. U. L.Q. 355, 1956 WASH. U. L.Q. 21; Note, *Residence Requirements in State Public Welfare Statutes*, 51 IOWA L. REV. 1080 (1966).

24. 394 U.S. at 627. Justice Brennan described the effect of the classification:

> [T]he effect of the waiting-period in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.

394 U.S. at 627.

The Supreme Court received amicus curia briefs; each brief, however, focused on three issues; 1) the importance of AFDC benefits; 2) empirical studies illustrating the impact on migration, coupled with the constitutional right to travel; and 3) the establishment of an irrebuttable presumption as to why the migrant entered the state. P. KURLAND & G. CASPER, LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 68 (1975). In oral argument, Solicitor General Archibald Cox tied the major arguments together. First, Mr. Cox emphasized the importance of the AFDC benefits. Second, he stressed that the classification "rested on a prejudice against outsiders." *Id.* at 387. Third, he argued that the classification lacked a "substantial relation to the accomplishment of any permissible State policy." *Id.* On the second day of oral argument, Mr. Cox delivered a passionate plea in favor or protecting the right to travel:

> [W]e have a situation in which the state has singled out for the purposes of disfavor and hostile treatment those who exercise the fundamental liberty of moving to a new residence in pursuit of better opportunities, better life, or what else they consider to be an advantage. That discrimination, we say, is not merely capri-

the residency requirements: (1) to protect the fiscal integrity of the governmental unit by discouraging potential recipients from entering the jurisdiction;[25] (2) to discourage indigents from entering the jurisdiction for the purpose of receiving aid;[26] (3) to allocate resources on the basis of contributions to the community;[27] and (4) to facilitate administrative convenience and encourage new residents to look for jobs.[28] The Court held the statutes unconstitutional under all of the asserted objectives.[29]

Writing for the majority, Justice Brennan responded to each of the justifications with a separate rationale.[30] He rejected the initial purpose as having a constitutionally impermissible goal—that of penalizing the exercise of the right to travel.[31] The Court had held consistently that the state could not purposely chill[32] the exercise of a

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cious, but it is invidious in the same sense that discrimination on grounds of race or religion is invidious. And it also operates to deter the exercise of a right which underlies a number of the provisions of the Constitution.

Id. at 390.

Cox might have bolstered his argument by pointing out that an exemption existed for those who entered the state and had "a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter." 394 U.S. at 622. Clearly, the statute not only classified according to time of residency, but also according to wealth. *But cf.* Dandridge v. Williams, 397 U.S. 471 (1970) (wealth not a suspect class and welfare benefits not a fundamental right). Moreover, lurking behind the fact situation in *Shapiro* lay the emerging area of governmental entitlements. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (a welfare reciprient's benefits cannot be terminated without due process). The Court decided *Kelly* during the same term as *Dandridge* and *Shapiro*. In *Kelly*, the Court held that welfare benefits amounted to a property interest protected by the due process clause. *Id.* at 262-65. For material discussing governmental entitlements, see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in "The New Property:" Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

25. *Shapiro*, 394 U.S. at 627-28.

26. *Id.* at 631.

27. *Id.* at 632. "Appellants argue . . . that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes." *Id.*

28. *Id.* at 633-34.

29. *See infra* notes 30-40 and accompanying text.

30. *See supra* text accompanying notes 25-28.

31. *Shapiro*, 394 U.S. at 629.

32. A state cannot chill the exercise of a fundamental right. *See, e.g.*, United

constitutional right.[33] Justice Brennan found the second justification unreasonable in light of the over-inclusive classification; the one-year waiting period created an irrebuttable presumption that all newly arrived indigents entered the jurisdiction to obtain greater benefits.[34] Additionally, the rationale of conditioning benefits based on past contributions to the community posed two problems. First, the "past contribution argument" had no basis in fact.[35] Second, the Court invoked the "parade-of-horribles" argument[36] cautioning that the same justification might allow state apportionment of other benefits and services.[37]

When reviewing the last objective, Justice Brennan heightened the scope of equal protection analysis.[38] If a classification penalized the

States v. Jackson, 390 U.S. 570, 581 (1968) (unconstitutional to chill both the exercise of the fifth amendment right not to plead guilty and the sixth amendment right to a jury trial); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia's poll tax struck down); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (freedom of religion and expression may not be "infringed by the denial of or placing of conditions upon a benefit or privilege"); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (freedom of expression may not be deterred by a state's general taxing program without justification). Not until the twentieth century, with the demise of the doctrine of unconstitutional conditions and the abandonment of the "right"-"privilege" distinction, did this judicial attitude gain ascendancy. *See generally* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Van Alstyne, *supra* note 24.

33 In *Shapiro*, the right to travel served as the constitutional right. 394 U.S. at 629.

34. *Id.* at 631.

35. *Id.* at 632. Justice Brennan questioned whether long-term residents did make a greater contribution through taxes than newer residents. Both classes were indigents. Moreover, he noted that in Pennsylvania 40% of those denied benefits "had lengthy prior residence in the State." *Id.*

36. This type of argument exemplified the Waite and Fuller Court's jurisprudence. Uniformly the Justices on these courts reasoned that if they allowed the state to enforce "T," then the state would follow suit with "X" and "Y" and "Z."

37. 394 U.S. at 632-33. Without citation or explanation, Justice Brennan opined that the equal protection clause prohibits the apportionment of benefits and services. Otherwise, states might bar new residents from public facilities, or they might allocate all benefits and services according to a citizen's past tax contributions. *Id.*

38. *See supra* notes 27, 35-37 and accompanying text. *Shapiro* illustrates the Warren Court's expansion of the traditional areas for invoking a strict scrutiny analysis of classifications. *See, e.g.*, Mogk v. Detroit, 335 F. Supp. 698, 700 (E.D. Mich. 1971) (declined to apply the "reasonableness" test, concluding that "[i]t appears to us, however, that not only the Supreme Court of the United States but the Congress as well has discarded the 'reasonableness' test in favor of the 'compelling state interest' test"). *See generally* R. FUNSTON, CONSTITUTIONAL COUNTER-REVOLUTION 58 (1977) ("Indeed, *Shapiro* presented some troubling questions to those who remembered their constitutional history. The thought processes and methods of analysis employed by

exercise of the right to travel, the Court demanded that the state prove the classification "necessary to promote a *compelling* governmental interest.[39] Furthermore, the "necessary" standard required the state to adopt the least drastic means available.[40]

Although criticized,[41] *Shapiro* provided a mandate for lower courts to review the constitutionality of other durational residency requirements.[42] These requirements inherently penalize those who have re-

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the majority in *Shapiro* were strikingly similar to those which characterized the Court during the heyday of substantive due process."); L. LUSKY, *supra* note 13, at 251 (*Shapiro v. Thompson* crystallized a broad rationalizing principle."); Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection*, 66 AM. POL. SCI. REV. 1226 (1972); Park, *supra* note 14, at 993 ("In the waning years of the Warren Court, the Court expanded aggressively both branches of strict scrutiny, that of the suspect class and that of fundamental rights."). Justice Harlan expressed a similar attitude in his *Shapiro* dissent, see *infra* note 41.

39. 394 U.S. at 634. The Court did not hold *per se* infringements on the right to travel unconstitutional; rather, it would declare the end illegitimate when the legislature *purposely* infringed on the right to travel. Absent that discriminatory purpose, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.*

40. *Id.* at 637. For example, when responding to the claim that the requirement safeguarded against fraud, Justice Brennan offered alternate means the two states could have chosen. *Id.*

41. "Make no mistake about it," wrote one contemporary observer, "*Lochner v. New York* is alive and well in *Shapiro v. Thompson*." Winter, *supra* note 23, at 102. Ten years after *Shapiro*, Professor Michael Perry criticized the Court for implicating the equal protection clause. Perry asserted that "while the line or classification offended a constitutional norm, the right of interstate migration, it did not offend or even implicate the principle of equal protection." Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979). *See also The Supreme Court, 1968 Term, supra* note 23, at 122-23.

Dissenting, Justice Harlan argued that the Court expanded its newly developed "doctrine of the compelling state interest test." 394 U.S. at 655. Justice Harlan suggested that in cases like *Shapiro*, when classifications are based on the exercise of a constitutional right, the Court should employ the due process rather than the equal protection clause. *Id.* at 658-59. Furthermore, Justice Harlan criticized what he perceived as an expansion of fundamental rights. *Id.* at 661. He opined that "[v]irtually every state statute affects important rights," and by expanding the realm of rights subject to the compelling state interest test the Court acted like a "super-legislature." *Id.*

42. Dissenting in *Shapiro*, Chief Justice Warren feared the Court opened the floodgates:

> The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implication cannot be ignored.

cently exercised their right to travel.[43] Other types of requirements,

394 U.S. at 655.

With *Shapiro* as precedent, lower federal courts invalidated an array of residency requirements conditioning receipt of public benefits. *see, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1972) (affirming lower court holding "that a State statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violates the Equal Protection Clause"); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (five-year residency requirement for public housing unconstitutional); Cole v. Housing Auth. of Newport, 435 F.2d 807 (1st Cir. 1970) (public housing); Barnes v. Board of Trustees, 369 F. Supp. 1327 (W.D. Mich. 1973) (five-year residency requirement for Michigan Veterans Trust Fund); Butler v. Breyer, 355 F. Supp. 405 (S.D. Ohio 1972) (one-year residency requirement for poor relief unconstitutional); Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971) (durational residency requirement for veterans' preference statute); Besaw v. Affleck, 333 F. Supp. 775 (D. R.I. 1971) (one-year residency requirement for public assistance benefits invalidated); Stevens v. Campbell, 332 F. Supp. 102 (D. Mass. 1971) (residency requirement for veterans' preference statute struck down); Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), *aff'd*, 404 U.S. 1054 (1972) (one-year requirement for public assistance); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971) (one-year requirement for hospitalization or medical care in non-emergency cases declared unconstitutional); Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971) (four-month residency requirement for obtaining therapeutic abortions unconstitutional); Arnold v. Halifax Hosp. Dist., 314 F. Supp. 277 (M.D. Fla. 1970) (residency requirement for medical care); Crapps v. Duval County Hosp. Auth., 314 F. Supp. 181 (M.D. Fla. 1970) (residency requirement for medical care); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970) (residency requirement for medical care); Passmore v. Birkins, 311 F. Supp. 588 (D. Colo. 1969) (statutes conditioning receipt of AFDC and AND assistance unconstitutional); Sheard v. Department of Social Welfare, 310 F. Supp. 544 (N.D. Iowa 1969) (nine-year residency requirement for old-age assistance unconstitutional); Morrison v. Vincent, 300 F. Supp. 541 (S.D. W.Va. 1969) (one-year residency requirement for AFDC assistance unconstitutional).

43 As courts broadened the scope of the right to travel, land control programs and exclusionary zoning practices received greater attention along with residency requirements. While these types of regulations did not involve durational residency requirements, the legal issues raised were a product of *Shapiro*. *See* Construction Indus. Ass'n v. Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See generally* Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraintist Debate*, 40 U. PITT. L. REV. 169 (1979) (arguing that "right to travel" analysis is not useful in challenging zoning ordinance); Comment, *The Right to Travel and Community Growth Controls*, 12 HARV. J. ON LEGIS. 244 (1975); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972); 9 GA. L. REV. 260 (1974) ("right to travel" analysis could have a profound impact on zoning and growth control).

Employment preference statutes also conflicted with right to travel analysis. *See* Hicklin v. Orbeck, 437 U.S. 518 (1978) (privileges and immunities clause forbids discriminatory hiring practices). *But cf.* White v. Massachusetts, 103 S.Ct. 1042 (1983) (Commerce clause not violated by mayor's executive order "which required that all construction projects funded in whole or in part by city funds . . . should be performed by a work force consisting of at least half *bona fide* residents of Boston.") *See*

therefore, received closer attention—such as bar admission requirements,[44] divorce statutes,[45] residency requirements for public officers,[46] tuition fee differentials for public schools,[47] and residency

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generally Note, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L.J. 1069; Comment, *Durational Residence Requirements for Public Employment*, 67 CALIF. L. REV. 386 (1979) (predicting that if penalty analysis survives *Sosna* then the penalty will probably be determined by examining the individual interest).

44. *See, e.g.*, Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (one-year residency requirement for bar admission unconstitutional); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970) (one-year residency for bar admission unconstitutional); Kennan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D. N.C. 1970) (twelve-month residency requirement for taking bar exam unconstitutional). According to one commentator, however:

> Most courts have not extended Shapiro to void durational residence requirements for bar admissions. Lower courts have generally found that denying admission to the bar did not penalize the right to travel sufficiently to warrant the application of strict scrutiny.

Note, *Durational Residence Requirements From* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 645 (1975) [hereinafter cited as Note, *Durational Residence Requirement*]. *See generally* Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979); Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838 (1973); Note, *The Future of State Bar Residence Requirements Under the Privileges and Immunities Clause*, 26 S.D.L. REV. 79 (1981). As these articles indicate, the challenges to bar admission requirements usually center on the privileges and immunities clause in article IV. Today, many bar admission regulations have a residency component. These requirements are currently being challenged in the federal courts. *See, e.g.*, Piper v. Supreme Court of New Hampshire, 708 F.2d 825 (1st Cir. 1983) (rehearing en banc granted) *In re* Roberts, 682 F.2d 105 (3d Cir. 1982); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982); Lowrie v. Goldenhersh, 521 F. Supp. 534 (N.D. Ill. 1981), *aff'd*, 716 F.2d 401 (7th Cir. 1983).

45. Subsequent to *Shapiro*, some courts extended the penalty analysis to include residency requirements for parties seeking a divorce. *See* Note, *Durational Residence Requirements*, *supra* note 44, at 656. Additionally, for the Supreme Court's treatment, see *infra* notes 81-87 and accompanying text. Courts differ over whether such statutes impose a penalty, or whether an important governmental interest is at stake. *Compare* Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973) *and* Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971) *and* State v. Adams, 522 P.2d 1125 (Alaska 1974) *and* Monroe v. Monroe, 32 Ohio Misc. 129 (1972) *with* Makers v. Askew, 500 F.2d 577 (5th Cir. 1974) *and* Caizza v. Caizza, 291 So.2d 569 (Fla. 1974), *cert. denied*, 420 U.S. 907 (1975).

46. The leading case is Green v. McKeon, 468 F.2d 883 (6th Cir. 1972). In *Green*, the court held a two-year residency requirement for a public officer unconstitutional. After finding a penalty on the exercise of the right to travel, the court applied the strict scrutiny test of *Shapiro*. *Id.* *See, e.g.*, Headlee v. Franklin County Bd. of Elections, 368 F. Supp. 999 (S.D. Ohio 1973) (three-year residency requirement for mayor unconstitutional); Mogk v. Detroit, 335 F. Supp. 698 (E.D. Mich. 1971) (three-year residency requirement for membership to charter revision commission unconstitu-

requirements for voter qualification.[48]

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tional); Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971) (three-year residency requirement for mayor unconstitutional absent compelling state interest). Other courts apply a lesser standard of review. *See, e.g.*, Akron v. Bell, 660 F.2d 166 (6th Cir. 1981); Joseph v. Birmingham, 510 F. Supp. 1319 (E.D. Mich. 1981); Russell v. Hathaway, 423 F. Supp. 833 (N.D. Tex. 1976). Additionally, two Supreme Court summary affirmances indicate that these requirements may be less suspect than other durational residency requirements. *See* Sununu v. Stark, 420 U.S. 958 (1975), *aff'g* 383 F. Supp. 1287 (D.N.H. 1974); Chimento v. Stark, 414 U.S. 802 (1973), *aff'g* 353 F. Supp. 1211 (D.N.H. 1973). *See also* Bullock v. Carter, 405 U.S. 134 (1972) (judging restriction on candidate in light of impact on voters). *See generally* LeClercqu, *Durational Residency Requirements for Public Office*, 27 S.C.L. REV. 847 (1976); Note, *Durational Residency Requirements for State and Local Office: A Violation of Equal Protection?*, 45 S. CAL. L. REV. 996 (1972).

47. Courts usually find a legitimate state interest for imposing a durational residency requirement upon out-of-state students. The legitimate interest apparently negates the necessity for invoking the "compelling state interest" test. *See, e.g.*, Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash. 1973), *aff'd*, 414 U.S. 1057 (1973); Weaver v. Kelton, 357 F. Supp. 1106 (N.D. Tex. 1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); Arizona Bd. of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972); Kirk v. Board of Regents, 273 Ca. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970). The *Starns* court distinguished its case from *Shapiro*. Unlike in *Shapiro*, the *Starns* court rejected the presence of any discriminatory purpose to exclude a class of people. *Id.* at 237. Moreover, the court noted that " [t]here is no showing here that the one-year waiting period has any dire effects on the nonresident student equivalent to those noted in Shapiro." *Id.* at 238. Adopting the reasoning in Kirk v. Board of Regents, the *Starns* court acknowledged the absence of a chilling effect on a fundamental right; thus, the court failed to find a "penalty" requiring the invocation of the compelling state interest test. *Id.* The court conceded, however, that the classification was discriminatory and created an irrebuttable presumption. *Id.* at 238-39. Nevertheless, the court attempted to explain that the presumption could be overcome. *Id.* at 240. The court's logic fails. In short, it assumed away the presumption by asserting that the presumption could be overcome after a year. *Id.* More importantly, however, the *Starns* court accepted as a legitimate state interest the goal of cost equalization. *Id.* But in Zobel v. Williams, 102 S. Ct. 2309 (1982), the Supreme Court suggested that its summary affirmance of *Starns* should not be read as an acceptance of cost equalization as a valid state interest. *Id.* at 2315 n.13. The *Zobel* Court added that it considered the requirement in *Starns* a test of bona fide residence. *Id.*

48. For the Supreme Court's treatment of these requirements, see *infra* notes 51-55 and accompanying text. *See also* Meyers v. Jackson, 390 F. Supp. 37 (E.D. Ark. 1975) (voter residency requirement unconstitutional absent compelling state interest); Fisher v. Herseth, 374 F. Supp. 745 (D. S.D. 1974) (five-year United States and one hundred and eighty-day state residency requirement unconstitutional); Moen v. Erlandson, 80 Wash.2d 755, 498 P.2d 849 (1972) (one-year state and ninety-day county voter residency requirement unconstitutional absent compelling state interest).

For the difficulty with drawing a line between the acceptable and unacceptable residency requirement, see Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (fifty-day voter residency requirement for non-presidential elections constitutional); Burns

The Court's next treatment of a state durational residency requirement came in a challenge to Tennessee's voter registration law.[49] While *Shapiro* focused on whether the classification penalized the exercise of the right to travel,[50] this step served as a mere formality when, in *Dunn v. Blumstein*,[51] the Court suggested that all durational residency requirements operated as a penalty.[52] The *Dunn* Court held that a durational residency requirement for voting,[53] imposed on an otherwise potentially bona fide resident, penalized the exercise of both the constitutional right to travel[54] and the constitutional right to equal opportunity to participate in the political process.[55] Aside from ambiguous dicta in *Shapiro*,[56] the opinions in *Dunn* and *Sha-*

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v. Fortson, 410 U.S. 686 (1973) (per curiam) ("Although the fifty-day registration period approaches the outer constitutional limits in this area, we affirm.").

49. Dunn v. Blumstein, 405 U.S. 330 (1972). The Tennessee law authorized voter registration to only those "resident[s] of this state for twelve (12) months, and of the county wherein he may offer his vote for three (3) months." TENN. CODE ANN. sec. 2-201 (Supp. 1970).

50. Shapiro v. Thompson, 394 U.S. 618, 638 (1969). *See supra* notes 31-33 and accompanying text.

51. 405 U.S. 330 (1972).

52. Indeed, Justice Marshall's words are unequivocal:

> Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right . . .
>
> In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the state can demonstrate that such laws are "necessary to promote a *compelling* governmental interest."

Id. at 342.

53. *See supra* note 49.

54. 405 U.S. at 339. Mr. Blumstein, a law professor at Vanderbilt University, was clearly a bona fide resident. *Dunn*, 405 U.S. at 331. Additionally, he brought the suit as a test case. *Id.* at 361 (Blackmun, J., concurring).

55. *Id.* at 336. Citizens have no constitutional right to vote, but they do have the right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* For a possible explanation of the case, see Nowak, *supra* note 14, at 1083-84 (Court employed a "demonstratable basis standard rather than the compelling interest standard to review the limitation of the right of voting and travel. The majority found that the State was unable to demonstrate that the residency requirement was in fact a rational means of promoting a state interest capable of withstanding analysis.").

56. The Court suggests that all penalties on the exercise of the right to travel are subject to the compelling state interest test. *Shapiro v. Thompson*, 394 U.S. at 634. However, the Court then conditions this suggestion:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements

piro mandate that durational residency requirements satisfy the "compelling state interest" test.[57]

The Court subsequently modified its penalty analysis, reading *Shapiro* and *Dunn* for slightly less than the opinions suggested. In *Memorial Hospital v. Maricopa County*,[58] the Court applied the strict scrutiny component of equal protection analysis[59] and invalidated a waiting period requirement for non-emergency medical care for indigents.[60] Authoring the majority opinion, Justice Marshall[61] distinguished between migration and travel, deciding that the Constitution protected against penalties imposed only on the right to migrate.[62] Justice Marshall noted further that *Shapiro* did not require an impact on the right to migrate.[63] Instead, classifications merely penalizing those recently exercising a constitutional right invoked the "compelling state interest" test.[64] He also added that while not all waiting

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may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel. Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969). In *Memorial*, the Court recognized this ambiguity, but side-stepped the problem. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-59 (1974).

57. *Shapiro* and *Dunn* suggest that if a classification penalizes the exercise of the right to travel solely on the basis that one of the classes consists of newcomers, then the classification must pass the compelling state interest test. *See* Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972).

58. 415 U.S. 250 (1974).

59. *Id.* at 250, 254, 262.

60. The statute provided that an indigent would not receive non-emergency "hospitalization, medical care or outpatient relief" unless he had resided in the county for a year. ARIZ. REV. STAT. ANN. § 11-297A (Supp. 1973-1974).

61. Joining Justice Marshall on the majority opinion were Justices Brennan, Stewart, White and Powell. Chief Justice Burger and Justice Blackmun concurred in result. Justice Douglas wrote a separate opinion, and Justice Rehnquist dissented. 415 U.S. 250.

62. Adopting the reasoning of a federal court, Justice Marshall concluded that "the right to travel was involved in only a limited sense in *Shapiro*." *Id.* at 255. He associated travel with mere movement, and interpreted *Shapiro* as applying only to migration. *Id.*

63 Justice Marshall incorrectly stated that the Court in *Shapiro* looked at whether the waiting-period itself deterred migration. *Id.* at 257. In the portion of the opinion Justice Marshall quotes, the Court discussed one of the proffered purposes of the statutes and remarked that the means operated as an impermissible purpose of discouraging the poor from entering the jurisdiction. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

64. 415 U.S. at 256-57. In this case, the right to travel served as the requisite constitutional right. *Id.*

periods constituted penalties, a penalty clearly existed in this case—the denial of a vital benefit and privilege.[65]

Before *Memorial*, the Court had appeared ready to phase out its "penalty analysis" and examine classifications as irrebuttable presumptions, an approach discussed in *Shapiro*.[66] In *Shapiro*, the Court rejected one of the asserted justifications for the residency requirement[67] because the classification created an irrebuttable presumption without any factual basis.[68] The *Dunn* Court adopted a similar approach toward irrebuttable presumptions,[69] holding that the equal protection clause limits when a state may employ a conclusive presumption to justify a durational residency requirement.[70] In *Vlandis v. Kline*,[71] the Court went a step further and declared the conclusive presumption in the University of Connecticut's non-resident tuition system an unconstitutional denial of due process.[72] The *Vlandis* Court held that the irrebuttable presumption arbitrarily denied[73] a student an opportunity to make an individualized showing

65. *Id.* at 259. Here, Justice Marshall refers to governmental entitlements. Perhaps an implicit concern in *Memorial* is that of protecting government created property interests. *See supra* note 24.

66. *See Shapiro*, 394 U.S. 618, 631 (1969). An irrebuttable or conclusive presumption "is one in which proof of a basic fact renders the existence of the presumed fact conclusive and irrebuttable." BLACK'S LAW DICTIONARY 1067 (5th ed. 1979).

67. *See supra* notes 26, 34 and accompanying text.

68. Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

69. The Court considered Tennessee's argument that the durational residency requirement operated as an "administratively useful conclusive presumption" to test bona fide residence. Dunn v. Blumstein, 405 U.S. 330, 349-52 (1972).

70. The Court relied on Carrington v. Rash, 380 U.S. 89 (1965), and found the use of such a presumption too "crude" and "imprecise." *Id.* at 351.

71. 412 U.S. 441 (1973).

72. *Id.* at 442. Connecticut created an irrebuttable presumption of non-residence if the student's "legal address for any period of the one-year period immediately prior to his application for admission" was outside the state. *Id.*

73. Connecticut offered three objectives for its policy: 1) cost equalization; 2) rewarding for past contributions; and 3) administrative convenience. *Id.* at 448, 449, 451. Justice Stewart accepted the goal of achieving "cost equalization between bona fide residents and non-residents," but added that "basing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to that objective." *Id.* at 448-49. Considering the second objective, Justice Stewart quoted from *Shapiro* that apportionment between new and old residents based on past contributions might lead to apportionment of other state services. *Id.* at 450. Furthermore, Connecticut's interest in administrative convenience lacked sufficient importance, and less drastic means were available. *Id.* at 451.

of bona fide residence.[74]

The *Memorial* Court never considered the irrebuttable presumption approach of *Vlandis*,[75] and the Court ultimately abandoned the due process argument.[76] The penalty analysis developed in *Shapiro* and *Memorial* also proved difficult to use.[77] Justice Marshall observed in *Memorial* that the "penalty analysis" approach saddled the Court with the task of defining the scope of a penalty.[78] Indeed, other courts wrestled with the problem, and their decisions lack uniformity.[79] Not surprisingly, therefore, a year after its decision in *Me-*

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74. *Id.* at 453. Chief Justice Burger lamented that the Court's resort to the due process clause foreshadowed future complications:

> There will be, I fear, some ground for a belief that the Court now engrafts the "close individual scrutiny" test into the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions. . . . The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area.

Id. at 462 (Burger, C.J., dissenting).

75. *See supra* notes 71-74.

76. See *infra* note 83 for a possible explanation for the short-lived due process approach to durational residency requirements.

77. *See supra* notes 31-33, 45, 50-65 and accompanying text.

78. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974). *See infra* note 79.

79. Five years after *Shapiro*, Justice Marshall sensed the problem with defining the scope of "penalty." 415 U.S. at 259. He continued to use the penalty analysis, however. Village of Belle Terre v. Boraas, 416 U.S. 1, 18 (1974) (Marshall, J., dissenting). Not surprisingly, therefore, federal courts read *Shapiro* differently. In Cole v. Housing Auth. of Newport, 435 F.2d 807 (1st Cir. 1970), for instance, the court noted that *Shapiro* left few clues as to the amount of impact on or interference with the right to travel necessary to invoke the "compelling state interest" test. *Id.* at 809. While the *Cole* court rejected any sort of deterrence test, it escaped the problem of defining all durational residency requirements as penalties:

> We conclude that *Shapiro* stands for the proposition that a rule penalizing travel requires a justification of a compelling state interest. However, it would seem that *any* durational or residency requirement would penalize persons who have recently exercised their right to travel by denying them benefits granted to other residents. How can this be reconciled with footnote 21 in *Shapiro*, . . which says that some such requirements may be justified because they either promote a compelling state interest or "may not be penalties upon the exercise of the constitutional right of interstate travel"?
>
> The answer, we think, lies in the Court's concept of the right to travel. The Court apparently uses "travel" in the sense of migration with intent to settle and abide. Thus, laws that comparatively disadvantage persons traveling to take advantag of state benefits and then leaving are permissible under *Shapiro*.

Id. at 810-11 (citations and footnote omitted). The key question for the Court, there-

morial, the Court, in *Sosna v. Iowa*,[80] departed from its path of prior precedent.

In *Sosna*, the Court[81] upheld Iowa's one-year waiting-period requirement in a divorce action.[82] Without applying explicitly any test from either the equal protection or due process clauses,[83] the Court

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fore, was whether the requirement penalized persons for having recently exercised their right to migrate. *Id.* at 811.

Other courts measured the nature of the benefit denied. *See, e.g.*, Suffling v. Bondurant, 339 F. Supp. 257, 259 (D. N.M. 1972), *aff'd mem.* Rose v. Bondurant, 409 U.S. 1020 (1972) (*Shapiro* explicitly excluded durational residency requirements for professional licenses); Keppel v. Donovan, 326 F. Supp. 15, 20 (D. Minn. 1970) (six month residency requirement for voting creates a penalty, although less severe than the one in *Shapiro*); Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971) (*Shapiro* "specifically concerned" with the denial of basic necessities); Kirk v. Board of Regents, 273 Cal. App.2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970) (neither deterrence nor deprivation of basic necessities created by public school tuition system). Moreover, various courts examined the "interference" with the right to travel. *See, e.g.*, Carter v. Gallagher, 337 F. Supp. 626, 630-33 (D. Minn. 1971) (deterrent effect or intent not required, rather an interference with the right to interstate travel); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (actual or hypothetical impact on interstate movement); Lane v. McGary, 320 F. Supp. 562, 564 (N.D. N.Y. 1970) (substantiality of impact). For a recent case focusing on the nature of the benefit denied, see Strong v. Collatos, 593 F.2d 420 (1st Cir. 1979), *infra* note 89.

80. 419 U.S. 393 (1975).

81. *Sosna* is the only time Justice Rehnquist joined the majority in the major durational residency requirement cases.

82. 419 U.S. at 408. Appellant challenged the constitutionality of the requirement on two grounds. First, appellant argued that the law established two classes, and discriminated against one class because it targeted "those who have recently exercised their right to travel to Iowa." *Id.* at 405. Second, appellant raised a due process issue, claiming that the requirement "denies a litigant the opportunity to make an individualized showing of bona fide residence." *Id.*

83. The Court abandoned the *Vlandis* due process approach, no doubt, for practical reasons. Professor Tushnet explains that the conclusive presumption analysis in *Vlandis* fell prey to doctrinal inconsistency with equal protection analysis and was shortly thereafter discarded.

> A fair interpretation of the process is that Justice Stewart mounted a peculiar hobbyhorse in *Vlandis v. Kline* and the liberal justices went along for the ride to the result they favored.Unfortunately for the liberals, the inconsistency between the conclusive presumption and the general equal protection doctrines made it impossible for the former to become an established mode of analysis.

Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1326 (1979). *See also* McKay v. Horn, 529 F. Supp. 847 (D. N.J. 1981):

> In the past, the Supreme Court has struck down legislation under the Due Process clause which denies governmental benefits on the basis of a presumption not universally true without giving the claimant an opportunity to rebut the pre-

sustained the law as a legitimate means of protecting Iowa's interests.[84] The penalty analysis developed in the previous cases[85] never entered into the opinion, while the *Vlandis* approach succumbed to a quibble over semantics.[86] Instead, the Court employed a balancing approach to test the constitutionality of the statute.[87] Such judicial craftsmanship prompted Justice Marshall, in dissent, to express concern for future treatment of other durational residency requirements.[88]

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sumption. (Citation omitted.) It is now well-established, however, that where . . . social and economic legislation is challenged which neither creates "suspect" classifications nor burdens fundamental rights, the proper standard of review under the Due Process Clauses of the Fifth and Fourteenth Amendments is the same as the standard applied under the Fourteenth Amendment's Equal Protection Clause.

Id. at 864 (citations omitted).

84. 419 U.S. at 404-09. Justice Rehnquist distinguished between the *Shapiro*, *Dunn*, *Memorial* line of cases and *Sosna* by incorrectly limiting the states' interest in the former cases to matters of mere administrative and budgetary convenience. *Id.* at 406. In *Sosna*, however, he found additional state interests: 1) the state in a divorce proceeding is not merely a grantor, but an interested party; 2) the state sought to insulate itself from constant collateral attack of its divorce decrees; and 3) the state sought to prevent itself from becoming a divorce mill. *Id.*

85. *See supra* notes 49-65 and accompanying text.

86. The challengers to the statute averred that they were denied the "opportunity to make an individualized showing of bona fide residence," and cited *Vlandis v. Kline*, and Boddie v. Connecticut, 401 U.S. 371 (1971) as support. 419 U.S. at 405. Justice Rehnquist responded by drawing a distinction between a "denial" and a "delay." In the former case, a denial existed; here, however, Justice Rehnquist found only a delay because petitioner could always file for divorce after a year. *Id.* at 409-10. At best, this distinction is tenuous and merits the criticism it instigated. *See, e.g.*, Williams v. Zobel, 619 P.2d 448, 456 (Alaska 1980), *rev'd*, 102 S. Ct. 2309 (1982).

87. Justice Rehnquist never stated what test he was applying. Facially, at least, Justice Rehnquist employed some sort of balancing approach. Commentary on the case illustrates the problem with the reasoning in *Sosna*. One commentator lamented that "[t]he test the Court was applying simply defies definition." Note, *supra* note 45, at 666. *See also* McCoy, *supra* note 9, at 1014 (expressing uncertainty as to "whether the Court has found the *Shapiro-Dunn-Maricopa* compelling interest requirement and returned to some standard closer to the usual rational basis requirement"); Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 126-27 (1975) (suggesting that the Court deviated from its prior position and adopted—implicitly—a balancing approach); Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, 1158 (1975) ("Justice Rehnquist in *Sosna* refused to announce the applicable standard of review or even the applicable constitutional source."). One author suggests that the test in *Sosna* resembles the minimal scrutiny test. Comment, *The Right to Travel and Community Growth Controls*, 12 HARV. J. ON LEGIS. 244, 268 (1975).

88. 419 U.S. at 419.

Justice Marshall's fears proved unwarranted, as courts shy away from the *Sosna* balancing approach.[89] Indeed, many courts still examine classifications in light of the graduated model for equal protection review.[90] During the interim between *Sosna* and *Zobel*, the Supreme Court did not decide any major durational residency requirement case.[91] *Zobel*, therefore, offered the Court an opportunity

89. *See* Strong v. Collatos, 593 F.2d 420 (1st Cir. 1979). In *Strong*, Appellants averred that *Sosna* proscribed the use of a balancing test instead of the "compelling state interest" test. The court rejected their argument, and distinguished between residency requirements for bringing a divorce action and those "residency requirements that shut off the basic necessities of life, prevented voting, or curtailed hospital and medical services. *Id.* at 423. *See generally In re* United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982) (minimal impact on right to travel); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 276-78 (9th Cir. 1982) (apparently accepting, though not invoking, the penalty analysis); City of Akron v. Bell, 660 F.2d 166 (6th Cir. 1981) (although not applying any test, court accepts penalty analysis with caveat that not all durational residency requirements impose penalties); Hawaii Boating Ass'n v. Water Transp. Facilities, 651 F.2d 661, 665 (9th Cir. 1981) (applying penalty analysis, concluding "that the 'deprivation' involved in this case—the failure to provide a berth in a recreational harbor at the same rate as a resident—does not operate as a *significant* 'penalty' on the right to travel"). *But cf.* Joseph v. City of Birmingham, 510 F. Supp. 1319 (E.D. Mich. 1981) (after reviewing two-tier equal protection format, employing an intermediate tier); Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (applying a balancing approach), *rev'd*, 102 S. Ct. 2903 (1982).

90. For examples of federal courts discussing equal protection review, see Nunemaker v. Harris, 679 F.2d 328, 334 n.11 (3d Cir. 1982); Benham v. Edwards, 678 F.2d 511, 515-16 n.9 (5th Cir. 1982); Tarter v. James, 667 F.2d 964, 969-70 (11th Cir. 1982); Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149-50 (5th Cir. 1981); Joyner v. Dumpson, 533 F. Supp. 233 (S.D. N.Y. 1982); Dixon v. McMullen, 527 F. Supp. 711, 719 (N.D. Tex. 1981); Arceneaux v. Edwards, 516 F. Supp. 795 (E.D. La. 1980); Joseph v. City of Birmingham, 510 F. Supp. 1319 (E.D. Mich. 1981). These courts implicitly apply a balancing approach only when the factual situation presents a due process and not an equal protection issue. The following excerpt from a state case demonstrates this approach:

> Where the individual interest affected does not involve a fundamental right and the residency requirement is not a real impediment to interstate travel, then the governmental purpose sought to be gained by the imposition of the residency requirement may be justified under the traditional rational-relation test and need not be so indicated by the showing of a compelling state interest.

Lambrt v. Wentworth, 423 A.2d 527, 532 (Me. 1980) (citation omitted). The *Lambert* court's use of the phrase "real impediment" illustrates at least one way a court can implicitly escape the two-tier model. Deciding what constitutes a "real impediment" is the same as deciding what "interest" is sufficiently important in the court's eyes that it may impede interstate travel.

91. Nevertheless, the Court reaffirmed its attitude toward state discriminatory tactics against non-residents solely on the basis of non-residency or citizenship. *See, e.g.*, Cabel v. Chavez-Salido, 102 S. Ct. 735 (1982); Califano v. Torres, 435 U.S. 1 (1978);

to clarify its approach toward residency requirements, and equal protection analysis in general.

The *Zobel* Court cast aside the tests developed in prior cases. Instead, the Court applied a facially traditional equal protection analysis[92] to strike down the statute. Writing for the Court, Chief Justice Burger purportedly applied the minimum rationality test of the standard equal protection analysis,[93] notwithstanding the appellant's focus on showing that the statute acted as a penalty on the exercise of the right to travel.[94] First, while examining the asserted objectives of the act,[95] Chief Justice Burger determined that no rational relationship existed between two of the objectives and the classification.[96] Second, he considered the third objective stated in the act—that of allocating benefits according to past contributions to the community—the only justification for retrospective application of the Alaska plan.[97] After designating this third justification impermissible, Chief

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Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Austin v. New Hampshire, 420 U.S. 656 (1975). *But cf.* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Oklahoma, 441 U.S. 322 (1979); Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

92. *See infra* notes 117-20 and accompanying text. This type of analysis resembles the approach used during the heyday of substantive due process. *See supra* note 15.

93. *See supra* note 17 and accompanying text for a review of the minimum rationality test. The Chief Justice subjected the statute to the minimal scrutiny without deciding what the applicable standard of review would be if the statute passed this initial stage of the test. Zobel v. Williams, 102 S. Ct. at 2309.

94. *See generally* Brief for Appellants at 14-28, Zobel v. Williams, 102 S. Ct. 2309.

95. The Alaska legislature included a statement of objectives with the statute:

> 1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;
>
> 2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and
>
> 3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.

1980 Alaska Sess. Laws Ch. 21, § 1(b), *reprinted in* 102 S. Ct. at 2313 n.7.

96. Chief Justice Burger held that the second and third justifications in the act address current or future behaviors and could not justify a classification between newer and older residents. Both the recent migrant and the long-term resident are similarly situated with respect to the goal of encouraging persons to remain in Alaska and to encourage increased awareness of the permanent fund expenditures. 102 S. Ct. at 2313. Of course, one might respond by suggesting that long-term residents need more encouragement than recent migrants because long-term residents may have a deep-seated sense of apathy not found in new residents.

97. *See supra* note 95. Chief Justice Burger buttressed this point by noting that

Justice Burger declared the distribution scheme unconstitutional.[98]

Concurring, Justice Brennan agreed that the past contribution rationale reached too far.[99] More importantly, he would have declared the law unconstitutional solely on the basis that it affected free interstate migration.[100] Reading the equal protection clause as mandating equality of citizenship, Justice Brennan criticized the Alaska statute for establishing degrees of citizenship.[101]

Concurring separately, Justice O'Connor criticized the Court for invoking the equal protection clause, misreading *Shapiro* and *Vlandis*, and declaring Alaska's purpose illegitimate.[102] Instead, Justice O'Connor concluded that the distribution scheme burdened individuals exercising their right to migrate[103] and thus contravened the

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the Alaska Supreme Court apparently came to the same conclusion. 102 S. Ct. at 2313. The Alaska court, however, found this purpose—though not compelling—permissible. Williams v. Zobel, 619 P.2d 448, 459-61 (Alaska 1980), *rev'd*, 102 S. Ct. 2309.

Actually, both the Alaska Supreme Court and the United States Supreme Court ignored the language in the first objective. Rewarding for past contributions was not an "objective" of the Alaska legislature—at least according to the language it chose. The last two stated purposes were the "objectives," while the first listed purpose was merely the only viable means for implementing the program. *See supra* note 7.

98. 102 S. Ct. at 2315.

99. Justice Brennan feared the possible balkanization of states if each state adopted a plan similar to that of Alaska's distribution scheme. *Id.* at 2316-17. Moreover, Justice Brennan intimated that the "past contribution" rationale may have some importance, but measuring the contribution by a durational residency requirement created a tenuous presumption.

> In effect, then, the past-contribution rationale is so far-reaching in its potential application, and the relationship between residence and contribution to the State so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination that it purports to justify.

Id. at 2318.

100. *Id.* at 2317. Justice Brennan emphasized the pervasive discrimination embodied in the plan. *Id.*

101. *Id.* at 2317-18. The citizenship clause in the fourteenth amendment "equates citizenship . . . with simple residence." *Id.* By distributing benefits unequally to citizens, Alaska, according to Justice Brennan, violated this principle. *Id.*

102. *Id.* at 2319 (O'Connor, J., concurring).

103. Practically speaking, one cannot say the Alaska plan "burdened" those who recently exercised the right to travel. No great imposition arises from giving one a smaller slice of a boon. In order to reach the privileges and immunities question, however, Justice O'Connor opined that the statute infringes a fundamental right by burdening nonresidents.

> The "burden" imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new state that he lacked com-

article IV privileges and immunities clause.[104]

Justice Rehnquist dissented, admonishing the Court for abandoning the traditional deferential approach toward economic regulations.[105] He observed that the Alaska plan did not discourage travel or migration,[106] and he read the majority opinion as not treating the case as a right to travel issue.[107] But viewing the case in traditional equal protection terms, he disagreed with the majority's reliance on the illegitimacy of the "past contribution" argument.[108] The Court, opined Justice Rehnquist, should only question the propriety of the "past contribution" justification in right to travel cases and not in traditional minimum scrutiny analysis.[109] According to Justice Rehnquist, the deferential aspect of equal protection analysis required only that the classification be rationally based.[110] Otherwise, the Court might repeat its mistakes made during the substantive due process era.[111] After finding a rational basis for the Alaska plan, Justice Rehnquist concluded that the majority necessarily read a particular economic and social policy into the fourteenth amendment—

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pletely in his former state. The clause addresses only differences in treatment; it does not judge the quality of treatment a state affords citizens and noncitizens.

Id. at 2321 n.6. After determining the applicability of the privileges and immunities clause, Justice O'Connor focused on two questions: 1) whether nonresidents are a peculiar source of the evil the statute is aimed at; and 2) whether a substantial connection exists "between the evil and the discrimination preached against the" nonresident in the statute. *Id.* at 2321.

104. 102 S. Ct. at 2320. Justice Rehnquist and Chief Justice Burger disagreed with Justice O'Connor's reading of the privileges and immunities clause in article IV. *See infra* note 129 and accompanying text.

105. 102 S. Ct. at 2324 (Rehnquist, J., dissenting). For a discussion of the deferential approach, see *supra* note 17.

106. 102 S. Ct. at 2324.

107. *Id.* at 2324 n.1. Actually, the majority opinion equates right to travel analysis with equal protection review.

> In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer-term residents.

Id. at 2313 n.6. This approach resembles the position taken by lower federal courts prior to *Shapiro*.

108. 102 S. Ct. at 2324.

109. *Id.*

110. *Id.*

111. *Id.* If one accepts the objective of rewarding for past contributions, then the rationality of the Alaska plan is apparent, even though the presumption may not be accurate.

the same charge levelled against the Court during the era of substantive due process.[112]

Indeed, Chief Justice Burger employed an ends analysis characteristic of the *Lochner* era rather than a means analysis.[113] Arguably, the plan would have passed constitutional muster under the prior approaches.[114] But instead of examining whether the distribution scheme operated as a penalty on the exercise of the right to migration, as in *Shapiro*,[115] or whether it created an unjustified conclusive presumption, as in *Vlandis*,[116] or even whether it satisfied the balancing approach in *Sosna*,[117] Chief Justice Burger began the discussion in traditional equal protection terms.[118] By declaring the end impermissible, however, he failed to clarify the appropriate standard of equal protection analysis for classifications between recent migrants and long-term residents.[119]

In lieu of such analysis, the Court's holding turned on classifying the "past contribution rationale" as an impermissible end.[120] In the

112. 102 S. Ct. at 2325.

113. *See supra* note 15. Rather than examining the nexus between the stated objectives and the means employed, Chief Justice Burger held the retrospective application of the plan unconstitutional for lack of a legitimate purpose. 102 S. Ct. at 2315.

114. Applying the penalty analysis the classification passes the test. Because the distribution scheme also treats residents differently according to when they were born, the classification does not distinguish solely on the basis of the exercise of the right to travel. Alternately, the nature of the benefit denied cannot be said to deter travel, either practically or hypothetically. Consequently, the classification does not impose a penalty requiring the Court to invoke the compelling state interest test. For a discussion of the statute's constitutionality under a balancing approach see Note, *supra* note 6; Note, *supra* note 11.

115. *See supra* note 39 and accompanying text.

116. *See supra* notes 71-74 and accompanying text.

117. *See supra* notes 83-84, 87 and accompanying text.

118. 102 S. Ct. at 2312-13.

119. Through its prior decisions, the Court had created uncertainty as to what test applied to durational residency requirements. *Sosna* suggested the Court would consider a balancing approach. Conversely, the Court never explicitly abandoned its penalty analysis. Summary affirmances suggested that the Court did not hold all durational residency requirements penalties. The crucial question, therefore, centered on when the Court would ask more of a statute than mere rationality. When Chief Justice Burger said that "right to travel analysis refers to little more than a particular application of equal protection analysis," he brought attention to the question. 102 S. Ct. at 2312 n.6. But the Chief Justice never transformed the *particular application* he spoke of into the *appropriate standard* of review for durational residency requirements.

120. 102 S. Ct. at 2314-15.

tradition of Lewis Carroll,[121] the Court assumed that what it announces three times must be true.[122] Arguably, the prior decisions only rejected the "contributory rationale" when searching for a compelling state interest.[123] Even accepting the Court's reading of *Shapiro*, *Vlandis*, and *Memorial*, its underlying reasoning is intellectually unsatisfying. Here, the Court assumed incorrectly that rewarding for past contributions does not influence present or future behavior.[124]

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121. "Just the place for a Snark," the Bellman cried,
As he landed his crew with care
Supporting each man on the top of the tide
By a finger entwined in his hair
"Just the place for a Snark. I have said it twice:
That alone should encourage the crew.
"Just the place for a Snark. I have said it thrice:
What I tell you three times is true."
L. CARROLL, THE HUNTING OF THE SNARK, FIT THE FIRST.

122. *See supra* note 121. The Court merely extracted the language from its decisions in *Shapiro*, *Memorial*, and *Vlandis*. 102 S. Ct. at 2314-15. For the initial statement, see *supra* notes 35-37 and accompanying text. *See also* Memorial Hospital v. Maricopa County, 415 U.S. 250, 266 (1974) (rejecting contributory rationale); Vlandis v. Kline, 412 U.S. 441, 450 n.6 (1973) (relying upon *Shapiro* that apportionment based on past contributions "would give rise to grave problems under the Equal Protection Clause"); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969) (apportionment of state services on basis of past tax contributions prohibited). *But cf.* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) ("State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve"); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) ("whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own, is a matter which concerns only the people of that state, and with which the Federal government cannot rightly interfere").

123. *See supra* note 109 and accompanying text. The statement in *Shapiro*, however, is unambiguous: "The Equal Protection Clause prohibits such an apportionment of state services." 394 U.S. at 633. Instead, a careful appraisal of the contributory rationale reveals a parallel with conclusive presumption analysis. Often, no basis in fact exists for the proposition that those being rewarded actually contributed to the state, and those being denied often do contribute to the state. *See supra* note 35; Mayflower Farms v. Ten Eyck, 297 U.S. 266, 273 (1936) (requiring state to show factual basis); Stevens v. Campbell, 332 F. Supp. 102, 106 (D.C. Mass. 1971) (classification arbitrary and presumes contribution). If a state presented the factual basis for distributing benefits, arguably the two classes would not be similarly situated and thus the disadvantaged class could not raise an equal protection challenge.

124. Justice Brennan recognized the "presentist" argument for rewarding individuals for past action:

> The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future per-

More importantly, by labelling the "contributory rationale" as illegitimate, the Court reads a particular economic and social value into the equal protection clause.[125] If the Court really means what it says about classifications according to the length of residency, then statutes such as California's roll-back tax assessment plan,[126] Florida's homestead exemption,[127] or Kentucky and Indiana's durational residency requirements for alcohol sellers[128] pose troublesome questions.

Predicting how the Court might resolve such questions requires understanding the doctrinal conflicts among the justices. The four opinions in *Zobel* illustrate at least one of these conflicts. For instance, Chief Justice Burger and Justice Rehnquist rejected the application of the article IV privileges and immunities clause to the Alaska statute.[129] Justice O'Connor, on the other hand, championed the use of the clause as a constitutional source for protecting the right to migrate.[130] Although agreeing that the Alaska scheme might interfere with the right to migrate, Justice Brennan artfully dodged the privileges and immunities clause.[131] Consequently, five justices expressed their intention of protecting the right to migrate, and state legislation facially biased against newcomers might fall at the hands of judicial review.

Not all classifications between newcomers and long-term residents should fall prey to judicial review. Justice Brennan's concurrence foreshadows the Court's future role in assessing residency require-

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formance. In addition, to a limited extent, recognition and reward of past public service has independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service.

102 S. Ct. at 2318.

125. *See supra* note 112. The Court's decision severely limits state implementation of privitization statutes. *See supra* note 7.

126. *See* Amador Valley Joint High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978); *supra* note 2.

127. *See* Osterndorf v. Turner, 411 So. 2d 330 (Fla. App. 1982). While this comment was in print, the Florida Supreme Court held the act violative of the equal protection clause. Osterndorf v. Turner, 426 So. 2d 539 (Fla. 1983).

128. *See supra* note 2.

129. *Zobel*, 102 S. Ct. at 2312 n.5, 2325 n.3.

130. *Id.* at 2320.

131. *Id.* at 2316. Justice Brennan opined that Justice O'Connor's argument was plausible, but he found equally plausible arguments for the commerce clause and the privileges and immunities clause in the fourteenth amendment. Consequently, he noted "that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proven both inconclusive and unnecessary." *Id.*

ments in general, and the "past contribution rationale" in particular. In short, a state may establish requirements to test bona fide citizenship.[132] Beyond that limited goal, a state must demonstrate that its durational residency requirement does not create an irrebuttable presumption without an empirically identifiable basis in fact.[133]

The result in *Zobel v. Williams*, therefore, does not preclude states from adopting durational residency requirements. In fact, the majority opinion's reliance on equal protection analysis suggests that durational residency requirements might survive judicial scrutiny if a legitimate and demonstratable basis exists for the classification.[134] Nevertheless, the majority's failure to advance the applicable standard of review leaves open the possibility that the Court might develop yet another test.

Sam Kalen

132. While simple residency requirements may penalize the exercise of the right to migrate, the state is said to have a compelling interest in testing bona fide citizenship. *See supra* note 3.

In a case decided after *Zobel*, the Supreme Court implicitly established a definitional approach toward residency requirements. In Martinez v. Bynum, 51 U.S.L.W. 4524 (U.S. May 3, 1983), the Court explained its prior cases by drawing a distinction between durational residency requirements and bona fide residency requirements. "A bona fide residency requirement," the *Martinez* Court explained, "furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.* at 4526. The Court also added that bona fide residency requirements did not involve a "suspect" classification and thus were not governed by strict scrutiny analysis; instead, such requirements had only to pass a rational basis test *Id.* at 4526 n.7.

133. In other words, a state must present data illustrating that its classification scheme is grounded "in fact" and not in an arbitrary assumption about the differences between recent migrants and long-term residents. *See supra* notes 122, 123 and accompanying text.

134. *See supra* note 133. Consequently, although five justices in *Zobel* reaffirmed the vitality of "right to migrate" arguments, an even larger number suggested that these arguments could be overcome by an adequate demonstration of "reasonableness" on the part of a state.