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The Demise of the Durational Residence Requirement

by R. Dennis Anderson and Dennis L. Lutes

With the decision of the United States Supreme Court in Shapiro v. Thompson, the question of the constitutionality of those laws which restrict certain activity within a state on the basis of non-residence or length of residence was opened to a new line of attack—the violation of the equal protection clause of the fourteenth amendment by indirect infringement of the right to interstate travel. Residence requirements have been employed by the states to determine, generally, what persons are its "citizens"—that is, those persons who are entitled to enter into certain transactions with the state as sovereign. Such activities include voting in state elections, obtaining a divorce, attending state-supported colleges and universities at lower tuition rates, admission to the bar, candidacy for state office, and receipt of public welfare benefits. Shapiro invites further examination of the constitutionality of residence requirements in general, particularly in light of the recent application of its reasoning in the decision of the Supreme Court in Dunn v. Blumstein.

1 394 U.S. 330 (1972).
2 "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
3 Another possible line of attack is that such laws deny procedural due process or a privilege of national citizenship. See also note 12 infra.
4 Perhaps the earliest such requirement in the United States is contained in section 6 of the Pennsylvania Constitution of 1776: "(E)very freeman of the full age of 21 years having resided in the state for the space of one whole year . . . and paid public taxes during that time shall enjoy the rights of an elector provided always that sons of freeholders of the age of 21 years shall be entitled to vote although they have not paid taxes." Quoted in textual material following PA. Const. art. 7, § 1.
5 The discussion which follows will not deal with the relationship between residence requirements and public welfare, a question which, as is now clear, was settled by Shapiro. With reference to admission to public housing, the arguments against the constitutionality of durational residence requirements closely parallel those employed in Shapiro. At least one federal appellate court has found that such requirements deny to recently arrived, but otherwise eligible, persons the equal protection of the laws in that their right to interstate travel is inhibited by the action of the state in withholding housing. See Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970). Whether a requirement of simple bona fide residence as a pre-condition to receipt of public welfare or admission to public housing is similarly invalid is doubtful, although arguments against such requirements are by no means unimaginable.

The questions involved in the area of public housing differ in one significant respect from those involved with public welfare payments. Funds, no matter how limited, can be distributed proportionally according to family size, need, and related justifiable criteria. Public housing, on the other hand, is not fungible and cannot be so easily handled. One commentator has suggested that while the application of a legislative blunderbuss like a durational residence requirement is unconstitutional, an objectively applied measurement of local ties, including length of residence, is preferable to the application of a "first come, first served" standard for distributing limited public housing. See Walsh, The Constitutionality of a Length-of-Residency Test for Admission to Public Housing, 49 J. Urban L. 121 (1971).

Several courts have held that a durational residence requirement as a prerequisite to taking a bar examination is violative of the fourteenth amendment equal protection clause. See, e.g., Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970). These cases use similar reasoning and rely on the same authority as the cases discussed in the other areas of this Comment. For that reason they will not be discussed further.

The justification usually given for residence requirements is that they provide objective evidence of domiciliary intent and are, thus, a means of separating bona fide residents of the state from mere transients. Therefore, some comparison of the terms "citizen," "domicile," and "residence" is necessary, if only for semantic consistency. The fourteenth amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." "Domicile" is generally defined as physical presence in a jurisdiction and an intention to remain there, in the sense that the person has the intention of making his permanent home in the jurisdiction. Although "residence" technically does not include domiciliary intent, the courts and the commentators have used the terms interchangeably to such an extent that, for the purposes of this Comment, we shall also. The primary distinction with which we are concerned is that between residents and non-residents.

In order to reach any supportable conclusion concerning the constitutionality of residence requirements, two determinations regarding those requirements must be made. The first is whether the exercise of state created "rights" such as voting in state elections, divorce, and state supported higher education can be constitutionally limited only to residents of the state. If this inquiry is answered in the affirmative, the second question is whether a durational residence requirement is a constitutionally permissible means for distinguishing residents from non-residents so as to limit the exercise of the "right" to residents only.

I. THE RIGHT TO TRAVEL INTERSTATE

Although a residence requirement, whether requiring bona fide residence or a given length of residence as a pre-condition to carrying out certain intrastate activities, may run afoul of other constitutional mandates, the question of

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Footnotes:

8 U.S. CONST. amend. XIV, § 1. "Reside" was early interpreted to mean bona fide residence, i.e., domicile. See Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).
9 See RESTATEMENT OF CONFLICTS OF LAW §§ 9-41 (1934); RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 11-23 (1971); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).
10 "Residence," strictly, means only inhabitance. See, e.g., In re Campbell's Guardianship, 216 Minn. 113, 11 N.W.2d 786, 789 (1943); Zimmerman v. Zimmerman, 175 Ore. 585, 155 P.2d 293, 295 (1945).
11 At least one court has faced reality, noting that "residence" and "domicile" may have identical or different meanings depending on the subject matter and context of the statute involved. Kemp v. Kemp, 172 Misc. 738, 16 N.Y.S.2d 26 (1939). In most states, fulfilling the residence requirement is not conclusive proof of domiciliary intent. See, e.g., Strandberg v. Strandberg, 27 Wis. 2d 559, 135 N.W.2d 241 (1965); Tex. Educ. Code Ann. § 54.052 (1971) (domicile required even though statute speaks in terms of residence). The terms "domicile" and "residence" will be regarded as synonymous unless otherwise noted.
12 For example, the imposition of a durational residence requirement as prerequisite to the exercise of the franchise in a state election may be viewed as an unconstitutional restriction of the fundamental right to vote, quite apart from the obvious discouragement of interstate travel. See text accompanying notes 50-93 infra. On the other hand, any durational residence requirement may arguably contravene procedural due process by foreclosing a newly-arrived citizen's opportunity to prove his bona fide residence. The irrebuttable presumption of his non-residence is an impenetrable barrier to his taking maximum advantage of his newly-acquired state citizenship. See United States v. Provident Trust Co., 291 U.S. 272 (1934), in which the Court invalidated a conclusive presumption on procedural due process grounds.
whether the imposition of such a requirement infringes upon the right of interstate travel must invariably be answered. Though the violation of the right to interstate travel resulting from the imposition of a durational residence requirement is an indirect one (such requirements do not absolutely prohibit changing residence to another state), the violation is arguably present in every case in which satisfaction of a length of residence requirement is prerequisite to the enjoyment of the status of citizen in a state. Privileges and rights enjoyed by other citizens of the state may be withheld because the person has only recently moved into the jurisdiction. Hence, residence requirements result in penalties being inflicted upon the non-citizen or the resident who has not yet remained in the state for the necessary length of time.

The relative importance of the right to travel interstate in the hierarchy of personal rights must have been considered minor prior to *Shapiro v. Thompson.* The precise lineage of that right, a right which was only restrictively recognized prior to 1968, is relatively uncertain.

Extra-Constitutional Sources. The forty-second chapter of Magna Carta makes passing reference to the right to travel safely in and out of the realm. The textual position of the reference suggests that it may have been intended primarily as a guarantee of mercantile convenience. Yet, while the right as it existed in 1215 is cast in terms of the right to pass across international borders rather than the right to travel within the realm, the freedom is said to parallel roughly the right to free emigration. The necessity of a specific guarantee of some right to travel within a nation arises only within the context of a nation composed of sovereign entities; i.e., a federation. It is not surprising, then, that the right appears to be essentially a product of colonial America. The right is an express part of the Pennsylvania Constitution of 1776; in fact, that document characterizes the right to emigrate from one state to another as both natural and inherent. The Articles of Confederation contained a similar provision forbidding any single state’s interference with travel between itself and sister states. Curiously, the authors of the Constitution and subsequent amendments chose to speak in terms of commerce rather than travel, and only with reference to the powers of the central government rather than the right of United States citizens to move freely within the nation.

Constitutional Sources. There is presently no doubt that the unexpressed right to travel from state to state is tacitly part of that collection of rights which may be characterized as fundamental. Although the Court has recognized some species of this right since the late nineteenth century, its fundamental quality, like its source, has not always been so settled.

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13 As previously noted, *Shapiro* breathed new life into the right by placing it within the protective sweep of the equal protection clause. See note 1 supra, and accompanying text.
15 Id.
16 U.S. CONST. art. I, § 8: “The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .” For an example of the interrelationship between the commerce clause and the right of interstate travel, see note 26 infra.
17 See Dunn v. Blumstein, 405 U.S. 330 (1972), discussed in the text accompanying notes 94-118 infra. Thus, for purposes of application of the equal protection clause, laws
The right of interstate travel is arguably implicit in the concept of a federal organization of states. It need not be express as it is unqualifiedly suggested within the four corners of the Constitution. The acknowledgment of the right in case law came in the Court's opinion in Crandall v. Nevada, which struck down a state tax levied upon persons who left the state by common carrier. However, the right was not cast in terms of freedom to travel between the states regardless of purpose so long as the purpose was lawful. Instead, the right was limited so that federal protection against state interference was extended only to persons en route to the seat of government. While Crandall is invariably cited as the earliest authority recognizing the right to interstate travel, it attracted very little attention until the right itself came to be associated with the post-Civil War amendments. When, in the Slaughter House Cases, the Court sensed some obligation to distinguish "privileges and immunities" under article IV, section 2, from the "privileges and immunities" under the fourteenth amendment, as well as to enumerate a basic compilation of the latter, an acknowledgment of the right appeared. Again, however, the right was qualified and limited in application to citizens traveling to Washington, D.C. The viability of this interpretation became all the strong-
er in light of certain dictum in United States v. Wheeler. There the Court declared that the decision in Crandall had been based squarely upon the fact that the plaintiff, who was taxed incident to his passage through Nevada, was on route to petition the federal government.

The position of the modern Court has been to discredit the limitation placed on the right to travel by these earlier cases. The reasoning of the Court in 1966 was that the dictum in Wheeler was rendered inapposite by Edwards v. California. As for the suggestion in Crandall that the right was limited, the Court's position was apparently that the Crandall Court never meant to limit the right to one peculiar class of travelers. "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel . . . [a]ll have agreed that the right exists." Furthermore, it presently exists absent the limitations which earlier Courts were apparently inclined to impose upon it.

Although Shapiro implicitly adopted the broad interpretation of the right to interstate travel, its primary impact was a result of the characterization of that right as fundamental for purposes of, in what has become a somewhat trite phrase, the "new" equal protection test. Long overshadowed by the pervasive sweep of the due process clause, the guarantee of equal protection of the laws has lately become the cutting edge of the constitutional sword. Until relatively recently, the Court's reluctance to interfere with state business was reflected in the test used to determine whether a state was denying to any person equal protection called for by the fourteenth amendment—denial of equal protection permitted if the practice was reasonable in relation to some legitimate state goal. In practice, the presumption in favor of the state operated to make intervention by the Court difficult, if not impossible, to obtain. Contemporary concern with the protection of individual rights led to a more stringent test. Essentially, the new equal protection stands as a prima facie prohibition against those state classifications which are based upon some "suspect" criterion or which inhibit the exercise of some "fundamental" right. The presumption of invalidity may be rebutted only by a demonstration that the classification is necessary to further a compelling state interest. In practice,

commentary on the equal protection, due process, and privileges and immunities clauses of the fourteenth amendment, appears to be the first to find a particular constitutional source for the right to travel. Mr. Justice Story's failure to give more attention to the right of travel within the context of the Slaughter House Cases is, unlike his only passing attention to Crandall, explainable. His treatise went to press prior to the decision in the Slaughter House Cases; thus, his examination of the right as one of those rare and elusive privileges and immunities of national citizenship was relegated to an appendix, in which he did quote from the case at length. See 2 J. Story, supra note 21, at 723-33.

254 U.S. 281 (1920).


27 314 U.S. 160 (1941).

28 383 U.S. at 759.

29 See Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967). To characterize the concept as new, however, is misleading in view of the fact that the novelty of a point of constitutional law wears thin after more than twenty-five years.

30 For a relatively recent application of this traditional test to a challenge based on a violation of equal protection, see McGowan v. Maryland, 366 U.S. 420 (1961).
the finding of invidious discrimination and the invocation of the new test has consistently operated to invalidate the state practice in dispute; thus far, no state interest has been found sufficiently compelling. Since this compelling interest test is a judicial creature, the parameters of the classes of suspect criteria and fundamental rights sufficient to invoke the test have yet to be clearly defined. It is clear, however, that the right to interstate travel is within the accepted class of fundamental rights; likewise, it is also clear that discrimination based solely on the recent exercise of that right involves a suspect criterion.

II. Voting

A. The Right to the Franchise

The federal constitution does not expressly confer the right to vote upon any citizen of the United States. Nevertheless, the right to vote in federal elections is said to be implied by those constitutional provisions relating to the election of federal officers and representatives. The right of suffrage in the federal context is distinct from whatever similar right may exist with respect to the election of state and local officers and representatives. The federal constitution makes no provision for the latter right. Hence, the power to extend or refuse the franchise on the state and local level is among those powers reserved to the states. Furthermore, the states may impose certain limitations, apart from the requirement of citizenship, upon the exercise of the right to vote both in the state and in the federal context. Thus, while the right to vote in federal elections cannot be altogether denied by the states, the states may limit that right, as well as whatever right may exist to vote in the state and local context, such that it may be lawfully exercised only by a given class of citizens. However, the constitutional right to vote in federal elections, and

31 The only adequate interest found to date is that of national security. The imprisoning of Japanese-Americans in camps during World War II was upheld in Korematsu v. United States, 323 U.S. 214 (1944), the case in which, ironically, the new test began to take shape. The cases and commentaries which have formulated the test are myriad. The best explication of both the substantive and procedural interstices of the doctrine may be found in Mr. Justice Brennan’s majority opinion in Shapiro v. Thompson, 394 U.S. 618, 658 (1969).

32 Neither does the Federal Constitution entitle one to vote by virtue of his citizenship in one of the several states.

33 U.S. CONST. art. I, § 2, calls for the election of members of the House of Representatives by the people of the several states. The seventeenth amendment similarly calls for the election of United States Senators. Article II, § 1, deals with the somewhat more complicated procedure for electing the President and Vice President. The right to vote in federal elections has also been held to be among the privileges and immunities of national citizenship guaranteed by the fourteenth amendment. Ex parte Yarbrough, 110 U.S. 651 (1884). It might further be asserted that this right is essential to the maintenance of a republican form of government as guaranteed by art. IV, § 4. But cf. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), a pre-nineteenth amendment case which held that women need not be allowed to vote in order to find a republican form of government.

34 If a right to vote per se exists in this context at all, it exists by virtue of the particular state constitution.

35 This power is reserved to the states in U.S. CONST. amend. X.

36 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). See also U.S. CONST. art. I, § 4, which empowers the states to oversee the manner in which United States Senators and Representatives are elected, subject to certain congressional regulations.

37 Nevertheless, the power of the states to regulate the franchise with respect to the election of United States Senators and Representatives is expressly limited. While art. I, § 4, places authority over the time, place, and method of election in the hands of the several
the right to vote in local elections, once extended, may not be limited by the states in any manner which runs afoul of certain other constitutional limitations. That is, the federal constitution contains four specific and one general limitation upon the power of the states to deny the franchise to certain classes of citizens.

With reference to the specific prohibitions against imposing certain limitations upon the right of suffrage, the state of the law could hardly be clearer. From the point of their ratification, those amendments which explicitly prohibit the limitation of the right to vote on account of certain traits or conditions have foreclosed the power of both the federal and state governments to practice certain kinds of discrimination at the polls. With reference to the more general limitations imposed by the fourteenth amendment, the extent of the power of the states to classify is considerably more vague. If the guarantee of due process of the law is defined along traditional lines, only those restrictions which are unreasonable, or which offend fundamental procedural safeguards, would be proscribed. The guarantee against abridgment of privileges and immunities of national citizenship would seem to do little more than bolster the proposition suggested by previously cited constitutional provisions, i.e., that no state may interfere with a qualified citizen's right to vote in a federal election. Finally, if the guarantee of equal protection of the laws is drawn along traditional lines, only those state-imposed classifications not rationally related to a legitimate legislative objective would contravene the fourteenth amendment. However, if the more stringent test of equal protection is applicable to those state laws or policies which deny the franchise to an entire class of otherwise qualified citizens, then the limitations which the fourteenth amendment impose upon the states' power to regulate voter qualifications become substantial.

The stricter test of compliance with the equal protection clause has lately been used to invalidate discriminatory attempts to condition the franchise. The fall of the poll tax is an example. In 1937, the poll tax survived constitutional

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88 U.S. CONST. amend. XV prohibits the denial of the franchise in the federal, state, or local context "on account of race, color, or previous condition of servitude." The nineteenth amendment is a similar proscription applicable to denial of the franchise because of sex. The twenty-fourth amendment prohibits conditioning the right to vote in federal elections upon payment of any tax. The twenty-sixth amendment prevents the denial of the franchise on the basis of age to any person over eighteen years of age.

90 U.S. CONST. amend. XIV contains a more general limitation upon classifications which abridge the privileges or immunities of national citizenship, or which deny due process of law or equal protection of the laws.


42 See note 33 supra, and accompanying text. Of course, insofar as the privileges and immunities of United States citizens entail their right to interstate travel, the clause may have a direct bearing upon the constitutionality of residence requirements.

attack under the traditional test of equal protection. Some twenty-seven years later, the ratification of the twenty-fourth amendment banned payment of the taxes prerequisite to the exercise of the franchise in federal elections. In 1966, the Court reversed its earlier stance and held that a classification which denied the right to vote in state and local elections to those otherwise qualified voters who failed to pay a poll tax contravened the equal protection clause. Although that holding appears to have been based in large part upon a finding that the statute created a classification on the basis of wealth, the substance of the right involved, i.e., voting, was given considerable attention by the Court. Hence, while there seems to be no explicit basis for considering the right to vote in state elections as fundamental per se, and while the Court has not supplied an implicit constitutional basis for such a finding of fundamentality, subsequent cases support the conclusion that, at least for purposes of claims grounded upon the equal protection clause, the state and local franchise must be extended indiscriminately as a matter of right in the absence of a compelling state interest.

B. Voting and Residence Requirements

The history of the relationship between the right of suffrage and the imposition of residence requirements closely parallels the recent history of the

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45 U.S. CONSTR. amend. XXIV.
47 Whether a classification which discriminates on the basis of wealth but places no burden upon the exercise of a fundamental right violates the guarantee of equal protection is not clearly resolved. When classifications on the basis of wealth have received attention in cases involving the rights of the criminally accused, the Court has placed considerable reliance upon the tendency of such a classification to contravene procedural due process. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956). Likewise, in cases involving civil rights, the special attention given by the Court to classifications on the basis of wealth has invariably been coupled with the observation that basic substantive rights or questions of procedural due process were inextricably involved. Compare Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), with Boddie v. Connecticut, 401 U.S. 371 (1971). When fundamental rights are involved, the stricter test of equal protection is applicable even in the absence of classification on the basis of some suspect criterion. Hence, the above cited cases could conceivably have been decided in the same way without reliance upon the undesirability of classifications which engender economic discrimination.

48 Considerable reliance was placed upon the importance of that right as expounded in Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

A comparable history exists with respect to the demise of literacy tests as an impediment to the exercise of the franchise. In 1959 the Court's conclusion was that if the tests were fairly and consistently applied, neither the equal protection clause nor the seventeenth amendment prohibited their use in either federal or state elections. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). However, it was soon apparent that the discrimination, which the Court found was not condemned by the Constitution, was not beyond congressional sanction. During the same year that the poll tax was struck down in Harper, § 4 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1970), was put to the constitutional test. Specifically at issue was the authority of Congress to employ § 5 of the fourteenth amendment to invalidate state literacy test laws by way of the supremacy clause. The Court's conclusion in Katzenbach v. Morgan, 384 U.S. 641 (1966), was that since § 5 constituted an affirmative grant of congressional power, Congress might determine that such a prohibition was necessary and proper to implement fully the guarantee of equal protection of the laws.

right to vote. With reference to the requirement of bona fide residence, as opposed to constant residence throughout a given period of time, judicial thought has been relatively consistent—a state may impose upon the exercise of the franchise the requirement of bona fide residence. While the imposition of this requirement has apparently never been challenged in the appellate courts, certainly judicial review under even the compelling interest standard would not lead to invalidation of this limitation. Though compelling governmental interests are rarities in the law of equal protection, the public concern for "purity of the ballot" would apparently be afforded such dignity.

With reference to durational residence requirements, the law has undergone a slow evolution, culminating in the invalidation of such requirements as prerequisite to the exercise of the right to vote. Pope v. Williams appears to be the first case in which the United States Supreme Court considered the constitutionality of a durational residence requirement which limited the right of suffrage in state elections. Though the one-year requirement was attacked on equal protection grounds, the Court's conclusion that the statutory requirement was rationally related to a legitimate legislative objective, i.e., insuring that only persons with a stake in the outcome of the election would take part, left the requirement undisturbed. Evidently, Pope constituted the last word on the subject until the more stringent standard of equal protection was developed. That durational residence requirements might be imposed so as to limit access to the polls in both federal and local elections continued to resound within case law, though mainly by way of dictum.

As the standard for review of classifications which inhibited the right to vote changed, so the range of constitutionally permissible limitations on that right tightened. Of course, classifications limiting the franchise which were drawn along racial lines had long been prohibited. However, even following the invalidation of durational residence requirements as prerequisite to place-
ment on public welfare roles, there remained some uncertainty with respect to whether the reasoning of *Shapiro v. Thompson* \(^{59}\) might be extended so as to invalidate similar requirements which limited the franchise. The analogies suggested by *Shapiro* seemed speculative mainly because the *Shapiro* Court explicitly limited the reach of that decision by way of a much-quoted\(^{60}\) footnote which warned that the Court implied "no view of the validity of waiting period or residence requirements determining eligibility to vote . . . ."\(^{60}\) Nevertheless, the commentators, having been convinced of the fundamental nature of the right to the franchise per se and having been reminded of the potential sweep of the freedom of interstate travel, thought the prohibition of durational residence requirements limiting the franchise almost inevitable.\(^{61}\)

The very recent history of judicial intervention with respect to voting and equal protection of the laws may be traced to the reapportionment cases.\(^{62}\) Their importance is twofold. They not only clarify the fundamental nature of the right, at least for purposes of equal protection analysis,\(^{62}\) but also stand for the proposition that a voter's place of residence within a state should have no bearing upon his individual power at the polls. The reapportionment cases, however, did not touch directly upon discrimination based upon length of residence. In 1964, approximately one year after the reapportionment cases, the Court considered a limitation upon the right of suffrage which was similar to the familiar durational residence requirement. In *Carrington v. Rash* \(^{4}\) a serviceman stationed in Texas challenged a provision of the Texas Constitution which prohibited members of the military service who moved into the state during the course of their military duty from voting in Texas elections prior to discharge. The serviceman-petitioner's demonstration of his intent to remain in Texas permanently was evidenced by a number of objective indicia. Indeed, the fact of his bona fide intent to establish residence within the state appears to have been uncontroverted. The Court, with Mr. Justice Stewart writing the opinion, held that while Texas could undoubtedly condition extension of the franchise such that only bona fide residents would be permitted a political voice, the restriction which absolutely barred military personnel who were not residents prior to induction offended the guarantee of equal protec-


\(^{60}\) The Court's admonition that *Shapiro* should not be read to determine the invalidity of other durational residence requirements was quite unnecessary in light of the fact that no such question was then in issue. Nevertheless, it is not surprising that many of the later decisions which have dealt with the potential unconstitutionality of durational residence requirements only to conclude that such requirements were not invalid have relied to varying degrees on this admonition.

\(^{61}\) 394 U.S. at 638 n.21. The Court went on to enumerate other existing requirements which were considered to be unaffected by their decision: limitations with respect to admission to tuition-free public education, engagement in certain state-sanctioned occupations (e.g., the practice of law), and permission to hunt or fish within a state.

\(^{62}\) The only problem encountered by legal prognosticators was one of deciding which test to apply. Invariably these observers opined for the applicability of the stricter standard. It followed that unless some compelling state interest could be mustered, durational residence requirements for voting were doomed to unconstitutionality. See, e.g., Comment, *Constitutional Law—Elections—Durational Residency Requirement*, 23 S.C.L. REV. 320 (1971).


\(^{63}\) "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." 377 U.S. at 561-62.

\(^{64}\) 580 U.S. 89 (1965).
tion. The state's interest in preventing a military takeover of state government, while apparently a worthwhile goal, was found to be less than adequately related to the constitutional provision in question.

Though the decision in \textit{Carrington} seems sound in result, it is not easy to discern what standard was operative in the case. The opinion speaks in terms of the permissibility of classifications reasonably related to some purpose, rather than the stricter test of equal protection. However, if the state's legislative goal was legitimate, was not the classification rationally related to that end?\textsuperscript{65} Some attention is given to the zealous protection properly afforded the right to vote,\textsuperscript{66} but there is no significant support within the Court's language for the application of any test beyond the traditional one.\textsuperscript{67} The opinion seems to give passing approval to another state constitutional provision which required residence for one year within the state and six months within the county as a prerequisite to voting. Furthermore, besides the affirmation of the state's interest in limiting the franchise to bona fide residents, the Court indicated that something beyond living within the state and a declared intention to establish a residence might be necessary to ensure that the state's interest was protected.\textsuperscript{68} Only by "forbidding a soldier ever to controvert the presumption of non-residence" did the law in question violate the fourteenth amendment.\textsuperscript{69} Hence, \textit{Carrington} appears to have turned upon the absolute nature of the limitation which the state imposed. Because certain otherwise qualified persons were permanently barred from the polls, the Court passed upon the validity of the restriction by looking beyond the rational basis upon which the provision was based and evaluating the law in light of the "remote administrative benefit" which the law theoretically provided.

During the interim between \textit{Carrington} and the cases challenging the validity of the Voting Rights Act Amendments of 1970, the viability of durational residence requirements as a limitation on the right to vote remained, but it did not go unquestioned. This brief period enveloped three significant judicial events which shed light on the problem. Two of these, the decision in \textit{Shapiro v. Thompson} and the application of the stricter standard to other limitations upon the right to vote, have already been given some attention.\textsuperscript{70}

\textsuperscript{65} Mr. Justice Harlan seemed to encounter no difficulty in finding such a relationship. "Such a policy on Texas' part may seem to many unduly provincial in light of modern conditions, but it cannot . . . be said to be unconstitutional." 380 U.S. at 101 (Harlan, J., dissenting).

\textsuperscript{66} "The right . . . to choose, . . . [is one] that this Court has been . . . zealous to protect . . . ." 380 U.S. at 96.

\textsuperscript{67} Although Mr. Justice Harlan registered a well-grounded dissent in \textit{Carrington}, he nevertheless found occasion to review that decision in his synopsis of the new equal protection in \textit{Shapiro}. "[A]s I now see that case, the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally 'suspect.'" 394 U.S. at 660 (Harlan, J., dissenting). Of course, the \textit{Carrington} Court was more likely persuaded by the nature of the right involved than by the point of distinction upon which the discriminatory law was constructed.

\textsuperscript{68} For example, a further safeguard might be the imposition of durational residence requirements.

\textsuperscript{69} 380 U.S. at 96.

\textsuperscript{70} Id. With respect to the impact of \textit{Shapiro}, see notes 1-6 supra, and accompanying text. With respect to the application of the compelling interest test to other voting restrictions, as well as the continuing recognition that the right to vote in even local elections is of the
The third significant event involved indirect encounters by the Supreme Court with the validity of durational residence requirements as a pre-condition to voting.

Following Carrington, the next instance in point of time was a decision in keeping with the holding in Pope. In Drueding v. Develin, a federal district court sustained the application of a one-year durational residence requirement which limited the right to vote, even in federal elections. The Drueding court applied the rational basis standard and concluded that the requirement's rational relationship to the legitimate legislative goal of insuring bona fide residence adequately supported the validity of the statute. Among the voting rights cases during the period under examination, Drueding deserves primary attention, for almost immediately after the Court's decision in Carrington, the decision of the district court in Drueding was affirmed per curiam and without opinion by the Supreme Court. The case should, therefore, be regarded as representative of the federal courts' position with respect to the validity of durational residence requirements, at least until Shapiro. However, Drueding was not to be the Court's last contact with residence limitations and the franchise. In 1969, a short time after Shapiro, a second case upholding durational residence requirements as prerequisite to admission to the polls was put before the final arbiters. This time opinions were rendered but, unfortunately, the majority did not reach the merits of the case. Because the petitioners had satisfied the residence requirement under attack, the issue had become moot, and, accordingly, the lower court's judgment was vacated. However, Justices Brennan and Marshall were not persuaded that the procedural technicalities involved should be allowed to foreclose all opportunity for judicial review; they proceeded to reach the merits. Pope, it was said, was no barrier to a finding of presumptive unconstitutionality, as it had dealt with state elections only. At any rate, the standard for review of classifications limiting the exercise of fundamental rights had changed since Pope. For the dissenters, it followed that the durational residence requirement constituted an impermissible limitation on the exercise of the franchise. In light of the fact that the disposition of this case followed Shapiro, it is conceivable that the question of the validity of voting and durational residence requirements might have been settled as early as 1969 had the jurisdiction of the Supreme Court been invoked a few months earlier.

With but one exception, the Supreme Court did not again consider durational residence requirements and voting until the authority of Congress to

highest constitutional dignity, see note 50 supra, and accompanying text. See also Cipriano v. City of Houma, 395 U.S. 701 (1969), which invalidated a Louisiana law limiting the right to vote in municipal bond elections to property taxpayers. The somewhat unique case of the demise of literacy tests in state and local elections is traced in note 48 supra.

73 Other legitimate state concerns cited by the court included that of insuring that each voter had a stake in the outcome of the election and that of limiting the franchise to an informed electorate.
76 396 U.S. at 51 (Marshall, J., dissenting).
77 The Court did invalidate a Maryland law not altogether unlike the restriction which was struck down in Carrington. See Evans v. Cornman, 398 U.S. 419 (1970).
deal with the question was tested. The intervening period did, however, produce a significant number of lower court cases which dealt with the validity of such requirements. The results in those cases were not altogether one-sided, but the weight of authority was that durational residence requirements which restricted the franchise were violative of the equal protection guarantee. One representative case in the federal courts examined such a restriction in light of its tendency to restrict the exercise of the fundamental rights of voting and interstate travel. Finding no compelling state interest to support the imposition of this restriction, the court concluded that the statute ran afoul of the fourteenth amendment. The contrary point of view is represented by the opinion of an Arizona federal district court. The basis for applying the traditional test of equal protection to a state durational residence requirement was simple adherence to precedent: At the Supreme Court level the compelling interest standard had been applied with respect to voter qualifications only in cases involving something other than durational residence requirements. Hence, at least with reference to state and local elections, Drueding was still good law. Of course, the point of view which subscribes to the application of a reasonableness test fails to take into account the Court's earlier conclusion that for purposes of equal protection of the laws, the right to vote even in school district elections is fundamental in character. Nevertheless, there existed some division at the district court level with respect to what standard of review was appropriate in testing the validity of durational residence requirements which inhibit the exercise of the franchise.

In Oregon v. Mitchell the Supreme Court considered the challenges of four states to the validity of the Voting Rights Act Amendments of 1970. Among those provisions under attack was a prohibition against the states which forbade the disqualification of voters in presidential and vice presidential elections for failure to meet durational residence requirements which conflicted with the national rules governing residence as set by Congress. Because the opinion deals with two other provisions of the federal law under attack and because the various members of the Court were divided in a variety of ways not seen since the decision in United States v. Guest, Oregon v. Mitchell is a judicial crazy-quilt. However, the announcement of the judgments by Mr. Justice Black reveals that the provision abolishing state durational residence requirements with respect to presidential elections was upheld
by an eight-to-one margin, though for a variety of reasons. Mr. Justice Black was of the opinion that previously discussed constitutional provisions and the inherent power of a supreme national government to regulate its own affairs (e.g., federal elections) together provided a sufficiently broad basis to support the act of Congress in question. Following the senior Associate Justice's special opinion, Justices Stewart and Blackmun and the Chief Justice concurred, but relied upon congressional power to legislate in implementation of the fourteenth amendment guarantee of the various privileges of national citizenship, among which is the freedom of interstate movement. For the same reason, Justices Brennan, White, and Marshall also agreed that the abolition of durational residence requirements for purposes of electing presidential electors was within the limits of congressional authority. Only Mr. Justice Harlan dissented from a finding of constitutionality with respect to the congressional abolition of state residence requirements in presidential elections.

With the validation of that portion of the Voting Rights Act Amendments of 1970 which forbade the states from disqualifying voters in presidential elections because of their failure to meet state durational residence requirements, the Court's earlier decision in Pope v. Williams was not disturbed, since Pope dealt only with residence requirements in state elections. However, Oregon v. Mitchell did uphold that portion of the Act which invalidated state durational residence requirements in presidential elections. This holding implicitly overruled Drueding as that case applied to presidential elections. The only question which remained was whether the Court would continue to countenance the application of state durational residence requirements in state and local elections.

A related problem was one of determining whether there existed any congressional power to extend the 1970 amendments so as to preclude the application of such requirements in a non-federal context.

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88 Congress additionally set uniform law for absentee voting in such elections.
87 See note 37 supra.
86 400 U.S. at 124 n.7 (special opinion of Black, J.).
85 Id. at 281-87 (Stewart, J., concurring in part and dissenting in part). Particular reliance was placed upon United States v. Guest, 383 U.S. 745 (1966), as authority for a finding of broad congressional power under § 5 of the fourteenth amendment. The recognition of the right to interstate travel was based upon the previously discussed dictum in the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). See notes 22-24 supra, and accompanying text.
84 400 U.S. at 229 (Brennan, J., concurring in part and dissenting in part).
83 Id. at 152 (Harlan, J., concurring in part and dissenting in part).
82 Indeed, the only amendment which did not pass constitutional muster was one which lowered the voting age from 21 to 18 years in both state and federal elections. It was thought that Congress was without power to determine the minimum age requirement for voting in non-federal elections. The question of congressional authority to force the lower voting age upon the states for purposes of state and local elections has now been rendered moot by the ratification of the twenty-sixth amendment. The ratification process was completed on July 5, 1971. The amendment provides that: "(T)he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1.
81 Expressed another way, would Pope survive constitutional attack in light of the rise of the new equal protection?
80 In view of the lack of success with respect to congressional attempts to lower the voting age in all elections, the power of Congress to prohibit durational residence requirements in all elections may have seemed doubtful prior to Blumstein. The two situations are clearly distinguishable, however. Line drawing in terms of voting age requirements must necessarily be somewhat arbitrary, but the establishment of some minimum age may be regarded as necessary. On the other hand, the setting of durational residence requirements
Whether the imposition of durational residence requirements, like the eighteen-year-old vote controversy, would lead to a twenty-seventh amendment was not to be resolved until 1972.

C. Dunn v. Blumstein

In June 1970, James Blumstein moved to Tennessee to accept an assistant professorship at Vanderbilt University School of Law. The following month he attempted to register to vote in the primary and general elections to be held in that state during August and November of that year. Because he had not been a Tennessee resident for one year, nor a resident of the county in which he lived for three months, Blumstein was not allowed to register. He then appealed to the county election commission and requested that the Tennessee durational residence requirement be construed so as to allow him to rebut the presumption of incompetence which the provision created by demonstrating his ability to exercise the franchise intelligently. The commission unanimously concluded that failure to meet the durational residence requirement constituted an absolute bar to the exercise of the franchise. Having thereby exhausted his administrative remedies, Blumstein instituted a class action in the federal district court to challenge the validity of the restriction. Although his request for a preliminary injunction was denied, the three-judge court held that both the one-year and the three-month requirements were unconstitutional in that they denied to otherwise qualified new residents the equal protection of the laws. The subsequent November general elections were held in compliance with the court's order and, presumably, Professor Blumstein was allowed to vote. The decision was affirmed by the United States Supreme Court which held that the imposition of a requirement that a resident must have lived in the state for one year and in the county of registration for three

is invariably arbitrary, and, assuming that all voters are bona fide residents, no reason exists to impose such requirements. Furthermore, though both kinds of restrictions touch the exercise of voting, a fundamental right, only durational residence requirements affect the right to interstate travel.

44 The durational residence requirements which were applied to exclude Professor Blumstein from the polls are found in Tenn. Const. art. IV, § 1, which provides that twenty-one-year-old United States citizens who reside within the state for 12 months and within the county for 3 months prior to the day of the election shall be entitled to vote in the election of President and Vice President of the United States, members of the Tennessee General Assembly, and other civil officers for the county or district in which the voter resides. The provision then empowers the state legislature to enact laws to preserve the "purity of the ballot box."

Tenn. Code Ann. § 2-201 (1971), recites the same qualifications with respect to voting in the election of state legislators and various local officials.

Tenn. Code Ann. § 2-304 (1971), applies the previously enumerated qualifications to the registration procedure. It further provides that registration shall not be allowed within 30 days of any primary or general election.

Of course, those features of Tennessee law which apply the durational residence restriction to voting in the election of President and Vice President of the United States were pre-empted by the Voting Rights Act Amendments of 1970. See Oregon v. Mitchell, 400 U.S. 112 (1971), discussed in text accompanying notes 80-90 supra.

45 Dunn v. Blumstein, 405 U.S. 330, 332-33 (1972). The preliminary injunction was denied because the district court concluded that its issuance might disrupt the impending primary election.

46 The facts recited in the text are drawn substantially from the Brief of the Appellee at 2-4, Dunn v. Blumstein, 405 U.S. 330 (1972).
months as a precondition to the exercise of the franchise violates the equal protection clause of the fourteenth amendment.\footnote{405 U.S. at 360.}

It has been previously noted that the Court has treated the right to travel from state to state\footnote{See notes 17-31 supra, and accompanying text.} and, more recently, the right to vote in state elections\footnote{See notes 80-90 supra, and accompanying text.} as fundamental, at least for purposes of the application of the equal protection clause. It follows that a state statute, or any official posture, which limits the exercise of either or both of those rights is unconstitutional to the extent that it is not justified by a compelling state interest. No great amount of legal reasoning is necessary to conclude that durational residence requirements which restrict the franchise are presumptively violative of the guarantee of equal protection. Furthermore, the assumption that no compelling state interest will support a one-year durational residence requirement for purposes of voting easily supports a conclusive finding of constitutional invalidity. However, a more detailed examination of the Supreme Court's treatment of Dunn v. Blumstein does suggest some formidable questions.

The Court made clear from the outset that the provision under attack was not one which required merely bona fide residence. Presumably, even if it were contended that the requirement of bona fide residence within a given political subdivision severely limited the franchise, which it concededly does, this requirement would be supported by the state's overriding interest in preventing colonization. The opinion in Blumstein appears to regard the validity of this presumption as a foregone conclusion.\footnote{It is submitted that the Court's position in this regard is beyond dispute; the whole system of effective representative democracy, which the reapportionment cases sought to protect, would be undermined should dual voting become common practice. See note 62 supra, and accompanying text.}

The Court then looked to Williams v. Rhodes\footnote{393 U.S. 23, 30 (1968).} as a guide for review of the validity of laws challenged on equal protection grounds. That is, the Court determined "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Analysis of the classification in light of the first two features of this guide determined the standard to be applied. Since the individual interests affected were those of voting and interstate travel, the appropriate standard was the now familiar act to determine the necessity of imposing the classification in furtherance of a compelling state interest. This test was then applied with respect to the third feature of the Williams guide, an examination of the governmental interests at stake.

Prior to its inquiry into the nature of the state's interest, the Court briefly dealt with that precedent which, at first glance, stood in the way of any finding of invalidity with respect to durational residence requirements as a prerequisite to voting. Naturally, Tennessee relied heavily upon the Court's affirmation without opinion of the decision in Drueding v. Devlin.\footnote{405 U.S. at 335.} The Court's response was essentially an observation that legal circumstances had changed since that
decision. "[T]he Court is certainly clear now that a more exacting test is required for any statute that 'place[s] a condition on the exercise of the right to vote.'"\textsuperscript{104} Indeed, a line of decisions\textsuperscript{106} applying that stricter test during the years intervening between \textit{Drueding} and \textit{Blumstein} could hardly be ignored in favor of adhering to the reasoning of a case which was decided without the benefit of argument. As for the question of the continuing validity of \textit{Pope v. Williams},\textsuperscript{107} that case was distinguished on the ground that it merely approved the power of the state to require a showing of bona fide residence as a prerequisite to voting.\textsuperscript{107} Any dicta in \textit{Pope} concerning the authority of the state to go beyond the requirement of bona fide residence was considered to be no longer viable. Though the Court did not undertake to distinguish \textit{Hall v. Beales},\textsuperscript{108} that case posed no barrier to the ultimate decision in \textit{Blumstein}, for in \textit{Hall} the Court never reached the merits, but, instead, dismissed the case on procedural grounds.

The Court then proceeded to measure the substance of the state's asserted interest in imposing the requirement. The first cited interest was the familiar one of preserving the purity of the ballot, \textit{i.e.}, the prevention of colonization or dual voting. As mentioned earlier, the interest of a state in ensuring that only residents elect public officials must necessarily be considered essential to the efficient operation of both the state and federal systems.\textsuperscript{109} The shortcoming of the state's argument for validity was the lack of proximity between the concededly compelling interest and the classification itself. From one point of view, the imposition of a durational residence requirement indiscriminately swept recently-arrived bona fide residents into the same class with "colonizers," and hence, the overbreadth of the law placed an absolute bar on the innocent newcomer's exercise of a fundamental right. From another point of view the existence of even a rational relationship between the fact of residence for less than one year and any disposition to perpetuate a voting fraud was doubtful in light of Tennessee's practice of accepting a potential registrant's oath with respect to his qualification to vote as sufficient evidence to allow the affiant to register. In any case, if the state had chosen to protect its interest with greater vigor by investigating the fact of bona fide residence in each instance of registration, the imposition of the one-year waiting period would certainly have added nothing to the assurance of lack of fraud, assurance which could be had only by individual investigation of each registrant. Finally, the state's assertion that the imposition of the requirement was justified for the sake of administrative convenience was vulnerable to the argument that the fact of bona fide residence could be determined in another, if not also a better, way. Indeed, Tennessee had provided that registration cease thirty days immediately

\begin{footnotes}
\footnote{\textsuperscript{104} 405 U.S. at 337, quoting Bullock v. Carter, 405 U.S. 134 (1972), which held the imposition of excessive filing fees for placement on the ballot to be violative of the equal protection clause.}
\footnote{\textsuperscript{105} See, e.g., Cipriano v. City of Houma, 395 U.S. 701 (1969).}
\footnote{\textsuperscript{106} See note 55 supra, and accompanying text.}
\footnote{\textsuperscript{107} 405 U.S. at 337 n.7. It is interesting to note that Mr. Justice Marshall had earlier circumvented the holding in \textit{Pope} by concluding that the decision could not be construed to approve the application of durational residence requirements to voting in presidential elections. Hall v. Beales, 396 U.S. 45, 53 n.1 (1971) (Marshall, J., dissenting).}
\footnote{\textsuperscript{108} 396 U.S. 45 (1971). \textit{Hall} is discussed in the text accompanying note 75 supra.}
\footnote{\textsuperscript{109} See note 100 supra.}
\end{footnotes}
prior to election for the sake of compiling voter lists (thereby providing a sufficient period for insuring purity of the ballot) and, more importantly, had prescribed a test of bona fide residence elsewhere. Thus, while the state asserted an apparently compelling state interest, the classification in question was simply not necessary to promote that interest.

The second interest asserted by the state was that of ensuring that only "knowledgeable voters" would exercise the franchise. Of course, if the goal of the requirement was to guarantee a oneness of political disposition or a consistently provincial outlook, this constituted an impermissible state goal. If, on the other hand, the state's goal was one of insuring a general familiarity with local issues and an understanding of the points of view of candidates and incumbent public officials on the state and local level, this suggested the degree to which a state may deny to the voter who is ignorant of these facts a voice in his government. Putting aside that question, the Court concluded that, in any case, the tenuous relationship between residence for one year and the knowledgeability of the voter could not sustain the imposition of such a limitation on the franchise. The imposition of a requirement which treaded upon fundamental rights was simply not necessary to achieve such a goal.

In view of the inability of the state to demonstrate the necessity of imposing a durational residence requirement in furtherance of at least one admittedly compelling state interest, that of insuring purity of the ballot, the limitation on the franchise was held to contravene the fourteenth amendment. After Dunn v. Blumstein, the applicability of the reasoning in Shapiro to durational residence requirements which bar newcomers from the polls can no longer be doubted.

As is apparently the custom in most jurisdictions, Tennessee defines residence in terms of domicile: a present intention to stay indefinitely in one place. Brown v. Hows, 163 Tenn. 178, 42 S.W.2d 210 (1931).

"[I]t is impossible to view durational residence requirements as necessary to achieve that state interest [of stopping fraud]." 405 U.S. at 345 (emphasis added).

Such a concession on the part of the state placed the classification directly within the proscription of Carrington v. Rash. See note 64 supra, and accompanying text.

The dissenting opinion of Chief Justice Burger drew an analogy to the limiting of the right to vote to persons 18 years of age and older. He dismissed the challenge to durational residence requirements by stating: "In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote." 405 U.S. at 363 (Burger, C.J., dissenting). In essence, this argument is that since persons under age are denied the vote, there is no reason to allow new residents of a state to vote simply because of the protected right to interstate travel. This approach fails first because of the recently adopted twenty-sixth amendment which forbids denial of the right to vote to persons over 18 on account of age. The provision took the form of a constitutional amendment in order to avoid the problem of drawing lines by the courts, the problem with which the Chief Justice is so concerned. Denial of the vote to persons under 18 is no longer an equal protection question; it is now part of the Constitution. Secondly, even assuming that the twenty-sixth amendment had never been passed, it is certainly a unique approach in the history of equal protection to argue that some discrimination justifies all discrimination. Thirdly, discrimination based on recent exercise of the right to travel interstate is, under Shapiro, a violation of equal protection per se. The denial of the right to vote is only the particular form of discrimination involved in this durational residence requirement. Unless one wishes to assert that the "right" to receive welfare is fundamental for purposes of equal protection, it is clear that the penalty placed on the exercise of the right to interstate travel does not also have to abridge a fundamental right. In contrast to the usual attitude of the Chief Justice to prior decisions of the Court (e.g., Pope v. Williams), it is apparent that he may doubt the continuing validity of the decision in Shapiro.
Voter Fraud and the Registration Period. The basis of the opinion in Blumstein is that a state may effectively insulate itself from voter fraud without relying upon the blunderbuss of durational residence requirements—limitations which restrict the right of travel and, in this instance, the right to vote as well. Those avenues open to the state to thwart attempts to cross state lines to invade the polls are numerous. Apart from the administration of an oath of bona fide residence as prerequisite to registration, investigation of each resident to discover other indicia of bona fide residence, the imposition of criminal penalties for colonization, and the cross-checking of lists of new registrants with their former place of residence, the state could simply require the surrender of voter registration certificates issued by former jurisdictions in which the registrant resided as prerequisite to admission to the polls. It is important to note that Blumstein does not foreclose the requirement of registration nor the imposition of a cutoff point for registration so that the state will be afforded a chance to employ any one, or even all of the previously enumerated methods of protecting the purity of the ballot. Indeed, this feature of the case poses the most formidable question suggested by the majority opinion.

Does not the imposition of a cutoff period prior to the election penalize interstate movement within that period and bar the exercise of a fundamental right with respect to persons who enter a new state as bona fide residents during that period? Without regard to the term chosen as a waiting period, does not the requirement of residence within a state for even a comparatively short time contravene the equal protection clause? Blumstein would seem to indicate otherwise, for the imposition of a thirty-day cutoff with respect to registration of voters was not set aside by the Court.1 Yet, if the imposition of a one-year durational residence requirement has barred an estimated five million otherwise qualified voters from the polls,16 does it not follow, assuming a constant flow of persons in interstate travel, that the imposition of what is, in effect, a thirty-day residence requirement would preclude an estimated four-hundred thousand otherwise qualified voters from exercising the franchise following their recent displacement into another state? At least two related arguments may be advanced to support the position that a thirty-day registration cutoff does not offend the concept of equal protection of the laws.

One argument is that the closing of registration a month prior to election does not discriminate on the basis of recent arrival within a state because the closing of registration would apply indiscriminately to both newcomers and to long-time residents who, for unimportant reasons, fail to register prior to thirty days before an election.17 The obvious fallacy in this argument is that

118 "It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much." 405 U.S. at 348.
119 Comment, supra note 61, at 331.
117 This argument is suggested by the Court's analogy to the "different constitutional question . . . presented" by a situation in which "an interstate migrant loses his driver's license because the new State has a higher age requirement" than the old. 405 U.S. at 342 n.12. But cannot the driver's license case be distinguished from the voter registration case? In the former, all persons below the age requirement, both newcomers and old residents, are completely foreclosed from exercising a given privilege, while in the latter case, old residents have at least an opportunity to fulfill any requirement prerequisite to the exercise of the franchise.
newcomers are completely foreclosed from the exercise of the franchise whereas residents for more than thirty days have had at least an opportunity to register to vote. Furthermore, even assuming that the right of interstate travel is not penalized, the fundamental right to vote is itself restricted such that the thirty-day requirement might be regarded as presumptively unconstitutional.

A less vulnerable argument in defense of the closing of registration prior to election is that since the state has an admittedly compelling state interest in ensuring that only bona fide residents vote, the state must be given an opportunity to do that which is necessary to check voting fraud, e.g., compile and cross-check voting lists. Thirty days should provide a reasonable opportunity to investigate fraudulent registration and, therefore, the thirty-day buffer is itself necessary to promote the state's overriding interest in purity of the ballot. Furthermore, it is useless to speculate with regard to whether thirty-one-day or thirty-five-day requirements might be vulnerable to constitutional attack, for the period of time available to the state is a question of fact which may vary, though not considerably, from state to state. In this sense, then, registration cutoffs become analogous to age requirements in that some line, even though somewhat arbitrary, must be drawn in order to promote a compelling governmental interest. So long as the line drawn speaks well of legislative attempts to compromise individual freedoms with administrative necessities this new "reasonable/compelling interest test" is satisfied. Naturally, as technological advance speeds up administrative procedure, the range of permissible limitation will tighten.

The upshot of the Court's reasoning with regard to durational residence requirements and voting is that while a one-year requirement is impermissible because its imposition is not necessary to further the admitted compelling interest in purity of the ballot, a thirty-day period in which to check voter fraud is necessary and, therefore, may override the individual interests in interstate travel and, more importantly, the freedom to exercise the franchise. Perhaps subsequent cases will lead to further application of the reasonable/compelling interest principle which the Court appears to apply. Nevertheless, Blumstein does indicate that durational residence requirements may be vulnerable in any number of other cases in which they are properly viewed as penalties which restrict the right to travel across state lines. When this fact is recognized, at least a presumption of invalidity must follow.

III. Divorce

So loose, indeed, and so confusing, is our State marriage and divorce legislation becoming, that it might be well to ask whether the cause of morality would not be promoted if, by constitutional amendment, the whole subject were placed in control of the general government; so that, at least, one uniform system could be applied . . .

119 J. Schoeller, Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations § 1464, at 1721 (6th ed. 1921). "Citizens of this Union, traveling readily from one State to another, find facilities for divorce and re-marriage always at hand; for sham divorce and sham re-marriage, perhaps, but for divorce and re-marriage sufficient
In the more than eighty years since this passage was written, concern with the morality of divorce has decreased, but the problems inherent in the control of marital status by more than fifty separate jurisdictions have become even more complicated. This increase in confusion may be attributed primarily to two factors. There is now virtually no social stigma attached to divorce per se, and this society is much more mobile than that of three-quarters of a century ago. As a result of the increasing amount of interstate divorce litigation, traditional theory has suffered exhaustive examination and modification in order to satisfy the due process and full faith and credit clauses of the Constitution. A thorough analysis of these constitutional provisions as they relate to divorce is beyond the scope of this Comment, but an outline of the current state of the law should be helpful as framework for later discussion.

The Supreme Court has recognized that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." Domicile is usually defined as residence supported by physical presence and no intention to acquire another. For most purposes, a divorce action is treated as one in rem because of the fictional marital res, and jurisdiction over the res can be obtained only by obtaining jurisdiction over at least one spouse. Since a state has an interest in the marital status of those living within the state, the requirement of domicile, see supra, notes 9-11 supra, and accompanying text.

120 The opinion first appeared in an edition more than thirty years earlier. Id. at n.39.
121 U.S. CONST. amend. XIV, § 1.
122 Id. art. IV, § 1. See also 28 U.S.C. § 1738 (1970), which provides that the acts, records, and judicial proceedings of any state are entitled to the same "full faith and credit" in the courts of any other state as they would have in the courts of the rendering state.
123 For an excellent discussion of the constitutionality of domicile as the basis for divorce jurisdiction, see Note, "Domicile as a Constitutional Requirement for Divorce Jurisdiction," 44 IOWA L. REV. 765 (1959). In general, a decree of divorce is entitled to full faith and credit (at least as to marital status) if the rendering state was the domicile of one of the parties; due process is satisfied if at least one spouse is domiciled in the rendering state; and the finding of domicile in an ex parte proceeding may be attacked by a non-consenting spouse as well as by another state having some justifiable interest in the marriage relationship. Id. at 776.
125 See notes 9-11 supra, and accompanying text.
126 "The place of residence of the parties determines the jurisdiction of the court. If the parties live in different states each state has jurisdiction over the rest [sic] and each state may dissolve the relation as far as the party within its jurisdiction is concerned." F. KEEZER, TREATISE ON THE LAW OF MARRIAGE AND DIVORCE 314-15 (2d ed. 1923) (citing cases). See also H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS § 127 (4th ed. 1964); Cook, Is Haddock v. Haddock Overruled?, 18 IND. L.J. 165 (1943). Regulation of marital status has been regarded as one of the powers reserved to the states by the tenth amendment. See Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I).
127 In Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I), the Court stated:

Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of great importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state
domicile as the basis for divorce jurisdiction has developed.\textsuperscript{128}

The question with which we are concerned involves the determination of the requisite domicile.\textsuperscript{129} Virtually all of the states employ a durational residency requirement,\textsuperscript{130} which each particular legislature has determined to be the length of residency required to show that a person is, for purposes of divorce, probably a bona fide resident of that state.\textsuperscript{131} This durational residency requirement serves the same purpose as one for voting or state college tuition. Persons living in the state for less than the statutory period face an irrebuttable presumption that they are not bona fide residents, regardless of actual status.\textsuperscript{132} Whether residency requirements for divorce are regarded as jurisdictional or merely as an irrebuttable presumption, the fact is that they operate to deny access to the courts to persons who may be bona fide residents (and, therefore, domiciled in the jurisdiction) but have not lived in the jurisdiction for the statutory period.

The constitutionality of durational residence requirements has been challenged in two recent cases. In \textit{Wymelenberg v. Syman}\textsuperscript{133} a three-judge federal court invalidated a Wisconsin statute which provided that before a divorce action could be commenced one of the parties had to be a "bona fide resident of this state for at least 2 years . . . ."\textsuperscript{134} The court relied on \textit{Shapiro v. Thompson}\textsuperscript{135} and \textit{Boddie v. Connecticut}\textsuperscript{136} in declaring the durational residence requirement unconstitutionally impermissible.

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\textsuperscript{128} See note 123 supra, and accompanying text.

\textsuperscript{129} Apparently, Hawaii and Arkansas are the only two states which do not require that at least one of the parties to a divorce reside in the state. See notes 124 supra, 147 infra. Although the lack of requirement of domicile may lead to problems of full faith and credit and due process (see note 123 supra), such a policy is within the power of the states. It may be that the burden placed on the exercise of the right to interstate travel by the requirement of domicile per se is constitutionally impermissible. See notes 12-31 supra, and accompanying text.

\textsuperscript{130} See, e.g., MINN. STAT. ANN. § 518.07 (1969); OKLA. STAT. ANN. § 1272 (Supp. 1971); TEX. FAM. CODE ANN. tit. 1, § 3.21 (1971).

\textsuperscript{133} As the ecclesiastical courts which, in England, originally had jurisdiction of divorce cases, were never established in this country, the only jurisdiction which any court in this country has is founded upon special statutory and constitutional provisions. Such jurisdiction is not conferred from statutes giving general jurisdiction in civil matters.

F. KEEZER, supra note 126, at 312 (citing cases).

In \textit{Ruge v. Ruge}, 95 Wash. 51, 165 P. 1063 (1917), the court stated:

While inherently the matter of granting a divorce involves the judicial process, historically and theoretically the power to grant a divorce is purely legislative. Consequently, there is no inherent jurisdiction in the common-law courts to grant a divorce absolutely severing and canceling the marital bonds; but they have only such power with respect to granting absolute divorces as the legislative department in the particular jurisdiction sees fit to expressly confer upon them, or such as are necessarily implied from those expressly given them.

165 P. at 1064-65.


\textsuperscript{135} 328 F. Supp. 1353 (E.D. Wis. 1971).

\textsuperscript{136} WIS. STAT. § 247.05(3) (Supp. 1971).

\textsuperscript{137} 139 U.S. 371 (1971). In \textit{Boddie} the Court held that the due process clause of the fourteenth amendment prohibited a state from denying an indigent access to its courts to seek divorce solely because he was unable to pay the court costs. See note 139 infra.
quirement unconstitutional under the equal protection and due process clauses, respectively, of the fourteenth amendment. The court found that "Wisconsin by legislation has granted access to its divorce courts to 'bona fide residents' who have lived in the state for at least two years but has denied similar access to 'bona fide residents' . . . who have not yet lived in the state for that length of time." As a result, the court held that the statute violated due process because, under Boddie, a state may not "pre-empt the right to dissolve the marriage relationship without affording all citizens access to the means it has prescribed for doing so" in the absence of "a countervailing state interest of overriding significance . . . ." The statute was also held to violate the equal protection clause because "a substantial number of Wisconsin residents who possess grounds for divorce . . . remain barred from the courts simply 'because they have recently moved into the jurisdiction.' 

The state asserted four interests which could justify the two-year residence requirement. The first was to deter those with marital problems from entering the state, a purpose which the court immediately dismissed as impermissible under Shapiro. The second was to maintain marital stability, but the court, again citing Shapiro, regarded this theory as irrational in that residents of the state for more than two years could get a divorce even if they had been married but a day, while new residents who might have been married fifty years could not. The state's third alleged interest was to assure that at least one of the parties was domiciled in the jurisdiction. This contention was unacceptable under Shapiro because "'[f]ar less drastic means' of determining domicile are available" than what would amount to an irrebuttable evidentiary presumption. The last asserted state interest was to protect the state's reputation by avoiding a "divorce mill" image. In response, the court emphasized that Wisconsin would not be precluded from a determination of domicile before taking jurisdiction, but only that a durational residence requirement could not be conclusive on that issue. Thus, the state was held to have no interest sufficient to satisfy either the compelling interest standard of the equal protection test or the overriding significance test set out in Boddie. Perhaps the most significant aspect of this decision is that the court interpreted Boddie to stand for the proposition that access to courts is a fundamental right for purposes of either equal protection or due process.

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137 328 F. Supp. at 1354-55.
138 401 U.S. at 383.
139 Id. at 377. The Court held that the state had no interest which would justify deprivation of access to the courts: "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." Id. at 374.
140 328 F. Supp. at 1355, citing Shapiro, 394 U.S. at 634. The court gave alternate grounds for a violation of equal protection:
In the instant case, alternatively, the fundamental right of 'access to the divorce court,' Boddie, supra, is being penalized by a two year bar upon new residents, or the fundamental right to 'travel,' Shapiro, supra, is being penalized by the denial to new residents of access to the divorce courts.
Id. at 1356 n.6.
141 Id. at 1355.
142 Id.
143 Id.
144 Id. at 1355-56.
145 See notes 134-40 supra, and accompanying text. This characterization of access to
The decision in Whitehead v. Whitehead was rendered by the Supreme Court of Hawaii with the decisions in Shapiro, Boddie, and Wymelenberg before it; nevertheless, the court managed to uphold Hawaii's durational residence requirement by either dismissing or distinguishing those cases. The court stated that the residence requirement was reasonable for purposes of the traditional equal protection because of "the possibility of perjury if the finding on that issue [domicile] is made dependent upon the testimony of an interested party." The court then proceeded to assert that since the exclusion of persons contemplating divorce was not the specific purpose of the statute, and "the [residence] requirement [does not operate] in any appreciable number of cases to deter persons from moving into other states to establish their homes," the statute also survived Shapiro.

In avoiding Boddie and Wymelenberg, the court was a bit more inventive, distinguishing those cases on the basis that the Hawaii statute is a substantive provision which must be satisfied before a divorce may be granted, whereas the costs in Boddie and the residence requirement in Wymelenberg dealt merely with access to and jurisdiction of courts. The theory behind this distinction is that the Hawaii requirement only prevents the court from granting a decree, not from hearing a case. Thus, residents for less than one year are not denied access to state courts; they merely cannot obtain any relief. Of course, the Supreme Court of Hawaii is entitled to interpret state law as it sees fit, and its determination that the one-year residence required for the granting of a divorce is substantive is its concern only. However, the court
has completely missed the point of _Boddie_—that due process requires access to the courts for all citizens in order to obtain the relief which the state has determined only its courts can give. If a decree cannot be granted, the relief sought by plaintiffs in divorce suits is no more obtainable that if the court cannot hear the suit initially. The violation of due process in _Boddie_ was the deprivation of the only means of obtaining relief, which in that case was at the level of access to the courts; the assertion that somehow due process is not violated when such deprivation consists of the denial of a decree instead of the initial denial of access to the courts is a hollow one.

The _Wymelenberg_ opinion appears to be the better case in terms of its recognition of the thrust of cases such as _Shapiro_ and _Boddie—if the effect of a state policy is to deprive any of its citizens of either equal protection or due process, such a policy is constitutionally permissible only if the state has a compelling or overriding interest in retaining that particular policy. The holding in _Wymelenberg_ gains additional strength because the Supreme Court, in _Blumstein_, made clear that it meant what it said in _Shapiro_. If the recognized state interest in assuring the integrity of its elections is insufficient to support a durational residence requirement which deprives some bona fide residents of the right to vote and thus imposes a penalty on the right of interstate travel, it is difficult to imagine how a durational residence requirement for divorce, which has a similar effect, could be supported by any stronger state interest. _Blumstein_ involved the right to interstate travel and the right to vote in a state election, which, for purposes of equal protection at least, were considered fundamental. The inability to obtain a divorce undoubtedly would deter a party seeking one from moving to another state; thus, durational residence requirements penalize the exercise of the right to interstate travel. Although there is no "right" to divorce, _Boddie_ at least stands for the proposition that once a state makes divorce available, it may not restrict the relief provided by a dissolution of a "fundamental human relationship" to only a portion of its citizens unless such a restriction is supported by a state interest of "overriding significance." The effect of a durational residence requirement is to deny relief to some citizens of the state, and therefore, for purposes of equal protection as well as due process, the limitation of this right, once the right is given, involves the deprivation of a fundamental right of citizens of that state. _Blumstein_ treated the right to vote in state elections as fundamental, though not constitutionally required, once the right is given to some citizens of the state; there is no apparent bar to the application of this reasoning to the right of relief by divorce, once that right is given to some citizens.

is not concerned with actual domicile, what possible justification is there for a residence requirement which gives some non-residents a cause of action but denies it to some persons domiciled within the state? How can Hawaii assert an interest in admitted non-residents sufficient to allow alteration of their marital status, while at the same time denying sufficient interest in its own bona fide citizens to give them a cause of action? Even if the court succeeded in avoiding _Boddie_ by characterizing the requirements as substantive, such a characterization is irrelevant under _Shapiro_, which involved such a substantive bar to receipt of welfare payments.

184 See notes 136-39 supra, and accompanying text.

185 See notes 94-118 supra, and accompanying text.

186 See notes 137-39 supra, and accompanying text. See also text accompanying and immediately following note 15A supra.

187 See notes 94-118 supra, and accompanying text.
IV. STATE-SUPPORTED HIGHER EDUCATION

Free public education is now taken for granted by most citizens. Generally, the availability of such education through the high school level is conditioned only upon physical presence within the boundaries of the school district; minors may attend school wherever they are living, regardless of the fact that their domicile technically is wherever their parents or guardian reside. Although the expenses of maintaining a public school system are normally borne only by residents of the school district, persons in the tax base evidently have been willing to pay for the education of a child whose only relationship to the district is that he happens to be present there when school starts. This generous attitude, however, has been generally confined to the first twelve years of public education. Commonly, a distinction is made between residents and non-residents regarding the tuition payable in order to attend state-supported colleges and universities: if higher education is not made available to residents at no charge, they will at least be required to pay less than non-residents. As a practical matter, states with higher quality colleges and universities, or those with other attractive natural features, such as mountains or beaches, have found that non-residents may consider attending college in such states desirable. Since students of college age are much more likely to leave home to go to school than are those under eighteen, the fear of some states that their educational systems will be hard-pressed to handle a flood of non-residents is well-founded. The question with which we are concerned, however, is whether a state may constitutionally charge non-residents higher tuition than residents, and, if so, whether the distinction may be made by the use of a durational residence requirement.

Before examining the problem as it relates to the right of interstate travel, it should be noted that, for purposes of equal protection, there has not been authoritatively established a right to education. Although several commentators and some courts have thought that the line of school desegregation cases beginning with Brown v. Board of Education158 established such a right, the better view is that those cases turned on discrimination based on race, never reaching the question of whether education per se is a fundamental right.159 There are

159 In Brown the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493. That this was merely dictum was made clear by the Court's holding: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws . . . ." Id. at 495. Subsequent per curiam decisions indicate that the Court was concerned with segregation of any public facilities and not particularly educational ones. See, e.g., New Orleans City Park Improvement Ass'n v. Derige, 358 U.S. 54 (1958) (parks); Mayor and City Council v. Dawson, 350 U.S. 877 (1955) (beaches). See also Lee v. Washington, 390 U.S. 333 (1968) (prison facilities); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom).
cases involving school financing which have recognized a right to education in dealing with discrimination based on the wealth of individual school districts, but these cases have not yet reached the Supreme Court.

Higher tuition charges for non-residents have traditionally been held constitutional as a reasonable means for a state to secure cost equalization, the rationale being that residents have already, to some extent, paid for the cost of higher education by paying taxes, whereas non-residents have made no such contribution. The courts have continued to sustain this practice even after *Shapiro*, generally avoiding that case by citing to the limiting footnote in the opinion. One recent such case is *Thompson v. Board of Regents*, in which the Nebraska Supreme Court upheld that state's durational residence requirement. Essentially, the court's reasoning was that since higher tuition for non-residents was not a penalty on the exercise of the right of interstate travel, the compelling interest test was not involved, and, therefore, the discrimination could be upheld as reasonable. As authority for the proposition that higher tuition for non-residents does not constitute a penalty on the exercise of the right to interstate travel, the court relied on the decision of a three-judge federal court in *Starns v. Malkerson*, which was affirmed without opinion by the United States Supreme Court. The district court in *Starns*, however, relied on a case from the California court of appeals, *Kirk v. Board of Regents*, in which a durational residence requirement was upheld as reasonable. It is clear, however, that *Shapiro* forbids discrimination in state services between citizens of the state based on tax contributions. These courts have missed the thrust of *Shapiro*—that a durational residence requirement per se discriminates between bona fide residents, and is thus a penalty on the exercise of the right to

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Although the status of the "right" to vote is similar to that of the "right" to vote in state elections prior to *Blumstein*, in the sense that education has been characterized as an essential attribute of democracy, citizenship, and the American way, recognition of education as a fundamental right would result in problems not encountered in the voting context. Voting involves only the question of who may vote a few times a year, and the procedures are relatively simple; i.e., the state has very few (if any) additional burdens as a result of *Blumstein*. Education, however, would involve many complex questions were it characterized as fundamental for purposes of equal protection. For example, would the state's duty extend only through the first twelve grades? What would be required regarding quality? Would the right extend to retarded children? Who would determine whether the state was adequately fulfilling its duty? What does "adequate" mean? Although such problems should be considered irrelevant if education is found to be a fundamental right, undoubtedly the effect of such a characterization would play a large part in determining the extent of the "right."


163 394 U.S. at 638 n.21. The text of that footnote is quoted in the text accompanying note 175 infra.

164 397 Neb. 252, 188 N.W.2d 840 (1971).


166 401 U.S. 985 (1971).


168 394 U.S. at 632-33.
interstate travel which can be justified only by a compelling state interest. Obviously, higher tuition for persons who may be bona fide residents constitutes a penalty; surely, no state would assert that it could tax new residents more heavily to achieve cost equalization, but this is the effect of higher tuition for residents who have not satisfied a durational residence requirement.

Cost equalization, then, will not supply a durational residence requirement; Shapiro clearly forbids it. Again, however, it should be noted that the prohibition of Shapiro is directed at discrimination between residents, not discrimination between residents and non-residents. Obviously, however the distinction is made, non-residents will be deterred from entering a state to go to school by higher tuition charges. This penalty may be justifiable. The argument that a state's duties extend only to its citizens and that cost equalization is, therefore, permissible gains credence when used to justify discrimination against persons who are not its citizens and do not intend to become citizens. Similarly, arguments based on overcrowding of colleges and inability to provide quality education might show compelling interests in making the resident/non-resident distinction. It is inconceivable, however, that these interests would be any more compelling than fiscal integrity or purity of the ballot box in support of a durational residence requirement. Thus, the exercise of the right to interstate travel, as recognized in Shapiro and Blumstein, may not be penalized by charging persons who may in fact be bona fide residents higher tuition only because a durational residence requirement has not been met. It would be relatively easy for states to make the resident/non-resident distinction in this context. Since unemancipated minors are generally presumed to retain the domicile of their parents, a state could possibly require some objective evidence of emancipation (e.g., marriage) before granting resident status. In any event, the irrebuttable presumption of non-residence embodied in a durational residence requirement cannot be justified in this context any more than in any other context.

169 For example, it has been estimated that Colorado would lose $20 million, California $17 million, and Texas $8 million if non-resident tuition charges were abolished. See Hawkins, Should Out-of-Staters Pay More?, Dallas Morning News, Apr. 22, 1972, § D, at 2, cols. 3-5. The costs of education, however, would remain the same, necessitating higher taxes for citizens in order to keep the system operating.

170 The discriminatory effect is compounded when a state imposes special residence requirements on students. For example, the Nebraska statute involved in Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971), provided that no residence could be established by a person in attendance at a state college or university, regardless of satisfaction of the normal 4 months durational residence requirement. NEB. REV. STAT. § 85-502 (1943). After the lower court decision in Thompson, the statute was revised to eliminate this provision, but the durational residence requirement was lengthened to one year. 188 N.W.2d at 845-46. Prior to revision, this statute was clearly unconstitutional under Carrington v. Rash, 380 U.S. 89 (1965). See notes 64-70 supra, and accompanying text.

171 This emancipation criterion would be only logical in this situation, and would appear to be a reasonable method of distinguishing residents from non-residents by objective evidence which, under Blumstein, the Court would be willing to allow. Factors which would be relevant are, for example, whether the student is employed, whether he is paying his own expenses, where he lives (i.e., dormitory, apartment, renting a house, or buying a house), and whether he remains in the state while school is discontinued for the summer and holidays or returns to his parents' home. Similarly, an unemancipated minor whose parents have moved into the state should be entitled to show that both he and his parents are residents of the state.
V. Conclusion

The decision in *Blumstein* removed any doubt that discrimination based on the recent exercise of the right to interstate travel is sufficient to invoke the new equal protection test. Although the case also involved the right of a citizen to vote in state elections—which the court considered a fundamental right for purposes of equal protection—Justice Marshall stated that "whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements." The Court emphasized that the constitutionality of a requirement that voters be bona fide residents of the state was not in issue, but noted that an "appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny." Thus, state interests insufficient to support a durational residence requirement may yet be sufficient to support some discrimination between bona fide residents and non-residents, such as allowing only bona fide residents to vote in state elections. In *Shapiro*, the court noted that, since a state has a valid interest in preserving its fiscal integrity, it may legitimately attempt to limit expenditures, although it "may not accomplish such a purpose by invidious distinctions between classes of its citizens." Presumably, then, a state's fiscal integrity could be a compelling interest for purposes of distinguishing between citizens and non-citizens, i.e., residents and non-residents; if so, a state can constitutionally deny welfare benefits and lower tuition rates to non-residents. The denial of divorce to non-residents could likewise be justified by the expense of maintaining a judicial system; not only would decrees granted non-residents probably be denied full faith and credit, but states with relatively liberal grounds for divorce would find their courts inundated with suits by non-residents. In all probability, discrimination between residents and non-residents may be justified by compelling interests in all of the areas under discussion.

It appears, however, that virtually any durational residency requirement is not a constitutionally permissible means of distinguishing residents from non-residents for purposes of determining who may enjoy state "rights," because such a requirement penalizes newly arrived bona fide residents for the exercise of the right to interstate travel. Post-*Shapiro* decisions upholding durational residence requirements have generally avoided that case by relying on a footnote to the opinion, in which the Court stated: "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, hunt or fish, and so forth. Such requirements 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." *Blumstein* made clear that the term penalties is not to be defined technically: "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.\textsuperscript{176} Thus, the penalty involved is the denial of the benefits of resident status to persons who may, in fact, be bona fide residents. Such discrimination itself constitutes a penalty, and any durational residence requirement therefore imposes a penalty which can be justified only by a compelling state interest. Blumstein also indicated that there is probably no state interest compelling enough to justify the imposition of a durational residence requirement: "[T]here are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference."\textsuperscript{177} If neither fiscal integrity nor purity of the ballot box are sufficiently compelling, it is difficult to conceive of any state interest which would be so compelling. As the court indicated in Blumstein, there are other reasonable ways to distinguish residents from non-residents; for example, requiring a declaration of domiciliary intent supported by some objective evidence. Criminal sanctions are available in order to discourage fraud.\textsuperscript{178}

In each of the areas discussed in this Comment, it is apparent that a state could have a compelling interest in treating residents and non-residents differently. It is also apparent, however, that no durational residence requirement can be used to separate residents from non-residents because the conclusive presumption of non-residence resulting from such a requirement operates to deprive some bona fide residents of the benefits of state citizenship enjoyed by other residents. In the voting context, Blumstein indicates that a state may close its registration books to all residents a reasonable length of time before an election in order to complete the administrative process involved in setting up an election. This test, as applied to welfare and college tuition, would apparently mean that the question of bona fide residence must be determined within the period designated by the state as that required for administrative tasks to be completed regarding the application of any resident. Since divorce normally does not involve any administrative procedures, it is doubtful that any such waiting period would be permissible—a determination of residence could easily be, and normally is, made in the divorce proceeding itself.

The effect of the abolition of durational residence requirements would be to prevent a state from arbitrarily determining who will be accorded the status of a resident. In the overview, if a state is actually interested in distinguishing residents from non-residents, there should be no objection to allowing recently arrived residents to show that they intend to make the state their home. In the case of voting, such a showing could be as simple as producing evidence of cancelled registration in the prior jurisdiction in order to register in the new

\textsuperscript{176} 405 U.S. at 342.
\textsuperscript{177} Id. at 343.
\textsuperscript{178} Since Tennessee normally required only an oath before registration, the Court reasoned that a person intent on committing fraud would not be prevented from doing so by having to swear that he had fulfilled the residence requirement. Id. at 346. Logically, prevention of fraud could be more efficiently accomplished by requiring some objective evidence of domiciliary intent, which makes a durational residence requirement unnecessary. If qualification is determined only by oath, the only persons deterred from committing fraud by a durational residence requirement are those who would not perjure themselves in any event.
domicile; in the other areas, evidence such as acquisition of housing or a job would likewise be easy to produce. Certainly, such a system would be fairer, as well as more effective in preventing fraud, than the indiscriminate sweep of a durational residence requirement.