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ARTICLES

CLASSIFICATIONS THAT DISADVANTAGE NEWCOMERS AND THE PROBLEM OF EQUALITY

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I. INTRODUCTION

For those concerned with the substantial fiscal problems of government, we have a solution. The solution is — Newcomers. Newcomers are those who will become part of our community in the future but who are not here yet. Like unidentified holders of a contingent remainder, newcomers are not yet around to vote, to peddle influence, or to protect their turf. Since newcomers are not here to complain, now is the time to shift burdens onto their shoulders. Make them pay a larger share of taxes. Assign to them a smaller share of government largesse. Thanks to disarray in American policy and law, sometimes this can happen.

In 1988, when Stephanie Nordlinger purchased a new home in the Baldwin Hills neighborhood of Los Angeles, her property tax bill was almost five times that of her long-established neighbors in similar homes.[1] In 1992, when Deshawn Green moved from Louisiana to California and applied for Aid to Families with Dependent Children (AFDC) benefits, the monthly benefit she received was less than one-third of the amount that

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1. *See* Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

long-term residents of California were receiving in the AFDC program.[2] In 1993, when Governor Pete Wilson of California faced a budget crisis, he proposed a constitutional amendment to eliminate citizenship for those born in the United States to parents who are illegal immigrants, thus making those children ineligible for state welfare benefits.[3] When the federal government in the 1980s was unwilling to impose taxes at a rate sufficient to pay for the level of services it was providing, it borrowed and spent three trillion dollars[4] that will have to be repaid by future generations. Not surprisingly, members of these future generation did not get to vote on those budgets.

What all of these situations have in common is that government is unwilling to ask current members of the community to make any sacrifices but is quite willing to shift burdens onto future newcomers. This is not a new practice, but lately there seems to be a greater willingness to make use of it. This article examines one part of this issue: the extent to which the Constitution permits states to discriminate against newcomers. Once a person moves to a new state and becomes a resident of that state, should that person not be considered a full-fledged resident of that state, entitled to all the same rights and benefits the state accords to all the other residents who arrived there earlier? Or is it permissible for the state to save some rights and benefits for more established residents? Is it permissible for the state to classify on the basis of length of residence within the state? Are all state residents equal or are some more equal than others?[5]

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2. *See* Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993).

3. *See* Robert Reinhold, *A Welcome for Immigrants Turns To Resentment*, N.Y. TIMES, Aug. 25, 1993, at A1.

4. Robert D. Hershey, Jr., *The Burden of Debt—A Special Report. Why Economists Fear the Deficit*, N.Y. TIMES, May 26, 1992, at D1; Robert Pear, *Growing U.S. Debt Is Limiting Options For Clinton*, N.Y. TIMES, Jan. 3, 1993, at 1.

5. This article is concerned with state discrimination between newer and older state residents. It does *not* address the related, but separate, topic of state discrimination between residents and nonresidents. Discrimination of that type does not ordinarily give rise to equal protection problems. *See, e.g.*, Martinez v. Bynum, 461 U.S. 321, 328 (1983)("A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment."). Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 388-89 (1978)("Appellants urge, too, that distinctions drawn between residents and nonresi-

The Supreme Court's response to these questions has been inconsistent and inadequate. Shifting majorities on the Court have produced a changing standard of review and a set of precedents that appear fact specific. The Court's opinions establish no clear conceptual explanation for the results of the cases. This article critically examines what the Court has done in this area.[6]

II. THE FACTUAL SETTINGS

In several ways states classify based of length of residence within the state. The most common example is the law that creates a durational residency requirement. These laws establish waiting periods before a new resident is eligible for government benefits or is able to participate fully in the state's political and legal processes. For example, states have established one-year residence requirements to qualify for welfare benefits,[7]

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dents are not permissible under the Equal Protection Clause of the Fourteenth Amendment when used to allocate access to recreational hunting."); Vlandis v. Kline, 412 U.S. 441, 452-53 (1973)("We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis."); *But see* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985)(A state purpose to favor domestic industry at the expense of foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent . . . . [T]he Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'").

Although distinctions between residents and non-residents rarely create equal protection problems, they are more likely to create constitutional problems under the Privileges and Immunities Clause of Art. IV, or the Commerce Clause. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 339 (1979) (holding Oklahoma statute forbidding the transportation of natural minnows for sale out-of-state violated the Commerce Clause.) Hicklin v. Orbeck, 437 U.S. 518 (1978) (holding Alaska statute creating hiring preference for state residents in the construction of the Alaska Pipeline violated the Privileges and Immunities Clause of Article IV).

6. For earlier treatments of areas related to the topics covered in this article, see generally William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMMENTARY 9 (1984); Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987 (1975); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979); Jonathon D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

7. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

free medical care,[8] reduced tuition rates to state universities,[9] voting,[10] and divorce.[11] States have also established longer residence requirements that must be satisfied before a new resident is eligible to run for governor,[12] or state senator.[13] These durational residence requirements are temporary. After the relevant time period has expired, the recently arrived resident will then be treated like all other, longer-term residents. However, in the meantime, state law classifies residents into two groups based solely on the length of their residency.

Some state laws have attempted to create permanent classifications based on residence. These laws select a fixed date and then, either provide a benefit only to those who were residents of the state on that date, or alternatively, use that date as a baseline from which to measure comparatively higher or lower benefits. For example, New Mexico created a property tax exemption for veterans who were state residents as of a particular past date.[14] New York granted a hiring preference to veterans who had been state residents on the date they entered military service.[15] Alaska attempted to distribute some of the revenues from its oil bonanza to residents on the basis of the number of years since statehood that they had been residents of Alaska.[16] These statutes created permanent classifications among residents, once again, based solely on the length of their residence. Other statutes may have the effect of preferring older residents over newcomers, even though the statute does not explicitly classify on the basis of residence. A property tax scheme that artificially freezes property tax assessments at acquisition value in an inflationary real estate market will always favor established residents over newcomers.[17]

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8. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).
9. *See* Vlandis v. Kline, 412 U.S. 441 (1973).
10. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).
11. *See* Sosna v. Iowa, 419 U.S. 393 (1975).
12. *See* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973).
13. *See* Sununu v. Stark, 383 F. Supp. 1287 (D.N.H 1974), *aff'd*, 420 U.S. 958 (1975).
14. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).
15. *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986).
16. *See* Zobel v. Williams, 457 U.S. 55 (1982).
17. *See* Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

The Supreme Court has reviewed preferences of this type for established residents over newcomers and has invalidated a substantial percentage of them. But the Court has never gone so far as to insist that states treat all residents, older and newer, the same. Sometimes, according to the Court's opinions, a state has sufficient reason to treat newcomers differently. The next part of this article examines the framework the Court has established to analyze these issues.

III. THE COURT'S CONCEPTUAL FRAMEWORK

A. *Background: Equal Protection Analysis and the Right to Travel*

State preferences for established residents, over newer, are usually treated as a problem of equal protection. However, the appropriate standard of review for classifications that distinguish between older and newer residents has not always been clear. The Court has sometimes applied the traditional rational basis test and asked whether the distinction between older and newer residents bears a rational relation to a legitimate state interest. On the other hand, because discrimination against newer residents may single out those who have recently exercised an implied fundamental right to interstate travel, the Court will sometimes apply strict scrutiny. It will then ask whether the classification is necessary to achieve a compelling state interest. In order to identify the appropriate level of review, we must first determine what is the fundamental right to travel.

The Supreme Court has consistently found that there is an implied fundamental right to interstate travel, although no clause in the Constitution expressly provides for it.[18] While

18. *See* Jones v. Helms, 452 U.S. 412 (1981); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S.(6 Wall.) 35 (1867). The Court has also found an implied fundamental right to travel outside the country. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958). The Supreme Court has not yet addressed the question of whether or not there is an implied fundamental right of intrastate travel, but at least one federal appellate court has recognized such a right. *See* Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990).

there is substantial agreement as to existence of such a right, there is substantial disagreement among the justices as to its source.[19] Perhaps the right to travel freely between the states is best explained as "fundamental to the concept of our Federal Union."[20] Without such a right to travel freely from one state to another, the United States of America would be reduced from a federal union to a loose confederation of states.[21]

The right to interstate travel includes, at least, a right of physical movement across state borders. Thus, a tax on railroad passengers leaving a state would be an infringement on the right to travel.[22] Presumably, also, any attempt by a state to set up border crossings at state lines or customs stations at which incoming persons would be stopped and searched would violate the right to travel. However, these examples of border crossings and customs stations are generally more hypothetical than real. By far, the more important aspect of the right to travel is the right "to migrate, resettle, find a new job, and start a new life" in a new state.[23] Freedom to cross state borders is not enough. What really matters is what happens once you have crossed state borders and decided to settle in a new state. If, after resettling and becoming a resident of a new state, I am still treated as less worthy than those who were there before me, then my right to travel has been burdened. The right to travel is thus more helpfully characterized as a right to interstate migration.[24]

Justice Brennan has argued that this right to interstate migration is closely connected to, if not indistinguishable from, the equality of citizenship that is required by the Fourteenth Amendment. The first sentence of that Amendment states, "All persons . . . are citizens . . . of the State wherein they re-

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19. *E.g.*, *Zobel*, 457 U.S. 55 (O'Connor, J., concurring) (citing the Privileges and Immunities Clause of Article IV); Edwards, 314 U.S. 160 (Douglas, J., concurring) (citing the Privileges and Immunities Clause of the Fourteenth Amendment); *Crandall*, 73 U.S. (6 Wall.) 35 (citing the Commerce Clause).

20. *Guest*, 383 U.S. at 757.

21. *Zobel*, 457 U.S. 67 (Brennan, J., concurring).

22. *Crandall*, 73 U.S. (6 Wall.) 35.

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

24. *Memorial Hosp.*, 415 U.S. at 258 (citing Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (separate opinions of Brennan, White, and Marshall, JJ.)).

side."[25] As Brennan pointed out, this clause implicitly authorizes states to treat noncitizens differently from citizens.[26] However, it recognizes no degrees of citizenship based upon how long a person has been within the jurisdiction of the state. Significantly, "the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence."[27] Brennan's analysis suggests that, among bona fide residents, no distinctions whatsoever would be permitted. The majority of the Court has not adopted this extreme view. The next section examines how the Court began to establish a framework within which to evaluate claims of discrimination against newcomers.

B. *Round I: Durational Residence Requirements as Penalties on the Right to Travel*

In three early cases involving durational residence requirements, the Court sent the message that such requirements were unacceptable burdens on the right to travel and that they would readily trigger strict judicial scrutiny. In *Shapiro v. Thompson*,[28] *Dunn v. Blumstein*,[29] and *Memorial Hospital v. Maricopa County*,[30] the Court applied strict scrutiny and invalidated one-year residence requirements for welfare, voting, and free medical care respectively. These three cases seemed to make clear that a classification would be subjected to strict scrutiny because of its negative impact on the right to travel in three situations: (1)if the *purpose* of the law was to inhibit interstate travel; (2)if the effect of the law was to *deter* interstate travel; or (3)if the law served as a *penalty* on the exercise of the right to interstate travel.

The first of these grounds for heightened review was a legislative *purpose* to inhibit interstate travel. The attorneys defending the durational residence requirement in *Shapiro* sought to

25. U.S. CONST. amend. XIV, § 1.
26. Zobel v. Williams, 457 U.S. 55, 69 (1982) (Brennan, J., concurring).
27. *Id.*
28. 394 U.S. 618 (1969).
29. 405 U.S. 330 (1972).
30. 415 U.S. 250 (1974).

defend the statute on the grounds that it would prevent indigents from moving into the state in order to qualify for generous welfare benefits.[31] The Court's response was that a law enacted with such a purpose was "patently unconstitutional."[32] It is never permissible if a law serves no other state's interest than to attempt to "chill the assertion of constitutional rights."[33] A law designed to prevent out-of-staters from entering into a state, is an attempt to chill the assertion of constitutional rights. Unless the state can identify some other legitimate purpose the law serves, a law adopted with such a purpose is unconstitutional. After *Shapiro*, it would be unusual for a government attorney to attempt to defend a law in court on the ground that its purpose is to inhibit migration, but even today state legislators occasionally leave incriminating evidence that excluding indigents is precisely the purpose of a new law.[34]

The second ground for heightened scrutiny identified by the Court's early decisions was the possibility of *deterrence* of the right to travel.[35] An indigent currently receiving welfare assistance in State A would likely be deterred from moving to State B if the price of that move was the loss of basic subsistence for the period of one year. Such deterrence of the fundamental right to travel would trigger strict scrutiny. However, it would be a rare case in which actual deterrence of a specific individual could be demonstrated. To the extent a residence requirement is successful in deterring the resident of State A from moving to State B, it is also likely to deter lawsuits challenging the waiting period. The deterred resident of State A, still residing in State A, is not likely to bring a lawsuit challenging the residence requirement of State B. Given the improbability of finding an actual plaintiff who would claim that she had been deterred from moving, the Court did not insist on actual deterrence in order to trigger strict scrutiny, just the likelihood of

31. *Shapiro*, 394 U.S. at 628-29.

32. *Id.* at 631 (citing United States v. Jackson, 390 U.S. 570, 581 (1968)).

33. *Id.*

34. *See, e.g.*, Mitchell v. Steffen, 487 N.W.2d 896, 900, 902 (Minn. Ct. App. 1992), *aff'd*, 504 N.W.2d 198 (Minn. 1993).

35. *Memorial Hosp.*, 415 U.S. at 256-59; *Dunn*, 405 U.S. at 339-40; *Shapiro*, 394 U.S. at 629.

deterrence.[36] These difficulties make the deterrence argument a seldom used tactic.

The third, the most important, and the most frequent ground for heightened scrutiny in this area is that a law *penalizes* those who have recently exercised their right to travel from one state to another.[37] The *Shapiro-Dunn-Memorial Hospital* line of cases made no attempt to define the parameters of this penalty analysis, but did identify two specific kinds of impermissible penalties on recent arrivals. The first was the denial, even though temporary, of basic necessities of life, such as welfare or medical care.[38] The second was the denial of a fundamental right such as voting.[39]

The decisions in *Shapiro*, *Dunn*, and *Memorial Hospital* left open substantial questions concerning the penalty analysis. Most importantly, the opinions did not make clear how much negative impact a state may attach to the recent exercise of the right to travel before that state action becomes a penalty. The Court conceded that some waiting periods might not be penalties,[40] but did not explain "how to distinguish a waiting period which is a penalty from one which is not."[41] These three opinions did, however, leave the impression that durational residence requirements would be very difficult to defend under the Constitution.

C. *Round II: The Court Ignores Its Precedents: Durational Residence Requirements As Serving A Legitimate Purpose*

While the Court was strictly scrutinizing and invalidating durational residency requirements as penalties on the right to travel in *Shapiro*, *Dunn*, and *Memorial Hospital*, it was also deciding related cases with quite different results. Shortly after *Shapiro* and *Dunn*, but before *Memorial Hospital*, the Court

36. *Dunn*, 405 U.S. at 339-40.

37. *Memorial Hosp.*, 415 U.S. at 258-59; *Dunn*, 405 U.S. at 338; *Shapiro*, 394 U.S. at 634.

38. *Memorial Hosp.*, 415 U.S. at 259.

39. *Dunn*, 405 U.S. at 341-42.

40. *Shapiro*, 394 U.S. at 638 n.21.

41. *Memorial Hosp.*, 415 U.S. at 284 (Rehnquist, J., dissenting).

decided *Vlandis v. Kline*.[42] That case did not address a durational residence requirement but it did concern a closely related subject. In *Vlandis*, a Connecticut state law provided that an unmarried student who had been a nonresident for any part of the one-year period immediately prior to her application to the state university would retain that nonresident status for the entire period of her attendance at the university.[43] The rule thus did not purport to differentiate between different classes of residents. Its focus was on the distinction between residents and nonresidents. The rule made it difficult, however, to move from one status to the other. The Court invalidated the rule on the grounds that it created a permanent irrebuttable presumption of nonresidence that violated the due process clause.[44] The flaw in Connecticut's rule was that it provided "no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents."[45]

Today *Vlandis* is considered to be something of an oddity, with little precedential value. Its "irrebuttable presumption" reasoning was a curious mix of Due Process and Equal Protection elements,[46] and was widely criticized in the academic literature,[47] and later effectively rejected by the Court itself.[48]

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42. 412 U.S. 441 (1973).

43. *Id.* at 442. The statute was slightly more lenient to married students. In determining whether a married student, living with his spouse, was a resident, the statute looked to the student's residence at the time of the application, but did not consider the one-year period before the application. *Id.* at 442-43.

44. *Id.* at 452-53.

45. *Id.* at 453.

46. *See* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 MICH. L. REV. 800 (1974).

47. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1622 (2d ed. 1988) ("[M]ost commentators have regarded the Court's invocation of the irrebuttable presumption doctrine as analytically confused and ultimately unhelpful.") (citing Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975)). Professor Tribe is one of the few defenders of the irrebuttable presumption doctrine. *See id.* at 1618-25.

48. *See* Weinberger v. Salfi, 422 U.S. 749 (1975). In *Salfi*, Justice Rehnquist's opinion for the majority did not explicitly overrule *Vlandis*, Stanley v. Illinois, 405 U.S. 645 (1972), or Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), all of which had used the irrebuttable presumption reasoning. *Salfi*, 422 U.S. at 771-72. However, little was left of them after *Salfi*. Justice Rehnquist held that those cases were not controlling and purported to distinguish them. He feared that the extension of the holdings in those cases "would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been

What remains of *Vlandis* is its explicit factual holding—that students should be given a chance to demonstrate that they had become bona fide residents after they had applied to the university—and its implicit approval of the one-year durational residence requirement for lower in-state university tuition.

The validity of one-year durational residence requirements was not before the Court in *Vlandis*. Once the Court had set aside the rule that froze residence status as of the time of application, the only requirement left was a simple current residence requirement, which the plaintiffs were able to satisfy.[49] However, not wanting to leave well enough alone, the Court suggested that its decision in *Vlandis* should not be "construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement which can be met while in student status."[50]

The Court then referred approvingly to its earlier summary affirmance of *Starns v. Malkerson*.[51] That case involved a one-year durational residence requirement for eligibility for lower in-state tuition at the University of Minnesota. With its quick, approving reference to *Starns*, the Court left unanswered the effect of *Shapiro* and *Dunn* on durational residence requirements for lower university tuition. It is at least plausible to argue that Minnesota's one-year waiting period served to penalize those who had recently exercised their right to migrate to Minnesota. Certainly, recently arrived bona fide residents would not qualify for a benefit that was available to long-term residents. Perhaps the loss of a reduced tuition benefit is less significant than the loss of welfare benefits, and is therefore not a penalty. Perhaps a university education is less fundamental than the right to vote, and thus, once again, there is no penalty. These arguments may or may not be persuasive, but the Court did not even address them.

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thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Salfi*, 422 U.S. at 772.

49. *Vlandis*, 412 U.S. at 445, 454.

50. *Id.* at 452.

51. 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

Instead, the *Vlandis* Court attempted to avoid the whole question of penalties by describing Minnesota's durational residence requirement as "merely one element which Minnesota required to demonstrate bona fide domicile."[52] That characterization of the Minnesota waiting period was misleading. Until a newcomer had lived in the state for one year, that person could not make the required evidentiary showing, no matter what other persuasive evidence of residence was produced. Thus, the Minnesota statute gave far more weight to the one-year residence requirement than the Court's comments suggest. Given the preclusive effect that the Minnesota statute assigned to one year of residence, Justices Marshall and Brennan were of the opinion that *Shapiro* and *Dunn* raised serious questions about its continuing validity.[53] However, since that issue was not before the Court in *Vlandis*, Marshall and Brennan declined to decide it.[54]

Around the same time the Court was deciding *Vlandis*, it also summarily affirmed two district court judgments that had rejected constitutional challenges to New Hampshire's seven-year durational residence requirements for governor and state senator respectively.[55] The reasoning of the district court in the first of these cases, *Chimento v. Stark*,[56] was confused. On the one hand, the court found that the seven-year requirement to run for governor did *not* penalize and was not an impediment to interstate travel, and was too far attenuated to constitute an infringement of that right.[57] Nevertheless, the court seems to have applied strict scrutiny to the seven-year waiting period.[58] Surprisingly, given the level of scrutiny, the waiting period survived. Presumably, but not obviously from the court's opinion, the waiting period was necessary to achieve the compelling interest of "maintaining a responsive and responsible government through the democratic process."[59]

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52. *Vlandis*, 412 U.S. at 453 n.9.
53. *Id.* at 455 (Marshall, J., concurring).
54. *Id.*
55. Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974) *aff'd*, 420 U.S. 958 (1975); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973).
56. 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973).
57. *Id.* at 1218.
58. *Id.* at 1214.
59. *Id.* at 1215.

Two years later, the Supreme Court similarly affirmed the district court's decision in *Sununu v. Stark*,[60] which upheld a seven-year residence requirement to run for state senator. The district court applied the compelling interest test.[61] It was not clear why. Two of the three judges on the panel were of the opinion that strict scrutiny was not the right test, but that if it were, the seven-year waiting period could not be said to be necessary to achieve a compelling interest.[62] The Court's summary affirmance of both *Sununu* and *Chimento* did nothing to explain what kind of adverse impact would provoke strict scrutiny nor what kind of necessity would satisfy that standard. Once again, the precedential effect of *Shapiro* and *Dunn* was not explained.

The Supreme Court was given a chance to clarify matters in 1975, in *Sosna v. Iowa*.[63] That case involved a one-year durational residence requirement on eligibility to bring a divorce action. The Court's opinion is remarkable. It never mentioned the Equal Protection Clause, the right to travel, the word "penalty", or what standard of review it was applying. The Court's holding was that the case "requires a different resolution of the constitutional issue"[64] than was the case in *Shapiro*, *Dunn*, and *Memorial Hospital*. One was left to surmise *why* the case required a different resolution. The court at one point suggested that the plaintiff in *Sosna* was different from the plaintiffs in *Shapiro*, *Dunn*, and *Memorial Hospital*, in that she was not "irretrievably foreclosed" from obtaining some part of what she sought.[65] That is, after one year, she could get her divorce. But the same could be said of the plaintiffs in the other cases. After one year, they would qualify for welfare benefits, be eligible to vote, or qualify for medical care. What was lost, permanently, was the receipt of those benefits for the first year. Likewise, Ms. Sosna permanently lost the ability to be legally divorced from her husband during her first year of residence. The

60. 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975).
61. *Id.* at 1290.
62. *Id.* at 1292 (Campbell and Gignoux, JJ., concurring).
63. 419 U.S. 393 (1975).
64. *Id.* at 409.
65. *Id.* at 406.

Court's attempt to identify a factual distinction was thus extremely weak.

After its decision in *Sosna*, the framework from which to measure the constitutional validity of durational residence requirements was anything but settled. The Court had sent contradictory signals concerning the amount of impact to the right to travel required to trigger strict scrutiny and on whether that test could be satisfied. Indeed, the Court had implicitly suggested that the issue need not be considered at all. The most one could say after *Sosna* was that one-year durational residence requirements are invalid when imposed for welfare, voting, and medical care, but valid when imposed for in-state tuition, high elective office, and divorce actions. The Court had given no guidance to explain the different conclusions and then, perhaps prudently given its conceptual disarray, retired from this area of the law for seven years.

D. *Round III: Fixed Date Residence Requirements and Rational Basis Review*

In 1982, the Court once again had a chance to clarify the validity of discrimination against new residents. In *Zobel v. Williams*,[66] the Court reviewed an Alaska statute that distributed a portion of Alaska's oil revenues to state residents based on the length of residence. Under the Alaska plan, each Alaska resident received one dividend unit for each year of residency since 1959, the first year of Alaska's statehood.[67] The distribution plan raised obvious questions under the *Shapiro-Dunn-Memorial Hospital* line of cases in that it preferred older residents over newer residents who had recently exercised their right to travel. Plausibly, the permanent denial of the right to receive the fullest share of benefits was as much a penalty on the right to travel as were the temporary waiting periods in the earlier cases. On the other hand, how could it be a *penalty* to award dividend shares, of whatever amount, to recent arrivals when no other state from which the arrivals might have departed offered any such dividends at all?

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66. 457 U.S. 55 (1982).
67. *Id.* at 57.

The Court declined to address these issues. Instead, the Court decided that, since the statutory scheme could not even pass the minimal rationality standard, it was unnecessary to "decide whether any enhanced scrutiny is called for."[68] This methodology is surprising in that the Court had to twist the traditional deferential rationality review into an unrecognizable form in order to find the Alaska statute irrational. Surely the Alaska legislature *might* have believed that the dividend classifications would further to some extent the purposes of: (1) creating financial incentives for individuals to establish and maintain residence in Alaska; (2) encouraging prudent management of the Permanent Fund; and (3) recognizing past contributions.[69] The fact that there may have been many better ways to achieve those purposes would not be relevant under traditional rational basis review. The classifications would be rationally related to conceivable state purposes and would be upheld.

The Court, however, applied a much more demanding test. With regard to the purpose of creating incentives for establishing and maintaining residence, the Court found that the purpose was not furthered by the dividend distribution scheme.[70] If Alaska wanted more people to establish and maintain residence in Alaska, then the *prospective* enactment of a dividend program would promote that goal. The *retrospective* award of twenty-one years of dividend credits for people who had already lived in Alaska for the past twenty-one years would be no incentive at all for recent arrivals to remain in Alaska or for out-of-staters to move to Alaska in the first place.[71] The selectively greater awards to older residents was a very underinclusive and ineffective way to promote residence in Alaska.

The Court also found that the dividend scheme did not further the purpose of furthering prudent management of the

68. *Id.* at 60-61.

69. These were the three purposes that the Alaska statute itself identified and which were accepted by the Alaska Supreme Court. *Id.* at 61. The Permanent Fund was established by an amendment to the Alaska Constitution as a fund into which the state must deposit at least 25% of its mineral income each year. *Id.* at 57.

70. *Id.* at 61-62.

71. *Id.* at 62.

Permanent Fund.[72] The State argued that if the fund were divided into equal shares, there would be pressure for short term, high risk investment of the fund that would lead to the rapacious development of natural resources.[73] Current residents would want to get as much money as possible out of the fund immediately, before the population of Alaska increased and the fund had to be divided up into many additional shares. Once again, however, the Court suggested that if Alaska wanted to promote a long-term perspective on the fund, it could do so *prospectively*, by beginning the dividend count from the year the statute was enacted.[74] In that manner, current residents would have a greater share of the fund than the anticipated future residents who would arrive during the next twenty years; thus current residents would not need to push for immediate distribution of the fund. But, according to the Court, *retrospective* application of the statute was not necessary to achieve this purpose. Awarding extra units to longtime residents but not to recent arrivals provided no additional protection against rapacious development that might occur because of concerns over future population increase.

The Court found that the state's third purpose, rewarding citizens for past contributions, was impermissible.[75] The Court did not explain *why* this purpose was impermissible, but cited *Shapiro* and *Vlandis* for authority to that effect.[76] The Court was concerned that the past contributions argument would be the first step down the slippery slope, "open[ing] the door to state apportionment of other rights, benefits, and services according to length of residency."[77]

The Court's decision in *Zobel* leaves a great deal to be desired. As a rational basis decision, it clearly departs from the traditional deference the Court normally accords legislative judgments. The Court closely scrutinized both the purposes of the law and the correlation between classification and purpose. This close scrutiny is inconsistent with the Court's earlier ratio-

72. *Id.*
73. *Id.* at 62-63.
74. *Id.* at 63.
75. *Id.*
76. *Id.*
77. *Id.* at 64.

nal basis precedents.[78] The Court's decision not to decide whether a heightened level of scrutiny was necessary may have been an attempt at judicial economy. But it leaves the underlying rationale of *Zobel* open to question. Two of the concurring opinions pointed out that the majority opinion cannot stand on its own. Justice O'Connor argued that, without reference to the right to travel, the majority could not explain why the reward for past contributions purpose was impermissible.[79] Justice Brennan argued that the constitutional problems with the Alaska distribution plan arose at least in part from the right to equal citizenship created by the Citizenship Clause of the Fourteenth Amendment and from the right to free interstate migration.[80] Neither Justices O'Connor nor Brennan would have decided the case on the rational basis standard alone.

Notwithstanding those criticisms, the Court continued to follow the rational basis path three years later in *Hooper v. Bernalillo County Assessor*.[81] That case involved a property tax exemption for veterans who had been New Mexico residents before May 8, 1976. The statute divided resident veterans into two groups—veterans who had resided in the state before May 8, 1976, and veterans who established residence after that date.[82] As in *Zobel*, the Court refused to address the question of whether this classification was a penalty on the right to travel.[83] Since the scheme could not pass even minimal scrutiny, there was no need to decide if heightened scrutiny was appropriate.

The State put forth two justifications for the classification. The first was encouraging Vietnam veterans to move to New Mexico.[84] The Court found that a statute enacted *after* the

78. *E.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' Flemming v. Nestor, 363 U.S. at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.").

79. *Zobel*, 457 U.S. at 72 (O'Connor, J., concurring).

80. *Id.* at 66, 69 (Brennan, J., concurring).

81. 472 U.S. 612 (1985).

82. *Hooper*, 472 U.S. at 616-17.

83. *Id.* at 618 ("As in *Zobel*, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.").

84. *Id.* at 619.

triggering date but given retroactive effect could not possibly influence conduct that occurred before the law was enacted.[85] A statute enacted in 1981 could not encourage veterans to move to New Mexico before 1976. The second purpose was to reward veterans for their military service.[86] This was clearly a permissible purpose. But the limitations of benefits to those who resided in New Mexico before May 8, 1976 were not rationally related to that justification.[87] The statute was impermissibly underinclusive in awarding the exemption only to a subclass within the group of veterans.[88] Ordinarily, underinclusiveness is not a concern under the rational basis standard.[89]

One year later, in *Attorney General v. Soto-Lopez*,[90] the Court made yet another inconclusive and confusing statement on the appropriate standard of review for classifications that disadvantage newcomers. The facts were similar to those in *Hooper*. This case involved a state law that created a preference in civil service employment for those who had been residents at the time they had entered military service.[91] Once again, the law divided resident veterans into two groups—those who had been state residents when they entered military service and those who became residents at a later date.[92] Although the Court decided that the statute violated the Constitution, no

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85. *Id.*

86. *Id.* at 620.

87. *Id.* at 620-21.

88. *See id.* at 621 ("The New Mexico statute, however, does not simply distinguish between resident veterans and non-veteran residents; it confers a benefit only on 'established' resident veterans . . . . [I]t is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a state bestows for national military service.").

89. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). The Court in *Williamson* stated:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definitions. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think . . . . [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Id.

90. 476 U.S. 898 (1986).

91. *Id.* at 900-01.

92. *Id.*

opinion was able to command the votes of a majority of the justices. Four justices thought that the classification should be subjected to strict scrutiny and that it failed this standard.[93] Two justices thought that strict scrutiny was unnecessary but that the statute did not even survive the rational basis test.[94] Taken together, the votes of these six justices were sufficient to invalidate the statute.

The plurality opinion of Justice Brennan first addressed whether the law operated to *penalize* those persons who had exercised their constitutional right of interstate migration.[95] If so, the State would have to demonstrate that its classification was necessary to achieve a compelling state interest. The plurality explained that "even temporary deprivations of very important benefits and rights can operate to penalize migration."[96] Applying *Zobel* and *Hooper*, the plurality found that it could be inferred that the creation of permanent distinctions among residents based on the length or timing of their residence was a penalty on migration.[97] In *Soto-Lopez* itself, the plurality indicated that the plaintiffs may have been permanently deprived of civil service employment, a benefit that was "significant" and "substantial."[98] Since the deprivation was "based only on the fact of nonresidence at a past point in time,"[99] it was a penalty on the right to migrate and therefore triggered strict scrutiny.

However, five justices in *Soto-Lopez*, a majority of the Court, ruled that the right to travel was *not* sufficiently implicated to require heightened scrutiny.[100] Two of those five, however, concurred in the judgment on the ground that, following *Zobel* and *Hooper*, the statute could not even satisfy rational basis review.[101] In dissent, Justice O'Connor severely criticized the

93. *Id.* at 899-912 (Justice Brennan announced the judgment of the Court in which Justices Marshall, Blackmun, and Powell joined.).

94. *Id.* at 912-16 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring).

95. *Id.* at 905-09.

96. Id. at 907.

97. *Id.* at 908.

98. *Id.* at 908-09.

99. *Id.* at 909.

100. *Id.* at 912-16 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring); *id.* at 918-25 (O'Connor, Rehnquist and Stevens, JJ., dissenting).

101. *Id.* at 912-16 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring).

plurality's "penalty" analysis. According to O'Connor, "it is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."[102] The veterans' preference was limited, as it did not directly restrict or burden the freedom to move to New York, did not permanently deprive anyone of the right to participate in a fundamental or significant activity, did not temporarily deprive newcomers of fundamental rights or essential government services, and did not require newcomers to accept an inferior status.[103] According to O'Connor, the plurality's penalty analysis was "ephemeral" and "unnecessary."[104] Therefore, heightened scrutiny was inappropriate.

Notwithstanding Justice O'Connor's criticisms, the plurality opinion found that the State's justifications for the resident veterans' preference were insufficient to satisfy heightened scrutiny. Although the purposes of encouraging and compensating veterans were legitimate,[105] the State could accomplish all of its purposes by granting bonus points to all veterans, not just veterans who had resided in New York when they entered the military.[106] Justice Brennan argued that under heightened scrutiny, a state when choosing among alternatives must choose the course of action that involves a lesser burden on constitutionally protected rights, such as the right to travel.[107]

After *Zobel*, *Hooper*, and *Soto-Lopez*, one could safely conclude that fixed date residence requirements which created permanent advantages for long-term residents were unconstitutional. It would be difficult, however, to generalize beyond the specific facts of these cases. One could not state clearly *why* the

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102. *Id.* at 921 (O'Connor, J., dissenting).
103. *Id.* at 921-22 (O'Connor, J., dissenting).
104. *Id.* at 923 (O'Connor, J., dissenting).
105. The State identified four purposes served by the preference for resident veterans:

> (1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service.

Id. at 909.
106. *Id.*
107. *Id.* at 909-10.

requirements were unconstitutional nor the appropriate standard of review. One could not confidently predict how the Court would respond in future cases where the nature or form of the discrimination against newcomers was any different. The Court's inability to achieve a clear consensus in this area continues to create uncertainty.[108]

The next part of this Article will examine the policy considerations which lead states to adopt laws that disadvantage newcomers. The Article will then consider difficulties with the Court's analysis.

IV. SUBSTANTIVE JUSTIFICATIONS FOR DISADVANTAGING NEWCOMERS

Why do they do it? That is, why are state legislatures so willing to enact laws that disadvantage newcomers? One obvious response would be that newcomers are outsiders and it is human nature not to be particularly concerned with the well-being of those who do not belong to your own group.[109] This section will examine the justifications which have been proffered by the states themselves in defense of their preferential laws. While some justifications are specifically related to a particular law, others are more general and recur quite regularly. These recurring justifications include: (1) that the state may reward residents for past contributions; (2) that the state may require satisfactory evidence that those who claim to be residents are residents in fact; (3) that the community may demand that newcomers learn to share community values before they are treated as a part of the community; (4) that the state should not have to carry more than its fair share of the burden of caring for those in need; (5) that the state must preserve its fiscal integrity; and (6) that administrative necessity requires a certain amount of time for the state to process information about newcomers. This section examines each of these justifications in turn.

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108. *See infra* part VI.

109. *See* McCoy, *supra* note 6, at 1019 ("Common experience indicates that something in the basic nature of man, some chauvinistic instinct, causes him to band together into groups of 'insiders,' which then cultivate a sense of security by fervently and irrationally discriminating against 'outsiders'.").

A. *Past Contributions Rationale*

When state laws deprive newcomers of state benefits that are provided to established residents, the state sometimes attempts to justify the distinction on the basis of past contributions to the community.[110] Recent arrivals should not reap the rewards of a system to which they have not contributed; established residents should be able to reap that which they have created through their contributions. Notwithstanding a certain plausibility and popular attraction to this argument, the Court as a general matter has consistently rejected this "past contributions" rationale.

In *Shapiro v. Thompson*,[111] the Court dealt with a narrower version of this claim. The state argued that past *tax* contributions justified the limitation of welfare benefits to established residents.[112] The Court rejected this claim, explaining:

> [This] reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.[113]

Why is it that the past tax contributions rationale is prohibited and how far does the prohibition go? The rationale has been defended on the ground that it simply attempts "to achieve partial cost equalization between those who have and those who have not recently contributed to the state's economy through employment, tax payments and expenditures therein."[114] This past contributions/cost equalization reasoning has been acceptable to the Court in explaining, in part at least, why states may preserve their resources for their own residents rather

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110. *E.g.*, Zobel v. Williams, 457 U.S. 55, 61 (1983); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969).

111. 394 U.S. 618 (1969).

112. *Id.* at 633.

113. *Id.* at 632-33.

114. Starns v. Malkerson, 326 F. Supp. 234, 240 (D. Minn. 1970) *aff'd*, 401 U.S. 985 (1971).

than for nonresidents.[115] Thus, in *Vlandis*, the Court implicitly approved this reasoning as the justification for a tuition differential between resident students and nonresident students.[116]

However, as applied to distinctions between different classes of residents, the past contributions rationale proves too much. If government services can be apportioned on the basis of past tax contributions, then why not apportion them on the basis of present tax contributions? The state could then build special parks, schools, and libraries to be used only by those affluent taxpayers who have paid above-average tax bills.[117] This might not be objectionable in private market transactions where it is assumed that benefits and services will be made available

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115. *See, e.g.*, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). The Court stated:

> Appellees argue that the State constitutionally should be able to charge nonresidents, who are not subject to the State's general taxing power, more than it charges its residents, who are subject to that power and who already have contributed to the programs that make elk hunting possible . . . . We need not commit ourselves to our particular method of computing cost to the State of maintaining an environment in which elk can survive in order to find the state's efforts rational, and not invidious, and therefore not violative of the Equal Protection Clause . . . . The resident obviously assists in the production and maintenance of big-game populations through taxes.

Id. at 389.

116. The State proffers three reasons to justify that permanent irrebuttable presumption. The first is that the State has a valid interest in equalizing the cost of public higher education between Connecticut residents and nonresidents . . . . The State's objective of cost equalization between bona fide residents and nonresidents may well be legitimate . . . ." *Vlandis*, 412 U.S. at 448.

117. Although it is unlikely that a state or a local government would itself create resources that would be available only to wealthy taxpayers, Robert Reich has argued that, indirectly, this very kind of discrimination based on ability to pay is already taking place. Reich states:

> In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members . . . . [S]everal cities have begun authorizing property owners in certain affluent districts to assess a surtax on local residents and businesses for amenities unavailable to other urban residents, services like extra garbage collections, street cleaning and security . . . . The new community of people with like incomes and with the power to tax and enforce the law is thus becoming a separate city within the city.

Robert Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6, at 16.

only to those who pay for them. In the marketplace, there is supposed to be a correlation between one's wealth and one's ability to consume. However, when the state provides benefits and services, the recipient does not have to "buy" the product. Government welfare programs distribute benefits on the basis of need, not ability to pay. A "past tax contribution" rationale, if taken to its logical conclusion, would turn the state into just another purveyor of goods and services in a marketplace where each taxpayer could expect to get what he or she paid for.

Such a system would, of course, be inconsistent with a theory of government that has created an array of social welfare programs for the aged, the disabled, the sick, the unemployed, and the indigent parent with dependent children. More to the point, it is a system in which newcomers could never achieve parity with long-established residents. If a thirty-year resident gets "credit" for thirty years of tax payments, a newcomer will always be thirty years behind the oldtimers in terms of contributions to the community. But the state ought not be allowed to make this kind of calculation in allocating benefits. This reasoning fails to take into account that today's newcomers in State A were probably yesterday's established residents in State B. Their past tax contributions went to State B. To prefer longtime residents over these newcomers who have just moved to State A is to create undeserved rewards simply for staying in one place.

While the court's discussion in *Shapiro* had been limited to past tax contributions, in *Zobel v. Williams*,[118] the Court broadened its rejection of the past contributions rationale. The Alaska dividend distribution scheme in *Zobel* had been defended in broader terms. In arguing that a distribution mechanism based on length of residence was equitable, the state had urged the Alaska Supreme Court to recognize "'contributions of various kinds, both tangible and intangible,' which residents have made during their years of state residency."[119] The Alaska court had explained that these "contributions," in addition to the payment of taxes, included contributions to the cultural and political life of the state, enduring the rigors of a harsh climate,

118. 457 U.S. 55 (1982).

119. Williams v. Zobel, 619 P.2d 448, 458 (Alaska 1980), *rev'd*, 457 U.S. 55 (1982).

and putting up with a high cost of living.[120] The Alaska court found that it was legitimate to recognize these contributions in distributing the oil fund.[121]

The United States Supreme Court disagreed, finding that rewarding citizens for past contributions, even broadly defined, was not a legitimate state purpose.[122] The majority opinion did not explain why this purpose was impermissible. The closest it came to an explanation was a "slippery slope" argument. If the dividend scheme were permissible, why couldn't Alaska apportion other rights, benefits, and services according to length of residence?[123]

Justices Brennan and O'Connor, in concurring opinions, helped fill in the explanatory void. Justice Brennan identified two basic flaws with the "past contributions" rationale. First, state laws that reward residents for past residence have the effect of creating a seniority system.[124] Once the system is in operation, a long-term resident who moves to another state would forfeit her accrued seniority and would have to begin again, building seniority in the new state. Other states might adopt similar "seniority" systems. The result, according to Brennan, would be that "the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive."[125]

Brennan identified another basic flaw in the "past contributions" argument. He conceded the possibility that "to a limited extent, recognition and reward of past public service have independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service."[126] But that type of reward for past *actual* service is unrelated to a reward simply for having been a resident of the State in the past.[127] The dividend distribution statute counted

120. *Id.*
121. *Id.* at 459.
122. *Zobel*, 457 U.S. at 63.
123. *Id.* at 64.
124. *Id.* at 68 (Brennan, J., concurring).
125. *Id.* (Brennan, J., concurring).
126. *Id.* at 71 (Brennan, J., concurring).
127. *Id.* (Brennan, J., concurring).

years of residence, not levels of past contributions. Yet there is no necessary or strong correlation between the two. Those who had been children or paupers for the past twenty-one years would have contributed very little to the state's economy, yet would receive the full benefit.[128] Those who had arrived more recently and helped to build the Alaska pipeline, which helped to generate the oil revenue, would be treated as having made insignificant contributions.[129]

Justice O'Connor, concurring, offered another explanation for the illegitimacy of the past contributions rationale in *Zobel*. According to O'Connor, "[a] desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational."[130] O'Connor suggested two examples of permissible recognition of past contributions. The state might legitimately award dividends on the basis of the number of years of prior community service or create a retroactive tax credit for those who had built alternative fuel sources or established recycling plans.[131] In support of her position, O'Connor might also have cited the numerous federal and state preferences for veterans, which the courts have always upheld and which are justified as rewards for past contributions.[132] The problem with the dividend allocation in *Zobel*, according to O'Connor, was not that it rewarded past contributions, but that it attempted to achieve this objective by disadvantaging those who had more recently exercised their right to travel. Not all state rewards for past contributions are impermissible, according to O'Connor, just those that treat new residents less favorably than longer-term residents who are the only ones who have "past contributions" within the state to reward.[133]

For a majority of the Court, the purpose of rewarding past contributions of state residents is impermissible. No majority opinion of the Court has explained adequately the reason why

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128. *Id.* at 77 (O'Connor, J., concurring).
129. *Id.* at 63 n.10.
130. *Id.* at 72 (O'Connor, J., concurring).
131. *Id.* at 73 n.1 (O'Connor, J., concurring).
132. Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).
133. *Zobel*, 457 U.S. at 72-73 (O'Connor, J., concurring).

past contributions may not be rewarded, and the assertion that no past contributions can be rewarded is an exaggerated and ultimately false claim. But a preference for established residents over newcomers, under the guise of rewarding past contributions, is impermissible.

B. *Evidentiary Justification: Durational Residence Requirements and Bona Fide Residence*

Quite apart from their relation to past actions of persons, durational residence requirements have been defended on the ground that the waiting period they establish provides evidence of bona fide residence in the present.[134] There is a certain logic to this argument. To qualify for the status of resident, a person must ordinarily have an intent to remain indefinitely.[135] The fact that I have been living in a state for one year, for example, is at least some evidence that I intend to stay there indefinitely. The implicit underpinning of this argument is that the durational residence requirement is not important in itself, but it is helpful in determining that which *is* important—bona fide residence. This section first examines what a bona fide residence requirement is and then considers the relation between bona fide residence requirements and durational residence requirements.

1. Bona Fide Residence

The term "resident" is defined by state law and it needs to be distinguished from its relatives, the terms state "citizen" and state "domiciliary." First, with regard to a possible distinction between "citizen" and "resident," there appears to have been a time when the Court was of the opinion that there was such a distinction and that the two terms were not interchangeable.[136] However, in recent years, the Court has made clear,

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134. *See infra* part IV.B.2.

135. *See infra* text accompanying notes 144-48.

136. *E.g.*, LaTourette v. McMaster, 248 U.S. 465, 469-70 (1919) ("'No discrimination is made on account of citizenship. It rests alone on residence in the state and experience in the business.' And the court further said: 'Citizenship and residence are not the same thing, nor does one include the other'."); *see also*, Hicklin v. Orbeck, 437

at least with regard to the Privileges and Immunities Clause, that the terms "citizen" and "resident" are essentially interchangeable.[137] More generally, it appears that "the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with simple residence."[138] Therefore, the concept of state citizenship will not be addressed in this article.

The relationship between the concepts of resident and domicile is more difficult to explicate. The terms are not used consistently. According to the Restatement (Second) of Conflict of Laws, the more important of these terms is domicile.[139] Domicile is a status that a person can attain by physical presence at a place and the intent to make his home there, for the time at least.[140] The required intent is sometimes spoken of as an intent to remain indefinitely or of having no present intention of moving elsewhere,[141] although the Restatement suggests that these latter two expressions "should not be taken literally."[142] According to the Restatement, no person can have more than one domicile at a time.[143]

By contrast to the relatively tight definition of "domicile" envisioned by the Restatement, the concept of "residence" is considered to be ambiguous. It may mean something more than domicile, such as a domicile where a person actually dwells,[144]

U.S. 518, 524 n.8 (1978).

137. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 216 (1984); *Hicklin*, 437 U.S. at 524 n.8 (1978); Austin v. New Hampshire, 420 U.S. 656, 663 n.8 (1975).

138. Zobel v. Williams, 457 U.S. 55, 70 n.2 (1982) (Brennan, J., concurring) (citing *Slaughter-House Cases*, 83 U.S. 36, 79 (1873) ("'A citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State'.").

139. The Restatement (Second) of Conflict of Laws chooses to spell the word "domicil." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 11 (1971). The more common spelling is "domicile". WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS, § 4 n.1 (2d ed. 1993). According to the Restatement, the "personal law" that follows a person "in his travels and determines certain of his most important interests" is the law of the person's domicile. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. c (1971). Conversely, "residence" is explained only as it relates to domicile. *Id.* at cmt. k.

140. *Id.* at § 16 (Requisite of Physical Presence); *id.* at § 18 (Requisite Intention).

141. *Id.* at § 18 cmt. c.

142. *Id.*

143. *Id.* at § 11(2).

144. *Id.* at § 11 cmt. k.

or it may mean something less than domicile, such as "where the individual has an abode or where he has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicile."[145]

Notwithstanding the Restatement's preference for the use of the term "domicile," the term "residence" is more frequently used in statutes.[146] Although the meaning of the term residence may vary depending on the context in which it is used, the term most frequently is used to mean physical presence along with an intent to remain indefinitely.[147] This definition of residence is the effective equivalent of the Restatement's definition of domicile. When the United States Supreme Court speaks of "residence" in constitutional law cases, it is virtually always speaking of residence as domicile, that is, physical presence with an intent to remain indefinitely.[148] Thus, this article will use the term residence in that sense.

The concept of "residence" is used by state legislatures to limit to residents the allocation of state rights and benefits. The Supreme Court has never found any constitutional problem with this sort of residence requirement. According to the Court, "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by its residents."[149] The ability to limit rights and benefits to residents "may be necessary to preserve the basic conception of a political community."[150] If states could not recognize legitimate differences between their own residents and the residents of other states, then the fifty sovereign states would be reduced to administrative departments of the federal government. Residence requirements are not considered to implicate or penalize the right to travel because all one has to do to take advantage of benefits in another state is to move there

145. *Id.*

146. RICHMAN & REYNOLDS, *supra* note 139, at § 6[b] ("'Residence' is a term favored by legislators seeking to establish rights and duties on the basis of a person's link with a location.").

147. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 352 n.22 (1972).

148. *See, e.g.*, Martinez v. Bynum, 461 U.S. 321, 330-31 (1983).

149. *Id.* at 328.

150. *Dunn*, 405 U.S. at 344.

and become a resident.[151] However, there are interpretive problems with the concept of residence. The intent portion of the residence definition creates two kinds of problems. The first concerns the sufficiency of evidence of intent and the second is the problem of multiple intents.

The sufficiency of evidence problem is that of determining a person's inner state of mind. How can anyone know if another person intends to remain indefinitely? Ultimately, any quest for certainty in this area is futile. No one can ever be certain what another is thinking or what is another's motivation. That said, there is often objective evidence of inner intent. The Restatement of Conflicts explains that "[a] person's intentions must be determined in the light of his declarations and other conduct and of the circumstances in which he finds himself."[152] Specifically, relevant objective evidence of a person's intent to remain or not remain would include where a person works, where she lives, where she registers her car, where she obtains a driver's license, where she owns property, and to what state she pays taxes.[153] When the place of a person's residence becomes an issue, all of these factors would be taken into account to determine presence or absence of intent to remain. But these factors are not conclusive. A person who sought to take advantage of residence benefits but did not have the requisite intent could manufacture just this kind of evidence in order to bolster a claim of residence.[154]

It is in part because of this difficulty in determining a person's intent to remain that states have made an additional factor relevant to this determination—how long a person has

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151. *Martinez*, 461 U.S. at 328-29.

152. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 cmt. d (1971).

153. *See, e.g., Dunn*, 405 U.S. at 348.

154. *See, e.g.*, Vlandis V. Kline, 412 U.S. 441, 466 (1973) (Rehnquist, J., dissenting). Justice Rehnquist stated that:

> it would not satisfy Connecticut's goals in seeking to subsidize the education of Connecticut's young people in Connecticut state universities to impose a classic residency test as of the moment of entry into the system of higher education. All students, and not only those with substantial Connecticut connections, will be present in Connecticut on this date, and those who have been astute enough to consult counsel will have obtained Connecticut drivers' licenses, registered their cars in Connecticut, and registered to vote in Connecticut.

Id.

been present in the state. On the one hand, it is quite clear that a newcomer can meet the test of residence immediately upon his arrival in a new state.[155] For example, a person who moves to Tennessee on any given day, and at that time intends to stay there indefinitely, is immediately a resident of Tennessee. But mere transients may have incentives to lie about their intent. Thus, the state may establish a requirement that a newcomer must have been present in the state for a specified period of time before the state really believes she intends to remain. This is the origin of the relation between residence requirements and durational requirements, and it will be evaluated in the next section.

The second problem in the determination of residence is the problem of multiple intents. A person may have the requisite intent to remain indefinitely but may also have other overlapping intents or motives. The issue arises when a person moves to a new state in order to qualify for a benefit or to obtain some special advantage. For example, someone might move to Connecticut to qualify for low tuition at the state university; another person might move to Iowa because the divorce laws are favorable. According to the Restatement, so long as a person is physically present within a state with an intention to make that place her home, then she has satisfied the requirement of domicile, and "it is immaterial what led the person to go there."[156] However, the fact that a move to a new state "was dictated by a desire to obtain some special advantage, as a divorce or the avoidance of taxes" is not entirely irrelevant.[157] A motive to move to another state solely to obtain a special advantage may indicate only a temporary change of place, rather than a bona fide intent to remain indefinitely in the new state. Although relevant, evidence of these motives is far from conclusive. No matter what one's motives in moving to a new state, one is a resident once physically present with an intent to remain indefinitely.

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155. *E.g.*, White v. Tennant, 31 W. Va 790, 8 S.E. 596 (1888) (Presence in a state for less than one day along with intent to make one's home there for an indefinite time sufficient to meet test of domicile.).

156. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 cmt. f (1971).

157. *Id.*

The issue of a person's motive for moving to a state becomes a constitutional concern when states attempt to deter or to penalize those who would immigrate with a particular motivation. In *Shapiro v. Thompson*,[158] the Supreme Court turned its attention to the class of persons who had chosen to move to a new state precisely because that state offered generous welfare benefits.[159] The state laws at issue treated such persons as "less deserving."[160] The court responded,

> But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular state in order to take advantage of its better educational facilities.[161]

The message of *Shapiro* appeared to be that moving to a state because of a desire to take advantage of state programs does not prevent one from becoming a resident, and may not be used as a reason to deny newcomers benefits made available to other, established residents.

Ironically, it is precisely with respect to "educational facilities" that the Court has most frequently disregarded the message of *Shapiro*. With regard to qualifying for lower, resident university tuition rates, the Court has consistently upheld state durational residence requirements that prevented newly arrived persons from proving their residence in the state.[162] In these cases, the fact that one had moved to a state to obtain a university education is considered at least temporarily to exclude the possibility of having an intent to remain there indefinitely.[163] Most out-of-state students at a state university

158. 394 U.S. 618 (1969).

159. *Id.* at 628-29.

160. *Id.* at 631-32.

161. *Id.* at 632.

162. *E.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

163. *Starns*, 326 F. Supp. at 240. The court in *Starns* stated:

> The regulation provides that an out-of-state student enrolled at the University is considered to be in Minnesota primarily for the purpose of attending school, and is presumed not to be in the State as a permanent

may have no intention of remaining after graduation. They are, therefore, not residents. But it is inconsistent with the Restatement of Conflicts and the Court's ruling in *Shapiro* to create a conclusive presumption that one who came to be a student cannot have an intent to remain indefinitely.

In *Martinez v Bynum*,[164] the Court applied similar reasoning to a statute that prevented certain elementary school students from proving their intent to remain indefinitely and thus qualify as residents for the purpose of attending public school. According to the statute, a child not living with his parents could qualify as a resident only if it was established "that his presence in the school district is not for the primary purpose of attending the public free schools."[165] The case may arguably be defended on the ground that it is a reasonable attempt to deal with the problem of children living apart from their parents when the residence of a child is ordinarily assumed to be that of the child's parent.[166]

But the Court's decision goes well beyond that because it approves the distinction between those who are present with the purpose of establishing a home (who qualify as residents), and others who are here with the purpose of attending school (who do not qualify as residents). The two purposes are not mutually exclusive, however. One could move into the school district to attend school *and* to establish a home. In *Martinez v. Byrum*,[167] Roberto Morales was a student who had moved to the McAllen Independent School District to live with his sister but not his parents when he was eight years old.[168] The evidence in the record, according to the majority, showed that Morales intended to remain in the school district only until he

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> resident . . . . We believe it is reasonable to presume that a person who has not resided within the State for a year is a nonresident student, and it is reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the State for one year.

Id.

164. 461 U.S. 321 (1983).

165. *Id.* at 323 n.2 (citing TEX. EDUC. CODE ANN. § 21.031(d) (West. Supp. 1982)).

166. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22(1) (1971) ("A minor has the same domicile as the parent with whom he lives.").

167. 461 U.S. 321 (1983).

168. *Id.* at 322.

completed his education (presumably ten years later).[169] The dissent argued that there was no evidence in the record concerning his intentions after the completion of school so that no inference concerning his intentions could be drawn.[170] Ordinarily, intentions to remain in the school district after completing school satisfy the intent portion of the residence test. However, the Court held that since Morales was living with his sister, who acted as a custodian instead of a guardian, he could not obtain tuition free assistance.[171] The statute disqualifying for assistance minors living apart from their parents or guardians was valid because "primary and secondary education, of course, is one of the most important functions of local government," and without certain residency requirements, the quality of education would suffer.[172] The case illustrates the Court's willingness, notwithstanding the contrary holding in *Shapiro*, to allow evidence of one's reasons for moving to a new state to negate the other evidence of intent to remain for a substantial period of time. In doing so, the Court permits discrimination against bona fide new residents, including small children.

2. Durational Residence Requirements as Evidence of Bona Fide Residence

Given the difficulties in proving the required intent to remain, it is not surprising that states have resorted to the use of durational residence requirements as evidence of bona fide residence. It is uncontroversial for a state to conclude that one has an intent to remain based on the fact that he or she has lived in the state for a one year period. The converse of this rule is far more controversial: one who has not lived in the state for a one year period *could not* have an intent to remain. This latter, evidentiary use of durational residence requirements creates logical and constitutional problems.

First, there is an obvious technical flaw in the argument that duration of residence is a determinative factor in finding the

169. *Id.* at 332 & n.15.
170. *Id.* at 336 & n.2 (Marshall, J., dissenting).
171. *Id.* at 323.
172. *Id.* at 329.

status of residence. It is logically impossible for a person to be a resident of a state for one year before that person can become a resident of that state.[173] No one could ever satisfy such a standard because it is backwards: the State must be willing to confer the status of "resident" upon a person before he or she can be a "resident" of the state for one year. Thus, the argument that durational residence requirements provide an administratively convenient means of determining residence must be interpreted more narrowly. The one-year durational residence requirement should mean merely that a new arrival must be "present" within the state for one year, not that he or she have any particular intent during that time.[174] To require a one year waiting period *plus* proof of intent during that time contradicts any claim that a person is using the waiting period as evidence of such as intent, which is not otherwise provable.

This was precisely the problem with the one-year durational residence requirement adopted by the University of Maine, which was successfully challenged in 1983.[175] As the University interpreted its rules, a student who lived in Maine for more than one year could not qualify as a resident for tuition purposes simply by proving a *present* intent to remain.[176] In order to qualify, he would have to prove that he had maintained such an intent for the entire year prior to his request for residency.[177] This interpretation of the residence requirement violated the Equal Protection Clause of the Fourteenth Amendment because it distinguished between residents based on whether they

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173. *See* Dunn v. Blumstein, 405 U.S. 330, 350 & n.20 (1972). The Court stated in *Dunn*:

> As a technical matter, it makes no sense to say that one who has been a resident for a fixed duration is presumed to be a resident. In order to meet the durational residence requirement, one must, by definition, first establish that he is a resident. A durational residence requirement is not simply a waiting period after arrival in the state; it is a waiting period after residence is established. Thus it is conceptually impossible to say that a durational residence requirement is an administratively useful device to determine residence.

Id. (emphasis in original).

174. *Id.* ("The State's argument must be that residence would be presumed from simple presence in the State or county for the fixed waiting period.") (emphasis in original).

175. Black v. Sullivan, 561 F. Supp. 1050 (D. Me. 1983).

176. *Id.* at 1068.

177. *Id.*

had resided in Maine for longer than a year.[178] The requirement transformed the permissible evidentiary use of physical presence in the state for one year into an unconstitutional distinction between new bona fide domiciliaries and older bona fide domiciliaries.[179]

Even if a state durational residence requirement avoids logical flaws by emphasizing physical presence of some duration rather than presence plus intent to remain, it is still subject to constitutional difficulties. The Supreme Court has invalidated the evidentiary use of durational residence requirements when it applies strict scrutiny.[180] Such a test is overbroad to accomplish its purposes. On one hand, the test refuses to count as residents, for tuition purposes, those who meet the statutory standard of physical presence and intent to remain if those persons have not resided in the state for a one-year period. On the other hand, it treats as a legal resident one who has been physically present in the state for more than one year, even if the necessary statutory intent is lacking. Although one's physical presence in the state for one year may not be entirely irrelevant, "conclusive presumptions" based on that factor are too crude and imprecise to survive strict scrutiny.[181]

However, when applying rational basis review, the Supreme Court has approved of the evidentiary use of a one year durational residence requirement. In *Vlandis v. Kline,*[182] the Court suggested that a reasonable durational residency requirement could be an appropriate element of a test for demonstrating bona fide residence.[183] The Court then noted that it summarily affirmed the decision in *Starks v. Malkerson*, in which a one year durational residence requirement for in-state tuition was

178. *Id.* at 1071.

179. *Id.* at 1070. As an example, the court said that although a one-year residence requirement could be used to establish bona fide domiciliary status, the school could not further require that the person be a bona fide domiciliary for a year prior to receiving aid. *Id.* at 1071. In that sense, once a person has become a new, one-year bona fide domiciliary, the Equal Protection Clause begins to protect them from disparate treatment.

180. Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

181. *Dunn*, 405 U.S. at 351-52.

182. 412 U.S. 441 (1973).

183. *Id.*

upheld.[184] Although, as indicated above, such a use of durational residence requirements is overinclusive and underinclusive, such a broad-brush classification is not considered unconstitutional under rational basis review.

Durational residence requirements are still used today. Most state universities continue to require a student's one year presence in the state before he or she can qualify for in-state tuition.[185] The one year waiting period appears to be the maximum that would be allowed in this context, but arguably even one year is too long if the state's concern is really the identification of a person's intent to remain. Still, the evidentiary use of one year durational residence requirements is constitutionally permissible, unless the Court is applying strict scrutiny.

C. *Communitarian Justification*

Laws that disadvantage newcomers in relation to established residents have been defended on the ground that it takes time for newcomers to share the traditions and values of the new community.[186] This defense derives from communitarian political theory, a theory that is often offered as an alternative to classical liberalism.[187] The two theories provide contrasting visions of the appropriate roles of the state, the community, and the individual.

Liberalism emphasizes individual rights, individual liberty, personal autonomy,[188] and duties to others that are derived by

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184. *Id.* at 452 & n.9 (citing Starks v. Malkerson, 326 F. Supp. 234 (Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971)).

185. *E.g.*, CONN. GEN. STAT. ANN. § 10a-30 (West Supp. 1994) ("Unless the contrary appears . . . it shall be presumed that: (1) The establishment of a new domicile in this state by an emancipated person has not occurred until he has resided in this state for a period of not less than one year."). *Id.*

186. *See infra* text and accompanying notes 194-208.

187. Often cited works of communitarian political theory include LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984) [hereinafter CRITICS]; ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); MICHELL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). The classic modern statement of liberalism is JOHN RAWLS, A THEORY OF JUSTICE (1971); *see, e.g.*, Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH L. REV. 685 (1992).

188. *See* Rawls, *supra* note 187, at 3 ("Justice is the first virtue of social institutions, as truth is of systems of thought . . . . Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.").

reason.[189] In the liberal state, the rights of individuals have priority over the public good.[190] The ideal liberal state provides a framework for a just society; it does not select a particular vision of the good to impose upon individual citizens.[191] By contrast, communitarian theory insists that individuals are formed in large measure by their membership in a community.[192] The community is a group of persons in which self-understandings,[193] such as values, goals, and a vision of the future, are shared. Such a community *should* promote a common vision of the good, even one that conflicts with individual choices.

When a newcomer arrives into a new community, liberal and communitarian theories suggest different responses. Because the liberal state imposes no particular vision of the good, as-

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189. *Id.* at 118-19.

> The intuitive idea of justice as fairness is to think of the first principles of justice as themselves the object of an original agreement in a suitably defined initial situation. These principles are those which rational persons concerned to advance their interests would accept in this position of equality to settle the basic terms of their association.

Id.

190. *Id.* at 31 ("The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good . . . . We can express this by saying that in justice as fairness the concept of right is prior to that of the good.").

191. *See* Ronald M. Dworkin, *Liberalism*, *in* CRITICS *supra* note 187, at 63-64 stating:

> The first [answer] supposes that government must be neutral on what might be called the question of the good life . . . . The first theory of equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life . . . .

Id.

192. CRITICS, *supra* note 187, at 5-6 (introduction).

> Communitarian critics of rights-based liberalism say we cannot conceive ourselves as independent in this way, as bearers of selves wholly detached from our aims and attachments. They say that certain of our roles are partly constitutive of the persons we are—as citizens of a country, or members of a movement, or partisans of a cause. But if we are partly defined by the communities we inhabit, then we must also be implicated in the purposes and ends of those communities . . . . Open-ended though it may be, the story of my life is always embedded in the story of those communities from which I derive my identity—whether family or city, tribe or nation, party or cause.

Id.

193. CRITICS *supra* note 187, at 172-73.

sumes no essential formation period for citizenship, and would limit a person's liberty to move around only when necessary, a new resident of the liberal state will be treated as an equal from the moment of his or her arrival in the new state. At the same time, however, it is not possible for a newcomer who has just arrived, uninvited, in a communitarian society, which shares values and goals, to place herself immediately within the group's understanding of community. At the very least, it takes time to come to share values and goals with your new neighbors.

In reviewing communitarian justifications for laws that prefer established residents, the court has reached conflicting results. The Court has sometimes viewed these laws from the classical liberal position and invalidated them. For example, in *Dunn v. Blumstein*,[194] the Court considered justifications for Tennessee's one-year durational residence requirement to qualify to vote. The State's justification was communitarian. In order to "further the goal of having 'knowledgeable voters,'" the waiting period was necessary to ensure that the new constituent had "in fact, become a member of the community,"[195] had "a common interest in all matters pertaining to [the community's] government,"[196] and was knowledgeable about local issues.[197] Under the requirement, a recently arrived resident could not meet these standards until having had time to develop the local community outlook. The Court rejected Tennessee's argument as parochial and unacceptable.[198] The "common interest" that the State sought to achieve was merely the exclusion of different opinions.[199] Although new arrivals "may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come," differing ideas are not a permissible reason to deprive those holding them of the right to vote.[200] Despite communitarian theory, the community was not free to impose a particularly local

194. 405 U.S. 330 (1972).
195. *Id.* at 354.
196. *Id.*
197. *Id.* at 356.
198. *Id.* at 357-60.
199. *Id.* at 355.
200. *Id.* at 355-56 (quoting Hall v. Beals, 396 U.S. 45, 53-54 (1969) (Marshall, J., dissenting)).

vision of the good on new arrivals. Applying strict scrutiny, the Court found that the durational residence requirement was not necessary to promote a compelling state interest.[201]

The Court also rejected the communitarian theory of residency requirements in *Hooper v. Bernalillo County Assessor*.[202] In that case, the State attempted to justify a property tax exemption available only to established residents on the grounds that it was appropriate as a measure for the State to take care of "its own."[203] Under this view, the State would not have to extend the exemption to new arrivals who had not yet become part of the community. The Court's response was clear: "Newcomers, by establishing bona fide residence in the State, become the State's 'own,' and may not be discriminated against solely on the basis of their arrival in the State [after a certain date]."[204] The statute was invalidated.

However, the Court has sometimes been willing to consider long-term attachment to a community as justifying state classifications. In two related cases from New Hampshire, the Court summarily affirmed district court decisions upholding the state's seven-year durational residence requirement for gubernatorial[205] or state senatorial candidacy.[206] The district courts had accepted explicitly communitarian justifications. The waiting requirements were constitutional because they allowed the candidate time to achieve "familiarity with and awareness of the conditions, needs, and problems of both the State of New Hampshire and the various segments of the population within the State."[207] Specifically, the seven year waiting period would "prevent frivolous candidacy by persons who have had little previous exposure to the problems and desires of the people of New Hampshire."[208] Apparently, merely residing in New Hampshire, for six and one half years would not be enough for a relative newcomer to take on the values of those citizens who

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201. *Id.* at 360.
202. 472 U.S. 612 (1985).
203. *Id.* at 623.
204. *Id.*
205. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973).
206. Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975).
207. *Chimento*, 353 F. Supp. at 1215.
208. *Id.*

have lived there longer. In both cases, the district courts, applying strict scrutiny, upheld these justifications.

Why is the Court willing to approve durational residence requirements that prevent newcomers from running for elective office yet unwilling to approve identical requirements which prevent them from voting? A comparison with two other sets of Supreme Court precedents reveals the lack of any principled reason to support the difference in outcomes.

With regard to the exclusion of newcomers from elective office, a comparison with the Court's decisions in the alienage cases is instructive. Although discrimination against aliens in the allocation of government benefits is suspect and is examined under strict scrutiny,[209] the Court has been far more sympathetic to laws excluding aliens from high-level state employment.[210] The Court has recognized "a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'."[211] The State also has "broad power to define its political community."[212] This includes the power to exclude aliens from state government positions whose holders "participate directly in the formulation, execution, or review of broad public policy."[213] Those holding such positions "perform functions that go to the heart of representative government."[214]

The reason that aliens are excluded from high-level government jobs is the perception that aliens are likely to lack something that is important for the job, while citizens are likely to have it. Justice Rehnquist has pointed out what that qualification is. There is, in fact, a durational residence requirement of five years before an alien can qualify to be naturalized as a United States citizen.[215] Rehnquist observed that the process of naturalization, including the five-year waiting period, "was specifically designed by Congress to require a foreign national

209. Graham v. Richardson, 403 U.S. 365 (1971).
210. *E.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973).
211. *Id.* at 642 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).
212. *Id.* at 643.
213. *Id.* at 647.
214. *Id.*
215. 8 U.S.C.A. § 1427(a) (Supp. 1993).

to demonstrate that he or she is familiar with the history, traditions, and institutions of our society in a way that a native-born citizen would learn from formal education and basic social contact."[216] According to Rehnquist, since an alien lacks a lifelong background of our institutions, history, and traditions, "[i]t is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect 'government' to treat us."[217]

From the premise that aliens do not sufficiently share the values of the community to hold high-level state positions, it is a small step in logic to infer that newcomers from other states do not sufficiently share the values of the community to run for high elective office. This may well have been the premise behind New Hampshire's exclusion of newcomers from the positions of governor and state senator. There is, of course, a critical distinction between the exclusion of newcomers from other states and the exclusion of aliens. The United States has the power to close its border to all aliens, but New Hampshire is only one state in a federal system which allows individuals free travel from state to state.[218] Once an American citizen has become a state resident, he or she is supposed to be the state's "own."[219] The Court may have affirmed too hastily the New Hampshire case in such a summary fashion.

Another area of the Court's constitutional jurisprudence also suggests the need to reevaluate the communitarian theory of residency requirements. The First Amendment protects the freedom of association.[220] That freedom includes both the right to choose the persons with whom one will associate, and the corresponding right to choose the persons with whom one does *not* wish to associate.[221] Similarly, a primary decision to be made by any community is who qualifies as a member.[222] At first glance, then, it might appear that the freedom of associa-

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216. *Sugarman*, 413 U.S. at 659 (Rehnqist, J., dissenting).

217. *Id.* at 662.

218. *See supra* part III.A.

219. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985).

220. NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

221. TRIBE, *supra* note 47, at 1401.

222. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31 (1983).

tion justifies a communitarian decision to exclude newcomers from community membership.

But, there is a critical distinction that is fatal to that argument. The constitutional protection of freedom of association extends only to truly private groups. These groups are characterized "by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[223] The larger the group, the less likely it is that the Constitution will protect associational interests. Neither a large corporation nor the United States Jaycees are of the size or type to be accorded associational protection.[224] *A fortiori*, a state may not impose communitarian mandates on access to full membership in the state.

In summary, the Court has approved the communitarian justification when used as a candidacy requirement but rejected it as a suffrage requirement. A consideration of the Court's other precedents suggests that perhaps the communitarian theory of residency requirements should be rejected in both situations.[225]

D. *The Purpose of Excluding Undesirable Outsiders*

In *Shapiro v. Thompson*,[226] the defendant sought to justify the one year durational residence requirements on the ground that they discouraged outsiders from moving to the jurisdiction solely to qualify for generous welfare benefits.[227] The Court held that this particular purpose was "patently unconstitutional."[228] Notwithstanding the clarity of the Court's rejection of this purpose, legislators still attempt to prevent the immigra-

223. Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

224. *Id.*

225. The opposing argument would be that although the right to vote is fundamental, an interest in being a candidate is not a fundamental right, Clements v. Fashing, 457 U.S. 957 (1982), and thus the Court is correct in its closer scrutiny of communitarian justifications for voting than for candidacy. While this distinction holds up when the restrictions on candidacy apply to all residents equally, it is not nearly as strong when the restrictions are applied only to new residents.

226. 394 U.S. 618 (1969).

227. *Id.* at 628-29.

228. *Id.* at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

tion of out-of-state indigents.[229] No state wants to be a welfare haven. This section considers what, if anything, can be said to defend this goal.

The state usually desires to exclude outsiders who will collect welfare benefits. A state's public assistance program demonstrates that its citizens feel some sense of responsibility for those who cannot feed, clothe, or house themselves. How far should such generosity go? People are naturally willing to take care of "their own." But the ability to take care of one's neighbor depends on his or her ability to define "neighbor."[230] Community or neighborly obligations have long been defined within the narrowest possible geographic framework. There arises a "contest of nonresponsibility."[231] Each community seeks to define narrowly the group for which it is responsible and thus to minimize its obligations to care for others. Historically, towns accomplished this goal by passing paupers on to the next town.[232] Today, restrictive zoning ordinances combined with artificially drawn boundary lines have the effect of keeping the poor out altogether.[233] As Robert Reich has explained,

> If generosity and solidarity end at the border of similarly valued properties, then the most fortunate can be virtuous citizens at little cost. Since most people in one neighborhood

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229. *See, e.g.*, Mitchell v. Steffen, 487 N.W.2d 896, 902 (Minn. Ct. App. 1992), *aff'd*, 504 N.W.2d 198 (Minn. 1993) ("The statements made by legislators during debate on the statute clearly show their desire to discourage people from moving into Minnesota solely because of the availability of higher public assistance benefits.").

230. In *The Bible*, a lawyer asked Jesus who his neighbor was. Jesus' response was to tell the parable of the good Samaritan. In that parable, the limits of neighborly obligation are shown to extend beyond the boundaries of one's own community. The Samaritan was the one who showed himself to be a neighbor, even though Jews did not associate with Samaritans. *See Luke* 10:25 to :37; *John* 4:9.

231. *Shapiro*, 394 U.S. at 628 & n.7.

232. *Id.*

233. *See, e.g.*, Southern Burlington County NAACP v. Mt. Laurel, 336 A.2d 713, 723 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975).

> This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost everyone acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing. There has been no effective intermunicipal or area planning or land use regulation.

Id.

> or town are equally well off, there is no cause for a guilty conscience. If inhabitants of another area are poorer, let them look to one another. Why should *we* pay for *their* schools?[234]

Within such a system of nonresponsibility, the few communities that are willing to accept some responsibility for those in need become a magnet to the poor citizens of cities around them. The city which builds low-income public housing attracts low-income persons from towns that do not provide low-income housing.[235] The city which provides a shelter for the homeless attracts homeless people from areas without shelters.[236] The state which enacts a generous welfare program attracts residents of states with underfunded or stingy welfare programs. The problem is that where not everyone will do his or her share, those who are willing to do their share become overburdened.

In this situation, it is not unreasonable for a city or a state to attempt to limit the allocation of its finite resources to the established residents of the city or state. Connecticut may be willing to allocate a sufficient level of state resources to fund a generous welfare program for all of its currently qualified indigent residents. It would be unwilling, and probably unable, to allocate sufficient resources to support a welfare program for all the indigent residents on the east coast who might flock to Connecticut if Connecticut's benefit levels were substantially higher than those in neighboring states. Connecticut's response might be to keep its benefit levels low enough so as not to attract outsiders. Alternatively, Connecticut might adopt a one-year waiting period knowing that the probable effect of the

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234. Robert Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 at 16, 42 (emphasis in original).

235. *See* Cole v. Housing Auth., 435 F.2d 807, 811 (1st Cir. 1970).

236. *E.g.*, *City Girds for Influx of Homeless*, NEW HAVEN REG., Nov. 15, 1992, at A1

> City officials fear state welfare cuts would force so many people into the streets this winter that shelters may not be able to accommodate them. Officials say they might be able to manage if they only had to help New Haven's homeless, but if surrounding communities continue to send their homeless to the city, the numbers could swell to more than 1,000.

Id.

waiting period would be to discourage an influx of indigents from other states.

Viewed from this perspective, the purpose of discouraging the migration of those who seek to qualify for higher welfare benefits is not necessarily suspect. It can be viewed as a tool to assure that Connecticut, already more generous to indigents than its neighbors, is not forced to take on more than its *proportionate* share of the regional responsibility for indigents. If other states were willing to be as generous as Connecticut, there would be no incentive for indigents to move to Connecticut and thus no need for Connecticut to discourage their immigration.

The federal system accords sovereignty to every state, so that each is free to decide how responsible it will be to indigents. Furthermore, in the federal system, each person has the right to travel freely between the states. In *Shapiro*, these two components of federalism made Connecticut look like the enemy of federalism, when it arguably was reacting to an undue influx of indigents caused by nonresponsibility elsewhere. The Court's bottom line, however, was clear. The constitutional right to travel supersedes any state law that tries to exclude indigents, no matter what the context or the reasonableness of the underlying public policy. An end to the contest of nonresponsibility can only come from collective political decisions made at the regional or federal level.

E. *Fiscal Integrity Justification*

Preferences for established residents over newcomers are sometimes defended on the ground that they preserve fiscal integrity.[237] Specifically, such preferences save money. The savings arise both because the state need not provide services to newcomers during the waiting period, and because the waiting period discourages outsiders who would use state services from immigrating at all.[238] Saving taxpayers' money is surely a permissible governmental interest, but the Court has consis-

237. *E.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); Shapiro v. Thompson, 394 U.S. 618, 627-28 (1969).

238. *Shapiro*, 394 U.S. at 628-29.

tently found that the distinctions between older and newer residents are not a constitutional means to achieve that purpose.[239] Every class of persons that receives state funds is similarly situated as to the purpose of saving state funds. But why should the state be able to single out one particular class of residents to bear the burden of cost savings? Selecting brown-haired persons who would be ineligible for welfare would surely save money, but such a classification would not be rationally related to a permissible purpose. Whether a citizen has brown hair or not is unrelated to the goal of saving money. Established residents and newcomers are similarly situated with respect to the purpose of saving welfare funds. In order to single out newcomers to bear the burden of saving state funds, the state must justify its choice with a goal other than saving money.

F. *Administrative Necessity Justification*

The Court has approved short waiting periods before newcomers are eligible to vote if those waiting periods are administratively necessary in order to establish accurate voter lists.[240] This approval appears to be premised on the understanding that the state is not excluding newcomers because they are newcomers, but that the state needs some short period of time to determine who is legally eligible to vote. Given this understanding, the length of the time period should be no longer than it takes to perform the administrative tasks necessary to prepare accurate voter lists. A one-year period is too long.[241] A 30-day period is clearly within constitutional boundaries.[242] A 50-day registration period "approaches the outer constitutional limits in this area"[243] but has been approved by the Court as "necessary to promote the State's important interest in accurate voter lists."[244]

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239. *Id.* at 633; *Memorial Hosp.*, 415 U.S. at 263.
240. Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973).
241. Dunn v. Blumstein, 405 U.S. 330 (1972).
242. Oregon v. Mitchell, 400 U.S. 112 (1970).
243. *Burns*, 410 U.S. at 687.
244. *Marston*, 410 U.S. at 681.

Although the Court has not evaluated the administrative necessity justification outside of the voting cases, administrative necessity might also justify short waiting periods in other contexts. For example, the statute in *Shapiro* might have been upheld had it called for a waiting period of thirty days rather than one year, and if its justification had been administrative necessity rather than the exclusion of indigents.

G. *Summary*

The Court has consistently rejected the following justifications for imposing a disadvantage upon new residents: (1) rewarding past contributions; (2) excluding undesirable outsiders; and (3) preserving fiscal integrity. The Court has been more sympathetic toward, and has occasionally approved, the following justifications: (1) using durational residence requirements as evidence of bona fide residence; (2) promoting communitarian values; and (3) recognizing administrative necessity.

V. DIFFICULTIES WITH THE COURT'S FRAMEWORK FOR ANALYZING STATE DISCRIMINATION AGAINST NEWCOMERS

A. *The Equal Protection Component of the Court's Analysis: Classifications, Purpose, and Comparative Claims*

To paraphrase the first Justice Marshall, let us not forget that it is an Equal Protection Clause that we are expounding.[245] With all its talk of penalties and fundamental rights, the Court's opinions sometimes obscure this point. However, the claims of newcomers are best understood as claims to equality with established residents, and thus, complaints about comparative disadvantages. The Court's emphasis on "penalty on the right to travel" has not been analytically helpful, both because that standard is difficult to apply consistently and because the Court has freely ignored it. Because some commentators have suggested that cases involving fundamental rights are not equal

245. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a constitution we are expounding.").

protection cases at all,[246] this section examines the equal protection element of the claims of newcomers.

The Equal Protection Clause is generally viewed as a limitation on government's ability to classify in certain situations.[247] Ordinarily, courts are very deferential to government classifications; they need only be rationally related to a permissible governmental purpose.[248] Occasionally, courts are suspicious about government classifications which may be based on prejudice, stereotypical views, or other irrelevant factors.[249] The Court subjects these classifications to a higher standard of review.[250]

The question of correlation between classification and purpose is necessarily a comparative judgment.[251] The court must determine whether the members of a class are similarly situated

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246. *E.g.*, Michael Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1075 (1979) ("It made little sense, however, for the court in *Shapiro* to treat the question posed by the disputed statutory provision as an *equal protection* problem . . . . [W]hile the line or classification offended a constitutional norm, the right of interstate migration, it did not offend or even implicate the principle of equal protection."); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560-61 (1982) ("But the 'fundamental rights' cases may serve as a congenial introduction because commentators have recognized that statements of 'equality' regarding fundamental rights invariably reduce to statements about 'rights.'").

247. *E.g.*, Parham v. Hughes, 441 U.S. 347, 358 (1979) (plurality opinion) ("The function [of the equal protection clause] is to measure the validity of classifications created by state laws."); Dunn v. Blumstein, 405 U.S. 330, 352 ("The Equal Protection Clause places a limit on government by classification."); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-44 (1949).

248. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

249. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice rather than legitimate public concerns."); Orr v. Orr, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.").

250. *Palmore*, 466 U.S. at 432 ("[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

251. *See generally* Kenneth W. Simons, *Equality as A Comparative Right*, 65 B.U. L. REV. 387 (1985); *contra* Westen, *supra* note 246, at 552 ("This equation of comparative rights and equality is fundamentally misconceived").

to nonmembers of the class with respect to the purpose of a law. Professor Simons has written on the comparative nature of the equal protection analysis:

> A right to equal treatment is a comparative claim to receive a particular treatment just because another person or class receives it. The claim to that treatment is not absolute, but relative to whether others receive it. And the claim is satisfied by giving the comparatively situated classes the required equal treatment.[252]

Professor Simons illustrates the comparative nature of equality with the following example. A parent who has three children but takes only two of them to the movies is expected to have a reason for leaving one child at home.[253] That third child has no independent claim to go to the movies. The only basis for any complaint would be that *if* the third child's brother and sister are going to the movies, the third child should be allowed to go also. The parent could treat the three children equally by either giving a reason for leaving the third child home, by taking all three children to the movies, or by leaving all three children home.

While the comparative nature of equal protection is relatively clear in cases challenging arbitrary classifications, the comparative nature of the fundamental rights branch of equal protection is less obvious. In *Skinner v. Oklahoma*,[254] the first case in which the Court explicated the fundamental rights branch of equal protection, the Court reviewed a statute that authorized the state to sterilize a person convicted three times of felonies involving moral turpitude. The statute's vision of moral turpitude included the felony of stealing more than twenty dollars but did not include the felony of embezzling a similar amount of money.[255]

The statute might have been challenged as a violation of due process in that it would serve to deprive any sterilized person

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252. Simons, *supra* note 251, at 389.

253. *Id.* at 390. Simons credits his example to Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 250-51 (1983).

254. 316 U.S. 535 (1942).

255. *Id.* at 538-39.

of a substantial liberty interest.[256] But rather than scrutinizing the liberty the defendant would lose, the Court emphasized the comparatively disparate treatment accorded by the statute to felons convicted of larceny as opposed to felons convicted of embezzlement. The problem with the statute was *not* that it deprived the defendant of liberty, but that it treated him differently than other similarly situated felons. Applying strict scrutiny, the Court found a violation of the Equal Protection Clause in the State's selective choice to sterilize only those "who have thrice committed grand larceny with immunity for those who are embezzlers."[257]

The Court's disposition of the case left no doubt that *Skinner* was an equal protection, not a due process, decision. If the proposed sterilization had been an unconstitutional deprivation of liberty without due process, the remedy would have been to forbid the defendant's sterilization outright. But the case had been decided on the grounds that the defendant's punishment was unequal to those who had committed the same kind of offense. Therefore, the Court explained, "It is by no means clear whether if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other . . . the class of criminals who might be sterilized."[258] The State could choose not to sterilize Mr. Skinner or to begin sterilizing three-time embezzlers as well.[259]

As the Court has further developed the fundamental rights branch of equal protection, the emphasis on comparative disadvantage has been essential to the Court's analysis and disposition of the case. For example, in *Griffin v. Illinois*,[260] the State refused to provide indigents with free trial transcripts

256. *Id.* at 538, 544 (Stone, C.J., concurring). The court's reluctance to rely on the Due Process Clause was probably related to the fact that in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court had recently abandoned the expansive reading of liberty under the Due Process Clause that had characterized Lochner v. New York, 198 U.S. 45 (1905).

257. *Id.* at 541.

258. *Id.* at 543 (citations omitted).

259. Chief Justice Stone was not convinced that the majority was serious on this latter point. He explained, "[i]f Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none." *Id.*

260. 351 U.S. 12 (1956).

necessary for the appeal of their criminal convictions. Standing alone, this would not amount to a denial of due process because the Court had made it clear that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."[261] However, once the state did create an appellate system in which defendants with sufficient funds obtained appellate review of their convictions, then the state had to make appellate review equally available to everyone, wealthy or poor.[262]

Similarly, in *Harper v. Virginia State Board of Elections*,[263] the Court held that a Virginia poll tax of $1.50 violated the Equal Protection Clause. The Court applied heightened scrutiny because the fundamental right to vote in state elections was involved. One problem with this analysis is that "the right to vote in state elections is nowhere expressly mentioned [in the Constitution]."[264] But in terms of comparative disadvantage, the plaintiffs in *Harper* had a good case. Once the state had created an electorate, the fundamental right to vote had to be granted to everyone on equal terms.[265] Equality was clearly the essence of the claim in *Harper*.

The Court's decisions in *Skinner*, *Griffin*, and *Harper* provide the necessary background for *Shapiro v. Thompson*,[266] a fundamental rights case in which the Equal Protection Clause was necessarily implicated. The *Shapiro* Court addressed the issue of whether denying welfare assistance to those who met all but the one-year residency requirement constituted an unconstitutional penalty on the fundamental right to travel. If an independent right to travel were the entire constitutional claim, it would make no difference to the plaintiff's case whether or not

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261. *Id.* at 18.

262. *Id.* The Court stated:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance . . . . Consequently at all stages of the proceedings the Due Process and the Equal Protection Clause protect persons like petitioners from invidious discriminations.

Id.

263. 383 U.S. 663 (1966).

264. *Id.* at 665.

265. *Id.*

266. 394 U.S. 618 (1969).

the State penalized others in the exercise of their right to travel. But it is impossible to identify this "penalty" in noncomparative terms. The State had no obligation to fund a welfare program at all.[267] Surely the total absence of a welfare program is more harmful to a newly arrived indigent than is a one-year waiting period. Yet the failure to create a program at all would not have been a penalty on the right to travel. Similarly, the noncomparative penalty analysis is inapplicable to those newcomers immigrating from states that had no welfare programs. How could it be a penalty for those newcomers when by moving to a new state they become eligible for welfare for the first time? The result in *Shapiro* stands for the proposition that once the state chooses to enact a welfare program, the state must make the program equally available to everyone. Thus, the nature of the wrong in *Shapiro* was comparative, that is, the state made benefits available to established, but not newly arrived, indigents. The result in *Shapiro* is a function of its equal protection component.

Shapiro, like *Skinner*, *Griffin*, and *Harper*, involved a fundamental right and is only understandable in comparative terms. Therefore, all four are equal protection cases. Although the plaintiffs may not have had independent, individual claims to the relief they sought, they prevailed because of their comparative equal protection claims.

B. *The Penalty Component of the Court's Analysis*

The Court strictly scrutinizes classifications which *penalize* those who exercise their right to travel.[268] Yet not all waiting periods or other disadvantages imposed on new residents are penalties.[269] The Court's precedents do not explain how to identify a forbidden penalty from an acceptable classification. For

267. This is at least the implicit message of Dandridge v. Williams, 397 U.S. 471 (1970), where the Court acknowledged that the Constitution may impose procedural safeguards on the operation of a welfare program. *Id.* at 487 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)). In *Dandridge*, an existing welfare program was subject to the limitations of the Equal Protection Clause. *Id.* at 485. "[N]either the State nor Federal governments are under any sort of constitutional obligation to guarantee minimum levels of support." Lavine v. Milne, 424 U.S. 577, 584 & n.9 (1976) (citing *Dandridge*, 397 U.S. 471 (1970)).

268. *See supra* part III.B.

269. *Shapiro*, 394 U.S. at 638 & n.21.

example, in *Memorial Hospital v. Maricopa County*,[270] a majority of the Court summarized its earlier penalty analysis by explaining that the denial of a fundamental political right or of basic necessities of life to those who have recently exercised their right to travel is a penalty.[271] On the other hand, in *Sosna v. Iowa*,[272] the majority opinion implied that a denial of a right or benefit may not be a penalty if it is temporary.[273] In *Attorney General v. Soto-Lopez*[274], a plurality of the Court attempted to explain penalty analysis as triggered by the permanent denial of a significant or substantial benefit.[275] These inconsistencies are evidence of the substantial difficulties with the Court's analysis. This section examines those difficulties in turn.

1. The Problem of Redundancy

One of the Court's definitions of "penalty on the right to travel" is the denial of a fundamental political right to those who have recently exercised their right to travel.[276] This explanation is redundant. If the right to travel is a fundamental right, then the Court should not need to identify the denial of a *second* fundamental right, such as voting, before finding a penalty on the right to travel. The Court seems to suggest that the state can burden one fundamental right at a time, but not two fundamental rights together. Since that suggestion is obviously unacceptable, the alternative conclusion is that the right to travel portion of the analysis is unnecessary. The waiting period in *Dunn* would thus be unconstitutional simply because it infringed the fundamental right to vote. Additional reference to

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270. 415 U.S. 250 (1974).
271. *Id.* at 259.
272. 419 U.S. 393 (1975).
273. *Id.* at 406.

> Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*. She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State.

Id.
274. 476 U.S. 898 (1986).
275. *Id.* at 908-09.
276. *See Memorial Hosp.*, 415 U.S. at 259.

a second fundamental right, the right to travel, would be superfluous. If this is true, the "penalty on the right to travel" analysis collapses.

2. The Problem of Consistency

Alternatively, the Court has attempted to explain penalty analysis as arising when the state burdens the right to travel by depriving newcomers of basic necessities, like welfare and medical care.[277] But *Lindsey v. Normet*,[278] *Dandridge v. Williams*,[279] and *San Antonio School District v. Rodriguez*[280] undermine this reasoning. In those cases, claims to basic necessities of life were of no special constitutional significance and received no special constitutional scrutiny. Therefore, in constitutional terms, the loss of welfare benefits is of no greater concern than the loss of the opportunity to get a divorce or to attend the state university at reduced tuition rates. Yet the Court has found that the denial of tuition benefits[281] or of access to divorce courts[282] is not a penalty. The Court's opinions, thus, contradict each other. Basic necessities are, on one hand, of no special constitutional significance; on the other hand, the denial of basic necessities constitutes a penalty triggering strict scrutiny.

It is instructive to see how the Court's precedents pull in opposite directions in the area of education. In *Vlandis*, the Court implicitly found that a one-year durational residence requirement for lower university tuition was not a penalty.[283] In *Rodriguez*, the Court held that public elementary and secondary education is not a fundamental right.[284] Nor could it reasonably be claimed that education is a basic necessity. It

277. *Id.*
278. 405 U.S. 56 (1972) (housing not a fundamental right).
279. 397 U.S. 471 (1970) (welfare not a fundamental right).
280. 411 U.S. 1 (1973) (education not a fundamental right).
281. Vlandis v. Kline, 412 U.S. 441 (1973).
282. Sosna v. Iowa, 419 U.S. 393 (1975).
283. *Vlandis*, 412 U.S. at 452 ("Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status.").
284. *Rodriguez*, 411 U.S. at 33-35.

would follow then that the state could enact a one-year durational residence requirement to be satisfied by new residents wishing to attend public schools. Such a denial of education, according to the Court's precedents, would *not* be a penalty on the right to travel and the exclusion would only have to meet the Court's minimum rationality standard. The logic of the Court's penalty analysis demands this result, but the Court's own precedents suggest otherwise.[285]

An additional problem with the Court's assertion in *Memorial Hospital* that penalties on the right to travel are limited to denials of fundamental rights or basic necessities is that such claims have been ignored by subsequent decisions. Since *Memorial Hospital*, the Court has invalidated state laws denying to newcomers such benefits as a property tax exemption,[286] a civil service job,[287] and a share in the distribution of Alaska's oil wealth.[288] Certainly, none of those interests could be properly characterized as fundamental or basic necessities. The Court did not even find it necessary to engage in its earlier penalty analysis to decide these latter cases.

3. The Problem of Measurement: When Does An Incidental Burden Become A Penalty?

Another difficulty with the Court's penalty analysis arises from the Court's suggestion that a denial of a right or benefit may not be a penalty if the denial is trivial. "Trivial" in this context means that the denial is either short-term or of an insignificant interest. For instance, in *Sosna*, the Court was not overly concerned about a new resident who could not get a divorce right away because eventually she would qualify.[289] Although seven years is a long time to wait to run for governor, a seven-year waiting period is not a penalty because the chance

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285. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution . . . But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation . . . . In sum, education has a fundamental role in maintaining the fabric of our society.").

286. Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

287. Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986).

288. Zobel v. Williams, 457 U.S. 55 (1982).

289. *Sosna*, 419 U.S. at 406.

to run for that office would be of very little concern to most persons.[290]

The idea that trivial denials of rights do not raise constitutional concerns is dangerous. As the Court said in the same right to travel context, "even temporary deprivations of very important benefits and rights can operate to penalize migration."[291] The Court found constitutionally impermissible such state-imposed trivial sums as a $1.50 poll tax[292] or a $1.00 tax on passengers leaving the state by rail.[293] As Professor Tribe has explained, "[a] one dollar fine for choosing to be critical of government, for example, would be as clearly suspect as a one thousand dollar fine."[294]

Notwithstanding these concerns, in order to continue using penalty analysis, the Court will have to distinguish between permissible incidental burdens and impermissible penalties. Remember that if a state law is enacted with the *purpose* of inhibiting interstate migration, the Court does not need to resort to penalty analysis. Such laws trigger strict scrutiny automatically and are invalid.[295] The penalty analysis then applies only to state laws that are enacted to serve lawful purposes but have an incidental effect on interstate travel. In these situations, incidental and inconsequential impacts on interstate travel should not trigger strict scrutiny. The fact that New Jersey and Delaware impose a toll on interstate travelers crossing the Delaware Memorial Bridge is not something that should implicate strict scrutiny.[296]

The problem is that, once it is conceded that insignificant and incidental burdens do not penalize the right to travel, from that point there is no principled way to identify a clear line at which insignificant burdens become significant enough to be

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290. Chimento v. Stark, 353 F. Supp. 1211, 1218 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973) ("It cannot be seriously argued that the inability to run for Governor is a real impediment to interstate travel . . . . While the Governorship of New Hampshire may be a coveted prize, it is one that is seriously sought after by only a very few.").

291. *Soto-Lopez*, 476 U.S. at 907.

292. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

293. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

294. TRIBE, *supra* note 47, at 1457 & n.18.

295. *See supra* text accompanying notes 31-34.

296. This example is taken from Justice Rehnquist. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 284 (1974) (Rehnquist, J., dissenting).

characterized as penalties. If a one-year durational residence requirement for university tuition is not a penalty, then what about a two-year requirement? What about a one-year durational residence requirement for public elementary school? There can be a clear answer to these questions. However, that answer would require the Court to abandon the idea that penalties are measured on some hypothetical absolute scale. Penalties should be viewed as comparative.

There already exists a bright line which the Court could use to separate the permissible from the impermissible; that bright line is the state's current treatment of its existing residents. If newcomers are treated as well as current residents, they have no equal protection claim. For example, if the state adopted a one-year durational residence requirement before newcomers could get a driver's license, that appears to be discrimination against newcomers and, to use the Court's analysis, is a penalty on the right to travel. Compare a state law setting a minimum age of eighteen to obtain a driver's license, applicable to all residents.[297] A newly arrived seventeen-year-old with a license to drive in her previous state of residence would lose the right to drive. But this deprivation would not be a penalty on the right to travel. If the Court must look for penalties, the test should involve a comparison of how established residents are treated. The state could still distinguish between older and newer residents; but it would need a good reason for doing so.[298]

4. The Elusive Penalty/Subsidy Distinction[299]

Since the state has no obligation to establish any welfare program, the denial of welfare benefits to newcomers is arguably not a penalty, but a mere refusal to subsidize the right to travel. This attempt to distinguish between penalties and subsidies raises the question of an "unconstitutional condition."[300]

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297. This example is taken from Justice Marshall. Dunn v. Blumstein, 405 U.S 330, 342 & n.12 (1971).

298. *See infra* part V.B.5.

299. *See generally* TRIBE, *supra* note 47, at 781-84.

300. *See generally* Richard A. Epstein, *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5

The doctrine of unconstitutional conditions limits the government's ability to impose conditions when it confers a benefit on an individual.[301] For example, the government cannot insist that citizens waive their free speech rights in order to receive welfare benefits. The Court has applied this "unconstitutional condition" doctrine in its abortion funding decisions.[302] The Court explained that the privacy right established in *Roe v. Wade*[303] "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[304] However, the privacy right established in *Roe* did not require that the state subsidize a woman's decision to terminate a pregnancy.[305] Specifically, the government could choose to promote childbirth over abortion by paying for the expenses of childbirth but not abortion. This choice is *not* a penalty on a woman's decision to terminate a pregnancy[306] and thus does not trigger strict scrutiny.

The widespread criticism of this distinction between penalties and subsidies is that it unjustifiably assumes the existence of a particular baseline of government activity from which departures may be measured.[307] Thus, in the abortion funding cases, the Court must have assumed a baseline of no government funding for medical procedures.[308] From that point, the state

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(1988).

301. *Id.* at 6-7. The doctrine of unconstitutional conditions holds that:

> even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights. Thus, in the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution.

Id.

302. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

303. 410 U.S. 113 (1973).

304. *Maher*, 432 U.S. at 473-74.

305. *Id.* at 474 ("*[Roe]* implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.").

306. Harris v. McRae, 448 U.S. 297, 317 & n.19 (1980) ("[T]he Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

307. Epstein, *supra* note 300, at 99.

308. *Harris*, 448 U.S. at 317 ("[T]he fact remains that the Hyde Amendment leaves

funding of childbirth would be a subsidy to childbirth, not a penalty on abortion. Indigent women seeking abortions would be no worse off than they would have been in their assumed baseline condition. However, if one begins with the equally plausible baseline of government funding for all medically necessary procedures for those who qualify for Medicaid,[309] then the withdrawal of funding for abortions would be a penalty on the exercise of a fundamental right. Indigent women seeking abortions would then be now worse off than they would have been in their assumed baseline condition. The problem is that in a complex regulatory state, there is no agreement on assumed baselines.

This absence of assumed baselines clouds the issue of whether or not the denial of welfare benefits for one year is a penalty on the exercise of the right to travel. Once again, the answer to that question depends on the baseline that is chosen. If the common law, minimal state baseline is selected, in which the state has enacted no social welfare programs, then the refusal to extend welfare benefits to recent arrivals would be simply a decision not to subsidize them. The recent arrivals would be in no worse a position than they would have been at the baseline. On the other hand, if we select the current regulatory welfare state as the baseline, in which the state provides an extensive array of welfare services, then the refusal to include new arrivals is a penalty on the exercise of their right to travel. They are in a worse position than they otherwise would have been, because of the exercise of their right to travel. The Court in *Shapiro* assumed this later, modern day welfare state as the baseline, and found that the one-year waiting period was a penalty. But, of course, the baseline in other cases is not as easily identified. In *Memorial Hospital*, the Court again assumed that the baseline was one of government-provided medical services, and the waiting period was therefore a penalty. On the other hand, in *Vlandis*, the Court must have assumed that the baseline did not include publicly provided university educa-

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an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.").

309. *E.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1440 (1989).

tion, so that the denial of resident status for tuition purposes was not a penalty.

5. Summary: A Comparative Alternative

From a practical perspective, the Court's penalty analysis was valuable because it rescued newcomers from the certain defeat of deferential rational basis review. But the penalty analysis is seriously flawed. It is flawed in application because the Court does not follow it with any consistency. It is flawed in theory because its focus is misguided. The Court purports to be examining an abstract concept of interstate travel when it should be focusing on comparative disadvantage to newcomers. However, if the Court abandons its penalty analysis, it should not go to the other extreme leaving newcomers to a standard of review that is so deferential as to be meaningless. The constitutional policy of free interstate migration and the fact that newcomers were not represented when today's laws were passed should move the Court in the direction of a genuine, serious, and consistent review of state discrimination against newcomers.[310]

Not that states should always treat newcomers the same as established residents: the comparative idea of equality simply requires that a state that grants some benefit or lessens some burden for established residents must have good reason for failing to do likewise for newcomers. The Court should clarify what reasons are adequate and what reasons are not. The Court has begun this process, albeit unsystematically. As indicated above, the Court has approved a limited use of short-term durational residence requirements when used as evidence of bona fide residence or when necessary to achieve administrative objectives. The Court has approved the use of communitarian justifications as qualifications for elective office. The Court has

310. Such a review would be consistent with what Justice Marshall has long championed. Marshall has criticized the Court's rigid, tiered system of equal protection and argued in its place for a flexible review that would take into account the character of the classification and the relative importance to the individuals in the class of the governmental benefit that they do not receive. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting.).

not approved any other reasons for treating newcomers differently from established residents.

VI. RECENT DEVELOPMENTS

The attempt to impose additional burdens on new arrivals is more than a historical curiosity. Hard economic times have recently given rise to new attempts to decrease the benefits or impose additional taxes on recent arrivals. These situations illustrate that it is simply human nature to shift burdens onto someone else. They also demonstrate that the Supreme Court's analysis of equality for newcomers has been unclear and unhelpful, leaving state legislators unsure of the limits on their power in this area. This lack of clarity becomes an invitation for aggressive politicians to victimize newcomers, a group whose interests are not represented in the legislative process.

A. *Delaying or Reducing Welfare Benefits for Newcomers and the Legacy of* Shapiro v. Thompson

Since 1990, California,[311] New York,[312] Wisconsin,[313] and Minnesota[314] have reduced the welfare benefits available to new residents. Unlike the situation in *Shapiro*, these states have not eliminated benefits entirely. Rather, the limitation established in each of these states is that for an initial period, either six months or one year, a new resident will not receive welfare benefits any higher than those received in the state of previous residence. The purported purpose of these limits is to make the receipt of welfare benefits a *neutral factor* in a person's decision to move to a new state.[315] Welfare would be a neutral factor, it is argued, because the level of one's benefits would not increase as the result of moving to a new state.[316]

311. CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1994).
312. N.Y. SOC. SERV. LAW § 158(f) (Consol. Supp. 1993).
313. WISC. STAT. ANN. § 49.19(11)(m) (West Supp. 1993-94).
314. MINN. STAT. § 256D.065 (1992).
315. Mitchell v. Steffen, 504 N.W.2d 198, 204 (Minn. 1993) (Tomljanovich, J., dissenting).
316. *Id.* at 206.

The Court will have to decide what concepts underpin *Shapiro* in the light of these welfare limiting statutes. Arguably, the penalty in *Shapiro* consisted in the lack of *any* substitute benefits at all for the period of one year, a lack that deterred and penalized the free movement of indigents from one state to another. From this perspective, the "penalty" is eliminated if a new resident is allowed to remain at the same benefit level she held in her previous state of residence. How can there be a penalty if the recipient is no worse off than she was before?

The two courts that have considered this issue have both rejected this argument.[317] First, as a factual matter, it fails to account for different costs of living. A benefit of $190 per month in Louisiana is not the equivalent of $190 in California.[318] The higher cost of living is, of course, one of the reasons behind the higher benefit level in California. More importantly, these statutes do not recognize that *Shapiro* was, above all, an *equality* decision. The Court in *Shapiro* did not consider the benefit levels of the plaintiffs before they moved to the new state, nor even the fact that they had been receiving welfare at all. The problem in *Shapiro* was comparative. Connecticut was not required to have any welfare, but since it did, the program had to be equally available to all residents. The relevant comparison, then, was between newcomers and the established residents of the new state.[319] The welfare levels in the previous state were simply irrelevant. The right that was violated, while implicating the right to travel, was best explained as a "right to equal treatment without regard to length of residency."[320]

The California and Minnesota attempts to confer no benefit levels higher than those held in the previous state of residence were quickly found unconstitutional.[321] The New York and Wisconsin plans have not yet been the subject of a published court opinion. The Wisconsin Supreme Court, however, has

317. Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993); *Mitchell*, 504 N.W.2d 198.

318. *Green*, 811 F. Supp. at 521.

319. *Id.*; *Mitchell*, 504 N.W.2d at 201.

320. *Green*, 811 F. Supp. at 519.

321. *Id.* at 516; *Mitchell*, 504 N.W.2d 198.

already approved an additional welfare reduction strategy.[322] This strategy attempts to avoid the effect of *Shapiro* by reducing the waiting period instead of the benefit levels for new arrivals. While the Court in *Shapiro* forbade a one-year waiting period for welfare benefits, Wisconsin recently created a 60-day waiting period before new residents would be eligible for general relief.[323]

This strategy also requires reconsideration of the Court's "penalty" analysis in *Shapiro*. If the conceptual basis of *Shapiro* is that of comparative equality, then, even a short, 60-day denial of basic substance would be an unacceptable discrimination against new residents; on the other hand, if the Court's emphasis should be noncomparative, then the substantially shorter waiting period in the Wisconsin statute might not rise to the level of a penalty. Mathematically, it is only one-sixth of the deprivation in *Shapiro*. A majority of the Wisconsin Supreme Court adopted the second method of analysis, indicating that the *length* of the deprivation was short enough to not constitute a penalty.[324] Thus the court applied only rational basis review.[325]

Sixty days is a short enough period that there are two possibly adequate justifications for it under the Court's earlier precedents. First, as in the voting registration cases,[326] the state might claim the administrative necessity of having sufficient time to handle required paperwork. Alternatively, as in the student tuition cases,[327] the state could argue that the sixty-day waiting period is useful evidence of bona fide residence and thus helpful in distinguishing residents from transients. But Wisconsin argued instead that the sixty-day waiting period was rationally related to the purpose of encouraging employment.[328] From a comparative perspective, the argument is defective because Wisconsin does not appear to be making any effort to similarly encourage the employment of established resi-

322. Jones v. Milwaukee County, 485 N.W.2d 21 (Wis. 1992).
323. WIS. STAT. ANN. § 49.015 (West Sup. 1993).
324. *Jones*, 485 N.W.2d at 22-25.
325. *Id.* at 28.
326. *See supra* part IV.F.
327. *See supra* text accompanying notes 42-54.
328. *Jones*, 485 N.W.2d at 27-28.

dents.[329] Why are newcomers singled out to bear the burden of this new regulation? The one obvious answer is that the real purpose of the statute is to keep out those who cannot support themselves.

B. *Shifting the Tax Burden to Newcomers and the Legacy of* Zobel v. Williams

In the wake of sharply rising property taxes, the voters of California in 1978 adopted Proposition 13,[330] an amendment to the California Constitution which imposed sharp limits on property taxes. Specifically, under Proposition 13, property taxes could not exceed 1% of the acquisition value of real property and the property tax assessment could not increase more than 2% per year.[331] But how could local governments in California freeze their tax rates and still pay for the rising costs of government services in years to come? The solution, at least in part, was Proposition 13's "Welcome Stranger" system of taxation. The system received its name because "the newcomer to an established community is 'welcome' in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home."[332]

The key to shifting the tax burden to newcomers was the acquisition value assessment scheme. Since assessments were linked to acquisition value, during periods of steep inflation in the housing market those who purchased homes later received much higher assessments for comparable houses. For example, in 1988, ten years after the enactment of Proposition 13, Steph-

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329. *See* Shapiro v. Thompson, 394 U.S. 618, 637-38 (1969). The Court in *Shapiro* stated:

> Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment provides no rational basis for imposing a one-year waiting period restriction on new residents only.

Id.

330. CAL. CONST. art. XIII, § A.

331. *Id.*

332. Nordlinger v. Hahn, 112 S. Ct. 2326, 2329 (1992).

anie Nordlinger purchased a home in Los Angeles County for $170,000, and shortly thereafter received a tax bill of $1,701.[333] One block away, a long-established neighbor with a virtually identical house paid only $358 in property tax.[334] Ms. Nordlinger was sufficiently upset by the disparity to take her case all the way to the United States Supreme Court.

The Supreme Court considered the validity of Proposition 13 and its adverse impact on newcomers in *Nordlinger v. Hahn*.[335] Once again, the Court's treatment of the appropriate level of review was unsatisfactory. The Court considered the case to clearly warrant a straightforward application of rational basis review, a "standard [that] is especially deferential in the context of classifications made by complex tax laws."[336] At first glance, Proposition 13 appears to be a penalty on the right to travel in that it disadvantages all new California residents by requiring them to carry a disproportionate share of the tax burden. However, there are two ways to avoid the conclusion that Proposition 13 penalizes the right to travel. Neither response is entirely satisfactory.

The California Court of Appeals rejected the right to travel argument because Proposition 13 does not distinguish between citizens on the basis of residence, but rather on the basis of the time at which they acquire property.[337] Thus, any benefit to long-term Californians was incidental. In fact, many long-term Californians would be disadvantaged when they purchased new homes. The United States Supreme Court rejected the right to travel argument on the alternative ground that the petitioner, Stephanie Nordlinger, lacked standing to raise it.[338] Since she had been a resident of California before she purchased her new home, she could not argue that her right to *interstate* travel had been infringed.

A generous reading to its earlier treatment of this issue in *Memorial Hospital v. Maricopa County* would have justified the

333. *Id.* at 2330.
334. *Id.*
335. 112 S. Ct. 2326 (1992).
336. *Id.* at 2332.
337. *Id.* at 2331.
338. *Id.* at 2332.

Court in allowing Ms. Nordinger to raise the right to travel claim.[339] In that case, the plaintiff complained of an Arizona *county* residence requirement that equally disadvantaged immigrants from both other counties in Arizona and other states.[340] Like Proposition 13, the Arizona law was not an explicit classification based on *state* residence. The Court nevertheless concluded that the right to interstate travel was implicated because the state could not accomplish indirectly, through a county requirement, what it was prohibited from accomplishing directly.[341] One of the effects, even if not the principal effect, of the county residence requirement was an impermissible penalty on interstate migration. Similarly, even if the principal negative effects of Proposition 13 would be felt by California residents, it would also have significant effects on interstate migration. All those who benefitted from the law would be long-term residents of California and all interstate migrants to California would be comparatively disadvantaged. Under the Court's reasoning in *Memorial Hospital*, that disparity should be enough to implicate the right to travel. However, it was not enough for the Court in *Nordlinger*. The plaintiff's case would have been strengthened by the addition of a recent arrival from out of state as a co-plaintiff.

However, Proposition 13's treatment of newcomers could have easily failed even rational basis review. Although the Court in *Zobel v. Williams*,[342] used a rational basis standard to invalidate discrimination against newcomers, it was definitely not the Court's traditional rational basis review. Only reference to the right to travel or some special concern for newcomers can explain the close scrutiny which the Court used in that case to invalidate the statute. But the Court in *Zobel* refused to acknowledge that it was engaging in anything more than rational basis review. Thus, the majority in *Zobel* left open the possibility that a future Court could take them at their word. This is what happened in *Nordlinger*. Superficially, the Court's decision was consistent with *Zobel*, but in fact it used a far more deferential standard of review.

339. 415 U.S. 250 (1974).
340. *Id.* at 252.
341. *Id.* at 255-56.
342. 457 U.S. 55 (1982).

In applying this deferential standard of review, the majority opinion in *Zobel* intimated that the acquisition value assessment scheme may not be unequal treatment at all.[343] Even if there were some inequalities, the Court found that Proposition 13's acquisition value assessment scheme was rationally related to the preservation of neighborhood stability and to the protection of the reliance interests of established residents.[344] These three arguments will be examined more closely.

First, consider the argument that Proposition 13 does not create any inequalities. By way of comparison, the Court in *Zobel* forbade the distribution of the oil funds on the basis of length of residence, but implicitly approved an equal payment to all current residents. Even such an equal payment would not resolve the equality problem permanently. If in 1980, Alaska made a one-time payment of $1,000 to every resident, *Zobel's* requirement would be satisfied. But what about the new residents arriving in 1981 and thereafter? Although they would surely be disappointed, neither *Zobel* nor any other Court opinion has ever suggested that the state has any obligation to make up to new residents for the benefits that accrue from *past* equal treatment of earlier residents. Suppose then that in 1980 Alaska purchased for each current resident a $1,000 lifetime annuity. This would be no different and no more unconstitutional than the payment of $1,000 in a lump sum. However, it is likely that those arriving in 1981 and thereafter would feel even greater resentment as they saw their neighbors receiving annual annuity checks. Presumably, however, following *Zobel*, those checks would be viewed as benefits accruing from past equal treatment, rather than present unequal treatment, and would not be impermissible.

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343. Nordlinger v. Hahn, 112 S. Ct. 2326, 2332-33 (1992). The *Nordinger* court stated:

> As between newer and older owners, Article XIIIA does not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments. Newer and older owners alike benefit in both the short and long run from the protections of a 1% tax rate ceiling and no more than a 2% increase in assessment value per year. New owners and old owners are treated differently with respect to one factor only—the basis on which their property is initially assessed.

Id.

344. *Id.* at 2333.

Returning then to Proposition 13 and *Nordlinger*, consider the question: Is the acquisition value assessment scheme current unequal treatment of residents, or are the different tax levels merely benefits accruing from past equal treatment? There is no clear answer to this question. On one hand, since the state is free to make new assessments each year, the differentials can be viewed as current unequal treatment. On the other hand, since the state gave everyone an acquisition value assessment in 1978 and continues to do so for subsequent acquisitions, the tax differentials could be viewed as simply a reflection of advantages gained from inflation in the private market and thus as benefits accruing from past equal treatment.

Even if some inequality results from the acquisition value scheme, the majority in *Nordlinger* considered that inequality to be justified by promotion of neighborhood preservation, continuity, and stability.[345] This argument is partly communitarian. It suggests that those who stay in one place for a long time deserve a reward. Stability enhances a sense of community and often enhances community resources. Thus, in some situations seniority should be rewarded. Those societies that revere the elderly do so on the assumption that long experience brings wisdom and that wisdom is very beneficial to the community. Although the state ought not be allowed to impose communitarian mandates on membership in the state as a whole,[346] Proposition 13 is a far more benign attempt to support small communities in their attempts to preserve themselves. Thus the acquisition value scheme is rationally related to this legitimate concern for the community.

The final justification accepted by the majority was the protection of reliance. As the Court explained, "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner."[347] This probably means that a homeowner who has been paying property taxes of $500 per year has a reliance interest in keeping them at that level. If property taxes

345. *Id.*
346. *See supra* part IV.C.
347. *Nordlinger*, 112 S. Ct. at 2333.

increase too much, the homeowner may have to sell her home. On the other hand, a new purchaser has not relied on the past assessment, and, she can take into account the high property taxes when deciding whether to purchase the house in the first place.[348]

Notwithstanding the majority's ready acceptance of the stability and reliance arguments, a plausible application of *Zobel* to *Nordlinger* suggests that it should have reached a different result. In *Zobel*, the Court rejected the state's distribution of state funds on the basis of length of residence, and then asked rhetorically, "Could states impose different taxes based on length of residence?"[349] The Court obviously thought not, for this would create the impermissible result of the state "divid[ing] citizens into expanding numbers of permanent classes."[350] But this was precisely the impermissible result of Proposition 13. California enacted a program that in fact does impose different taxes based on length of residence. Proposition 13 appears to divide citizens into expanding numbers of permanent classes; each class consisting of those Californians who acquired their property on a given day. Proposition 13 appears to be nothing more than the "selective provision of benefits based on the timing of one's membership in a class."[351] Justice Stevens in dissent was not persuaded by the reliance interest justification. To him, the defense of reliance did no more than restate the discrimination being challenged.[352] Established homeowners, having been preferred by Proposition 13, had come to rely on that preferred position and did not wish to not be dislodged from it.[353] For Stevens, this was an unacceptable bootstrapping argument, not a justification based on reliance. "[T]he Court seems to be saying that earlier purchases can benefit under Proposition 13 because earlier purchasers benefit under Proposition 13."[354] That is a tautology, not a justification.[355]

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348. *Id.*
349. Zobel v. Williams, 457 U.S. 55, 64 (1982).
350. *Id.*
351. *Nordlinger*, 112 S. Ct. at 2348 (Stevens, J., dissenting).
352. *Id.* at 2347 (Stevens, J., dissenting).
353. *Id.* (Stevens, J., dissenting).
354. *Id.* at 2347 (Stevens, J., dissenting).
355. *See id.* at 2344.

VI. CONCLUSION

If Vivian Thompson[356] could be found today, she might still be living in Connecticut. She will have been a resident of Connecticut for twenty-seven years. Obviously, she would not be currently disadvantaged by discrimination against newcomers. Likewise, Stephanie Nordlinger may be an oldtimer in Baldwin Hills twenty-seven years from now. She will probably have one of the lowest tax bills in the neighborhood. Newcomers become established residents. Established residents move and become newcomers somewhere else. The rough edges in time are smoothed over.

In the meantime, however, feelings of resentment arise when some people appear to receive a better deal from the government than their similarly situated neighbors, just because they have been around longer. In the private sector, this comparative disadvantaging of newcomers is "an idea whose time may have passed."[357] If its time has passed, it will not be out of concerns over abstract justice or the Constitution, but because it turned out to be inefficient. The cost savings from paying new workers less than established workers was outweighed by the tensions it created in the workplace and by the psychological toll it took on the everyday workforce.[358] This evidence of efficiency, added to the claims of equality discussed above, indicates that newcomers should not be made to bear the burdens that long-term residents are unwilling to carry themselves.

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356. Vivian Thompson was one of the named parties in Shapiro v. Thompson, 394 U.S. 618, 623 (1969).

357. Clifford J. Levy, *An Idea Whose Time May Have Passed*," N.Y. TIMES, Sept. 17, 1993, at D1.

358. *Id.* at D4.