DISCRIMINATION AGAINST NEW STATE CITIZENS: AN UPDATE

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Ten years ago, the first article in Volume 1, Number 1, of *Constitutional Commentary* was my brief analysis of a decade of confusing cases dealing with discrimination against new state citizens.[1] In responding to the editors' request that I participate in the anniversary issue, it seemed only natural to try to bring my earlier effort up to date.

Most cases held that it was unconstitutional for states to discriminate against new citizens. The problem lay in the bewildering and inconsistent explanations for those outcomes. *Shapiro v. Thompson*[2] began the process by concluding that denying welfare benefits to new citizens interfered with their constitutional right to free migration. *Dunn v. Blumstein*,[3] dealing with durational residency requirements for voting, and *Memorial Hospital v. Maricopa County*,[4] invalidating a durational residency requirement for free medical services to the indigent, explained that the issue was not whether new citizens were in fact deterred from migration, but whether denial of a state benefit was a "penalty" for recent migration. *Maricopa County* stated that a durational residency requirement was an unconstitutional penalty if the benefit denied was a "basic necessity of life." *Vlandis v. Kline*[5] invalidated a state law that made new citizens enrolling in state universities permanently ineligible for the lower tuition charged state citizens. The rationale ignored claims of discrimination against new citizens, and rested on the denial of a hearing to determine actual citizenship. *Zobel v. Williams*[6] invalidated an Alaska scheme that distributed state oil income depending on

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1. William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Comm. 9 (1984).

2. 394 U.S. 618 (1969).

3. 405 U.S. 330 (1972).

4. 415 U.S. 250 (1974).

5. 412 U.S. 441 (1974).

6. 457 U.S. 55 (1982).

length of residence.[7] Chief Justice Burger's opinion for the Court applied what purported to be a "minimum rationality" standard of equal protection. While the opinion concluded that a state objective to award longer residents for their past contributions was not legitimate, it left open the question whether other possible state interests were legitimate, and whether "more rigorous scrutiny" was in order when the state discriminated against new residents.

The cases that permitted denial of benefits to new citizens were also confusing. *Vlandis v. Kline* stated, in dictum, that new state citizens could be charged higher tuition in state universities for the first year. The explanation was the relatively uncontroversial proposition that a reasonable durational residence requirement was an appropriate method to insure that only bona fide state citizens claimed the lower tuition.[8] *Sosna v. Iowa*,[9] which upheld an Iowa law barring new citizens from the divorce courts, could have been sustained on the same rationale. Justice Rehnquist's opinion for the Court, however, suggested that a wide range of state policies—here Iowa's concern to avoid becoming a "divorce mill"—could sustain durational residency requirements for state benefits extended to state citizens.

I argued ten years ago that the doctrinal confusion of the cases demanded a better explanation, one grounded in the Citizenship Clause of section one of the Fourteenth Amendment.

> One aspect of full sovereignty denied to the states is the power to determine membership in the community. Under the fourteenth amendment, any United States citizen becomes a full-fledged member of the state community immediately upon establishing residence there. . . . A state's decision that old-timers deserve a greater share of state-owned resources cannot be squared with a constitutional structure that demands that newcomers be treated as full members of the state community.[10]

I argued, from this premise, that no competing substantive state policies could justify a decision to deny newcomers an equal share of state benefits. A durational residency requirement

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7. Each citizen eighteen years old or older received one share for each year of residency since 1959, the year of Alaska statehood.

8. 412 U.S. at 452. The Court relied on the summary ruling in *Starns v. Malkerson*, 401 U.S. 985 (1971), affirming 326 F. Supp. 234 (D. Minn. 1970). Another summary affirmance of a case sustaining a durational residency requirement for payment of in-state tuition at a state university was *Sturgis v. Washington*, 414 U.S. 1057 (1973), affirming 368 F. Supp. 38 (W.D. Wash. 1973).

9. 419 U.S. 393 (1975).

10. 1 Const. Comm. at 17 (cited in note 1).

should only be sustained when a benefit can constitutionally be limited to a state's own citizens and when the requirement is a reasonable test of bona fide residence. I argued, finally, that the pattern of decisions lined up exactly with these principles, even if the stated rationales did not. Although *Sosna* purported to rest on other grounds, it could be explained by Iowa's concern that otherwise its divorce processes would be invoked by "non-citizens physically present in the state for a brief period."[11] The proposition that durational residency requirements are invalid except insofar as they respond to a reasonable concern for proof of domiciliary intent "is a cleaner inquiry than the ones suggested by present doctrine, and would place the constitutional right of equal state citizenship in its proper perspective."[12]

In the intervening ten years, very little has changed. Three additional cases have, over substantial dissent, disapproved state laws treating new and old citizens unequally.[13] Two cases dealt with veterans' preferences. *Hooper v. Bernalillo*[14] struck down a New Mexico law that granted a tax exemption to Vietnam veterans only if they resided in the state before May 8, 1976. Chief Justice Burger's opinion followed the same path as his *Zobel* opinion, concluding that the distinction between eligible and non-eligible veterans violated equal protection because "the statutory scheme cannot pass even the minimum rationality test." *Zobel* was cited for the proposition that "the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'" Justice Stevens' dissent, joined by Justices Rehnquist and O'Connor, argued that there was a "rational" justification. New Mexico could have awarded all Vietnam veterans living in the state a lump sum bonus in 1976, without being required to provide additional bonuses later to new arrivals. The tax exemption, although it continued into the future, operated in much the same fashion.[15]

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11. Id. at 19.

12. Id.

13. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986); *Williams v. Vermont*, 472 U.S. 14 (1985).

14. 472 U.S. 612 (1985).

15. There was a timing problem in *Hooper*. But if the majority ignored it, Justice Stevens oversimplified it. A state need not share state-owned resources with non-citizens. If a state were to give a cash bonus to resident veterans upon their induction into service, veterans who moved to the state after discharge could not complain they had been denied the bonus. If, however, the state is allowed to fix a past date as the qualifying residency date for future benefits, the door is open for the state to draw distinctions between old and new citizens for the disbursement of present benefits.

Moreover, newly arrived veterans denied the tax exemption were treated like the great majority of state citizens who were ineligible for the benefit.

The same 6-3 division split the Justices in the other veterans' benefit case one year later—*Attorney General of New York v. Soto-Lopez*[16]—but produced new doctrinal arguments. The Court struck down a New York law that limited a veterans' civil service preference to veterans who resided in New York when they entered military service. Chief Justice Burger and Justice White followed *Zobel* and *Hooper*, arguing that the denial of the veterans' preference to new residents failed the equal protection rational basis standard. Justice Brennan's plurality opinion, however, joined by Justices Marshall, Blackmun, and Powell, relied on the "penalty" rationale of *Dunn* and *Maricopa County*, concluding that "even temporary deprivations of very important benefits and rights can operate to penalize migration." As in *Hooper*, Justices Rehnquist, O'Connor, and Stevens dissented.

The third case dealing with discrimination against new citizens involved a complicated Vermont statute providing an exemption from payment of use taxes for automobiles purchased in other states. The exemption was available only for persons who were Vermont residents when they purchased the automobile. Justice White's opinion for the Court in *Williams v. Vermont*[17] held that the different treatment of new and old Vermont residents flunked the rational basis equal protection standard. There was "no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere." Justices Blackmun, Rehnquist, and O'Connor dissented.

Ten years ago, there was some reason to hope that the Court would provide a reasoned, unitary explanation for the outcomes in this area of constitutional law. There is less reason today. The Court continues to leave undefined the constitutional interest served by protecting new citizens from discrimination, and treats the question as one requiring an ad hoc balance between infinite competing interests.

The doctrinal uncertainty is likely to come to the surface in states that have recently tried to limit the welfare benefits awarded to new arrivals. *Shapiro* established that states cannot deny all welfare benefits to new arrivals. Instead, a number of

16. 476 U.S. 898 (1986).
17. 472 U.S. 14 (1985).

states facing budget crises have limited new citizens to the welfare benefits they would have received in their states of origin. In 1970, the Massachusetts Supreme Court rendered an advisory opinion that limiting welfare payments to those in the state of origin for the first two years of Massachusetts residence would be inconsistent with *Shapiro*.[18] Twenty-three years later, courts have struggled with a more complex doctrinal structure when they considered similar legislation. A federal district court has held unconstitutional the California statute[19] limiting AFDC benefits to the level of those in the state of origin for the first year of California residence.[20] Most recently, the Supreme Court of Minnesota invalidated a statute[21] reducing general assistance grants for the first six months of Minnesota residence to the greater of sixty percent of the normal grant, or the amount the recipient would have received in the state of origin.[22] In both cases state officials predictably argued that *Shapiro* and *Maricopa County* were inapplicable because new residents were not denied all benefits, and had not had their benefits reduced because they migrated. *Zobel*, *Hooper*, and *Soto-Lopez* were distinguished as involving permanent denial of benefits to new residents. Both courts rejected the arguments, and concluded that, whether or not the partial temporary denials of benefits actually deterred interstate migration, they were unconstitutional "penalties."

The states' arguments were accepted by the dissenting Justice in the Minnesota Supreme Court. Justice Tomljanovich argued that, because the right to travel was not "penalized," the appropriate standard of review was the rational basis test of the lowest tier of equal protection analysis under which welfare eligibility standards are nearly-uniformly upheld.[23] Similar arguments were adopted last year by the Wisconsin Supreme Court, which upheld a sixty-day waiting period for grants of general assistance.[24] The Wisconsin Supreme Court noted the "unsettled nature of the degree to which a durational residency requirement must impinge upon the right to travel to be unconstitutional," and that "the parameters of *Shapiro*'s penalty analysis . . . remain

18. Opinion of the Justices, 257 N.E.2d 94 (1970).

19. Cal. Welf. & Inst. Code § 11450.03 (West Supp. 1993).

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

21. Minn. Stat. § 256D.065 (1992).

22. *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993).

23. See *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

24. *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992).

undefined." The court justified the waiting period as advancing a number of substantive state interests, including encouraging employment and avoiding discrimination against families of the working poor.

It is less than clear with whom the Supreme Court, as presently constituted, will agree. The Court has not spoken to the issue since 1986. The only three Justices who were in the majority in all cases striking down discrimination against new state citizens[25] are gone. The Chief Justice has consistently voted to uphold all distinctions between old and new state residents. Three Justices dissented in one, two, or all three of the most recent cases.[26] The five remaining Justices have not participated in any Supreme Court decision touching the issue of discrimination against new state citizens.[27] It is possible that the Court will use minimum scrutiny, as in *Zobel*, *Hooper*, and *Williams*. Viewing the issue that way, it would be easy to characterize the problem, as did Justice Tomljanovich and the Wisconsin Supreme Court, to be simply part of the "intractable economic, social, and even philosophical problems presented by public welfare assistance programs."[28]

These should be easy cases. They are not because they have been viewed through the Byzantine lens of equal protection doctrine,[29] and not as a straightforward application of the Fourteenth Amendment's Citizenship Clause. A comparison with another application of that Clause will help to illustrate my argument. California's Governor, Pete Wilson, recently urged that citizenship be denied to children of undocumented aliens born in the United States.[30] The Governor recognized, however, that no state or federal statute could deny these children their United States citizenship. Whatever the strength of competing state in-

25. Justices Brennan, Marshall, and White.

26. Justice Blackmun dissented in *Williams*. Justice Stevens dissented in *Hooper* and *Soto-Lopez*. Justice O'Connor dissented in all three cases.

27. Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg.

28. 485 N.W.2d at 27 (quoting *Dandridge*, 397 U.S. at 487). Justice Coyne reluctantly concurred in the Minnesota decision only because she read Supreme Court precedents to compel that outcome. She argued, however, that the Minnesota statute was "simply [ ] neutral with respect to the right to travel." She concluded that there was "no earthly reason for limiting a state's option to the total discontinuance of general assistance or of risking financial ruin." 504 N.W.2d at 211.

29. See William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 Tul. L. Rev. 884 (1985); William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1 (1985); William Cohen, *State Law in Equality Clothing: A Comment on* Allegheny Pittsburgh Coal Company v. County Commission, 38 U.C.L.A. L. Rev. 87 (1990).

30. *Seeking to Deny Citizenship to Some*, N.Y. Times, Aug. 11, 1993, at A10.

terests, the Citizenship Clause states simply that all persons born in the United States are citizens. Moreover, just as surely as it would violate the Constitution to deny these children their citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were undocumented aliens.

The other provision of the Citizenship Clause is equally clear. United States citizens become citizens of the states wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.