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In the spring of 1974, in the case of *Memorial Hospital v. Maricopa County*,[1] the United States Supreme Court held unconstitutional an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency medical care at the county's expense. In reaching this result the Court relied upon the line of reasoning evolved in *Shapiro v. Thompson*[2] and reaffirmed in *Dunn v. Blumstein*[3] that such durational residence requirements create a classification that penalizes the fundamental right to travel and that must, therefore, be justified by a "compelling state interest" or be found to violate the equal protection clause of the fourteenth amendment.[4]

The thesis of this article is two-fold. First, the Court's acceptance and application of the *Shapiro-Dunn* reasoning in *Maricopa* unintentionally demonstrated the intellectual inadequacy of that much-discussed line of reasoning. Read together, the Court's opinions in *Shapiro, Dunn*, and *Maricopa* establish a set of theoretical principles whose derivation is logically defective, whose consistent application would require unacceptable results in many other cases, and whose existence now forces the Court to distinguish arbitrarily other cases that, in terms of those theoretical principles, simply are not distinguishable from *Shapiro, Dunn*, and *Maricopa*.[5] Secondly,

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1. 415 U.S. 250 (1974).
2. 394 U.S. 618 (1969).
3. 405 U.S. 330 (1972).
4. 415 U.S. at 254.
5. This type of practice by the Court has long been attacked by one body of commentators who, in the words of Professor Wechsler, view the role of the Court as follows:

> The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ . . . . This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved . . . .

despite the logical inadequacy and practical disutility of the theoretical reasoning of *Shapiro, Dunn*, and *Maricopa*, the actual result in each of those cases is defensible on the basis of classic fourteenth amendment principles that lead to neither the undesirable results nor the arbitrary distinctions required by application of the *Shapiro-Dunn-Maricopa* reasoning to other cases. To develop this thesis, the doctrines underlying substantive due process and equal protection will be examined, and the "right to travel" cases will be analyzed in light of applicable fourteenth amendment principles.

I. THE DOCTRINES OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

All state action directed at individuals, whether in the form of a restraint on individual interests or a distribution of some benefit to individuals, must satisfy both the substantive due process requirements and the equal protection requirements of the fourteenth amendment. Generally, substantive due process and equal protection impose on state action distinct and separate constitutional requirements. The doctrine of substantive due process is concerned with whether a particular state interference with some individual interest is adequately justified.[6] Whether the interference is imposed equally upon all persons is irrelevant to the requirements of substantive due process.[7] This conceptually secondary question of the state's equal treatment of individuals is the focus of the equal protection doctrine. Even if the state action has met the requirements of substantive due process, the doctrine of equal protection prohibits the unequal treatment of different classes of persons by state action without adequate justification for that inequality.[8]

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

A more tolerant attitude toward unprincipled decisions by the Court is evidenced by Professor Black in a reply to Professor Wechsler. Speaking of the line of segregation decisions following Brown v. Board of Education, 347 U.S. 483 (1954), Black asserted that "[o]pinions composed under painful stresses may leave much to be desired . . . [b]ut the judgments, in law and in fact, are as right and true as any that ever was uttered." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 430 (1959).

6. "Life, liberty, or property," U.S. CONST. amend. XIV, § 1.

7. With respect to federal action, the Court has held that the due process language of the fifth amendment incorporates the prohibitions of both the due process and the equal protection clauses of the fourteenth amendment. Frontiero v. Richardson, 411 U.S. 677 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954). "Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364-65 n.4 (1974).

8. " 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between

In dealing with cases based on the requirements of substantive due process, the Court has distinguished two categories of state actions: (1) state actions that interfere with some individual interest that can be broadly categorized as "life, liberty, or property" and (2) state actions that interfere with an individual interest appropriately described as a "fundamental right." According to the Court's analysis, an action of the former type is adequately justified for purposes of due process if the action bears "a reasonable relation to a proper legislative purpose."[9] This "rational basis" test for state actions that are challenged on substantive due process grounds first appeared in its present form in the mid-1930's in cases upholding the constitutionality of state statutory schemes that regulated retail prices[10] and minimum wages.[11] The development of this relatively tolerant standard was a rejection of the severe standard previously used by the Court to invalidate similar social welfare statutes.[12] Thus, state laws regulating economic affairs are classic examples of state actions that interfere with individual liberty and property and are subjected to this "rational basis test" by the requirements of substantive due process.[13]

On the other hand, when a state action interferes with an individual interest that the Court characterizes as a "fundamental right," substantive due process requires that the action be justified by a finding that it is the least restrictive method available[14] to the state to effectuate a "compelling state interest."[15] This stricter substantive due process test originally was applied by the Court in cases in which the individual interest infringed upon by the state was a liberty specifically protected from federal infringement by the first amendment.[16] Thus, freedom of

classes of individuals whose situations are arguably indistinguishable." Ross v. Moffit, 417 U.S. 600, 609 (1974).

9. Nebbia v. New York, 291 U.S. 502, 537 (1934).

10. Nebbia v. New York, 291 U.S. 502 (1934).

11. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

12. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905).

13. It has heen suggested that in the area of economic regulation the rational basis standard applied by the Court is so tolerant that it constitutes no standard at all. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 39; *see* North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963).

14. Roe v. Wade, 410 U.S. 113, 155 (1973); *see generally* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

15. 410 U.S. 113, 155 (1973).

16. "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963).

association,[17] freedom of speech,[18] and free exercise of religion[19] have routinely enjoyed the more stringent protection of this second substantive due process test. Recently, however, the Court has interpreted those earlier cases as resting, not directly on the specific enumeration of the protected rights in the first amendment, but on the characterization of those rights as "fundamental."[20] Under this view, while the rights enumerated in the first amendment may be fundamental, certain unenumerated rights also may be fundamental and therefore equally deserving of protection under the stricter substantive due process test. Following this line of reasoning, the Court in *Roe v. Wade*[21] specifically added the unenumerated right of personal privacy to the list of "fundamental rights" entitled to the protection of the "compelling interest" test.[22]

In developing the doctrine of equal protection, the Court has evolved a parallel pair of standards for the justification required for any unequal treatment of individuals by the state. Whenever the state distributes unequally the burdens of a regulatory scheme or dispenses benefits unequally, the equal protection clause traditionally has required that the inequality of treatment be justified by a showing that it is rationally related to the effectuation of a legitimate state goal. For example, a state statute setting a minimum age for driver's licenses creates two classes of individuals— those above the age and those below the age— and regulates those classes unequally. Similarly, a state welfare scheme whose benefits are available only to families with incomes below a certain level creates two classes of persons—those above and those below the specified level—and distributes the benefits of welfare unequally between the two classes. The inequality of treatment inherent in the driver's license law or the welfare scheme will be found to violate the equal protection clause of the fourteenth amendment only if the state cannot show that it is rationally related to the effectuation of a legitimate state goal.[23]

17. *E.g.*, Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

18. *E.g.*, Smith v. California, 361 U.S. 147 (1959); Grosjean v. American Press Co., 297 U.S. 233 (1936).

19. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); School Dist. v. Schempp, 374 U.S. 203 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

20. Roe v. Wade, 410 U.S. 113, 155 (1973).

21. *Id.*

22. *Id.* at 152-55.

23. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Fisher v. Secretary of HEW, No. 74-1740 (7th Cir., Sept. 3, 1975) (upholding the constitutionality of eligibility requirements of the Social Security Act, 42 U.S.C. § 423(c)(1)(b)(i) (1970) by applying a rational basis test under an equal protection attack).

In two types of situations the Court has held that an inequality must be justified by a showing that it is necessary to effectuate a "compelling interest" of the state, a much stricter justification for unequal treatment. First, a showing of a compelling state interest will be required whenever the class of persons disadvantaged by the unequal treatment is a "suspect" class, the traditional example of which is a class defined in terms of race. On the basis of the Court's reasoning in *Korematsu v. United States*,[24] unequal treatment of one race with respect to another has been held to violate the equal protection clause unless the state is able to demonstrate that the inequality of treatment promotes a compelling state interest.[25] More recently, the Court has held that "alienage"[26] and "lineage,"[27] like race, are suspect classifications and must be justified by a compelling state interest.[28] On occasion the Court has appeared to add further classes such as wealth[29] or political affiliation[30] to the list of suspect classifications, but in subsequent cases it has failed to implement these suggestions.[31] The result is that only race, alienage, and lineage have been clearly established as "suspect" classifications for equal protection purposes. Most recently, in the case of *Frontiero v. Richardson*,[32] four Justices specifically stated that sex should be held to be a suspect classification requiring the "stricter standard" of equal protection review. Three other Justices, purporting to apply only the weaker "reasonable basis" standard, concurred in finding that particular sex classification violative of equal protection. In spite of the protestations of the concurring three Justices, *Frontiero* ultimately may come to stand for the addition of sex to the list of "suspect categories" requiring stricter review under the equal protection clause.[33]

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24. 323 U.S. 214, 216 (1944).

25. Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

26. *In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

27. Oyama v. California, 332 U.S. 633, 644-46 (1948) (classification based on minor citizen's ancestry violates equal protection).

28. It has been suggested that the relationship of lineage and alienage to race led to this development. Note, *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1124 n.266 (1969) [hereinafter cited as *Developments*]. This, however, is an expansion of the doctrine beyond the original purpose of the equal protection clause.

29. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

30. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

31. For a conspicuous failure to implement the suggestion that wealth is a suspect classification see James v. Valtierra, 402 U.S. 137 (1971). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973). Witb respect to political affiliation see American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974).

32. 411 U.S. 677, 688 (1973).

33. Although the three concurring Justices specifically declined to adopt tbe stricter

The second type of situation in which the Court will require a showing of a compelling reason for unequal treatment arises when the individual interest concerned is a "fundamental right." The Court laid the foundation for this second branch of the more rigorous equal protection standard in the case of *Skinner v. Oklahoma*.[34] In *Skinner* the Court held that sterilizing one class of habitual criminals while exempting another class of habitual criminals was unequal treatment that must be supported by a justification beyond a mere showing of some rational basis for the distinction. The Court subjected this inequality of treatment to strict scrutiny because the individual interest concerned was "one of the basic civil rights."[35] The *Skinner* reasoning has been used by the Court to apply the stricter equal protection standard to state laws that unequally regulate access to the ballot[36] and weight the votes of one district unequally with respect to those of another district.[37]

Because a fundamental right is being regulated unequally, the potential exists for confusing this equal protection doctrine with the strict substantive due process doctrine discussed above. While this second branch of strict equal protection requires a showing of compelling interest to justify any *inequality* in the regulation of such a fundamental right, the strict due process doctrine discussed above requires a showing of a compelling interest to justify any *regulation* of such a right (even though the regulation may be equal in its impact). Theoretically, state regulation of a fundamental right like the right to vote raises separate due process and equal protection questions. First, is the interference with the fundamental right justified by a compelling state interest? Secondly, if the interference is imposed on individuals unequally, is the inequality justified by a compelling state interest? Thus, the doctrines of due process and equal protection that the Court has evolved to date can be outlined in "hornbook" fashion as follows:

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standard of review advanced by the plurality, the classification that they held devoid of a rational basis seemed in fact to be related quite reasonably to the legislative purpose. Thus, the conclusion may be inescapable that while they spoke in terms of the traditional standard, they actually subjected the classification to a standard closer to the strict standard of the plurality. *See id.* at 691-92. One other Justice concurred in the result without articulating the standard with which he judged the classification. *Id.* at 691. *But see* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

34. 316 U.S. 535 (1942).

35. *Id.* at 541.

36. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

37. *E.g.*, Hadley v. Junior College Dist., 397 U.S. 50, 52-53 (1970); Reynolds v. Sims, 377 U.S. 533, 555 (1964); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964).

I. Substantive Due Process Requirements:
   1. Rational Basis Test—Any state regulation of individual life, liberty, or property must be rationally related to the effectuation of a legitimate state interest.
   2. Compelling Interest Test—When the individual interest regulated is a fundamental right, the regulation must be the least restrictive method available for the effectuation of a compelling state interest.

II. Equal Protection Requirements:
   1. Rational Basis Test—Any inequality in the treatment accorded two separate classes of persons by the state must be rationally related to the effectuation of a legitimate state interest.
   2. Compelling Interest Test—
      a. Suspect Class—When the class of persons disadvantaged by the unequal treatment is a suspect class, the inequality of treatment must be necessary to effectuate a compelling state interest.
      b. Fundamental Right—When the unequal treatment is the unequal regulation of a fundamental right, the inequality of treatment must be necessary to effectuate a compelling state interest.

The Burger Court has begun to face increasing numbers of equal protection cases in which the alleged discrimination defies easy assignment to one of the three categories defined in the fashion of the Warren Court above. Some of these cases have concerned attacks on classifications that seem to raise many, but not all, of the same considerations that resulted in the establishment of race and alienage as suspect classifications subject to the compelling interest test.[38] Others have dealt with discriminatory regulation of individual interests that are clearly more important to the Court than individual economic arrangements, but do not seem to be as basic as access to the ballot or other "fundamental rights," whose unequal regulation must be justified by a compelling state interest.[39] Not surprisingly, several members of the Court have reacted to these cases by consciously or unconsciously moving away from the strict, two-tiered equal protection analysis in favor of an ad hoc weighing

38. *See* Johnson v. Robison, 415 U.S. 361 (1974) (unequal treatment of conscientious objectors); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex-based classification); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth classification); Reed v. Reed, 404 U.S. 71 (1971) (sex-based classification).

39. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (right to education); Dandridge v. Williams, 397 U.S. 471 (1970) (right to welfare).

of the state interest offered in justification of the discrimination against the invidiousness of the classification or the importance of the individual interest and the seriousness of the state's interference. In some instances, the Justices have engaged in this case-by-case weighing by conspicuously failing to state the standard against which the state interest is being measured.[40] In other instances, certain Justices have purported to measure the state interest against the traditional rational basis standard while holding the state to a standard of justification that obviously is much stricter than the "hands off" rational basis standard usually applied in economic regulation cases.[41]

Among the Justices who have used on occasion some standard in between hands-off rational basis and strict compelling interest, Justice Marshall has been the most forthright and consistent advocate of the substitution of a "sliding scale" of strictness for the rigid two-tiered approach usually imposed in equal protection cases.[42] To date, it appears that only one other member of the Court has been willing to embrace openly Justice Marshall's articulation of what the Court in fact has been doing.[43]

The Marshall analysis casts considerable doubt on the practical utility of forcing the nearly infinite variety of individual interests into the fundamental-nonfundamental conceptual dichotomy or of forcing the variety of potential classifications into the suspect-nonsuspect conceptual dichotomy. The seriousness of the defect in the classification and the importance of the right unequally regu-

40. *See* Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hospital v. Maricopa County, 415 U.S. 250, 270 (1974) (Burger, C.J., & Blackmun, J., concurring in the result); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Stewart, J., concurring).

41. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973) (Burger, C.J., Powell & Blackmun, JJ., concurring); James v. Strange, 407 U.S. 128 (1972) (no rational basis for Kansas recoupment statute denying to indigent defendants the statutory rights of other debtors); Eisenstadt v. Baird, 405 U.S. 438 (1972) (plurality opinion) (a ban on the use of contraceptives by single persons invalidated, citing traditional equal protection principles). *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

42. The Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); *accord*, Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

43. Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring).

lated, however, are separate and distinct reasons for requiring a certain level of justification by the state—whether an infinite number of levels of justification are possible, as Marshall suggests, or only two, as the "hornbook" outline above suggests. In other words, while the dichotomy between fundamental and nonfundamental interests in fact may represent a "sliding scale" or continuum of levels of importance, it is a qualitatively different "sliding scale" from the one represented by the dichotomy between suspect and nonsuspect classifications. Thus, the conceptual distinction between a defect in the class drawn by the state and the importance of the individual interest unequally regulated by the state would seem to retain analytic validity and utility even under the Marshall "sliding scale" analysis. Unfortunately, it is precisely this conceptual distinction that the Court has blurred badly in the process of deciding the *Shapiro* line of cases.

II. *Shapiro v. Thompson*[44]

Shapiro involved the constitutionality of residence requirements in the welfare statutes of two states and the District of Columbia. Plaintiffs attacked as violative of due process and equal protection the requirement that an applicant reside in the state or in the District for one year before becoming eligible for welfare payments. Invoking the second branch of the strict equal protection doctrine, the Court held that discrimination between applicants who had resided in the state for more than one year and those who had resided there for less than one year was unequal treatment that "penalized" the exercise of the fundamental right to travel and that therefore must be justified by a compelling state interest.[45] Concluding that none of the interests proffered to justify the inequality of treatment were "compelling," the Court held that the residence requirements violated the equal protection clauses of the fifth and fourteen amendments.

In view of the theoretical relationship between the due process and equal protection doctrines outlined in the discussion above, the Court normally should have addressed the due process questions first.[46] This would have involved three inquiries: whether the state

44. 394 U.S. 618 (1969).

45. *Id.* at 634.

46. [W]hen . . . a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, . . . there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.

Id. at 659 (Harlan, J., dissenting).

infringed upon some individual liberty; if so, whether the liberty interfered with was a fundamental right; and if so, whether a compelling state interest justified the regulation. In fact, the Court never addressed this initial substantive due process question. It appears that the Court was at least intuitively aware that the case did not involve the infringement of any fundamental right—specifically, the right to travel. Notwithstanding the Court's use of emotionally charged language implying the contrary,[47] no one had been "fenced out" of the state in the normal sense of that term. Since the defendant states neither directly nor indirectly had interfered with travel by the plaintiffs, the Court's intuition correctly led it to by-pass without discussion the contention that the questioned residence requirements violated substantive due process by infringing on the fundamental right to travel. Nor did the residence requirements raise substantive due process problems when viewed simply as a direct regulation of availability of welfare benefits. A state may choose to establish no welfare system at all and not thereby run afoul of the requirements of substantive due process. In other words, a right to welfare is not among the rights of "life, liberty, or property" protected by the due process clauses of the fifth and fourteenth amendments.[48] Since there is no constitutional right to welfare, a state regulation of the availability of welfare benefits cannot alone violate the requirements of substantive due process.

On the other hand, when a state chooses to dispense benefits such as welfare payments, the constitutional doctrine of equal protection requires that it do so equally or be able to adequately justify any inequality. While the defendant states in *Shapiro* did not "fence out" anyone from the state by the welfare residence requirements, they did deprive a class of persons (residents for less than one year) of welfare benefits. This led the Court to conclude correctly that the constitutional problem created by the residence requirements was essentially a problem of equal protection. The critical theoretical error in *Shapiro* occurred when the Court invoked the second or "fundamental rights" branch of the strict equal protection doctrine and subjected the inequality of treatment to the compelling state interest test on the ground that the questioned classification served to "penalize" the fundamental right to travel. In support of this assertion, the Court cited without further explanation the substantive due process case of *Sherbert v. Verner*.[49]

47. *Id.* at 631.

48. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Gunther, *supra* note 41, at 13.

49. 374 U.S. 398 (1963); *see* note 19 *supra* and accompanying text.

Certainly no regulation or restriction of the right to travel in the ordinary sense was present.[50] No criminal prohibition against travelling into the state or against assisting travel into the state was enforced,[51] nor was even the minimal restriction of a small tax on entry into or departure from the state.[52] Of course, the state may infringe upon an individual right through means other than direct regulation. The Court made clear in *Sherbert* that a state unemployment compensation law that conditioned availability of benefits upon willingness to work on Saturday infringed upon plaintiff sabbatarian's first amendment right to the free exercise of religion. Although no general constitutional right to unemployment compensation and no evidence of intent by the legislature to deter religious practices by sabbatarians were found, the Court stated that "conditions on public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[53] According to the Court in *Sherbert*, governmental imposition of a choice between unemployment compensation and adherence to the appellant's religious observances deterred or inhibited appellant's exercise of freedom of religion by rewarding the nonexercise of that right. Such a state-created reward for nonexercise of appellant's religious freedom put "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[54] Since the Court was unable to identify a compelling state interest to justify this infringement of appellant's fundamental right, the state unemployment compensation statute was found to violate the requirements of substantive due process.

The welfare residence requirements attacked in *Shapiro*, however, did not present even an indirect burden or penalty of the type identified in *Sherbert*. Prior to their moves to the defendant states, the plaintiffs had absolutely no claim in those states for welfare benefits. Immediately after moving to the defendant states their situation with respect to those states was unchanged—that is, they still had no eligibility for welfare benefits. With respect to the defendant states the plaintiffs simply were no worse off than before their moves. To be sure, the defendant states were not as attractive a destination as they would have been had welfare benefits been made

50. Shapiro v. Thompson, 394 U.S. 618, 650 (1969) (Warren, C.J., dissenting); *accord*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 285-86 (1974) (Rehnquist, J., dissenting).

51. *See* Edwards v. California, 314 U.S. 160 (1941).

52. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

53. 374 U.S. at 405.

54. *Id.* at 404.

available to new residents immediately upon arrival, especially if their welfare benefits were unusually generous. But failing to offer benefits that would make the state a more attractive place does not in any ordinary sense constitute penalizing those who travel to the state or inhibiting travel to the state by rewarding nonexercise of a right as in *Sherbert*.[55]

Furthermore, it is not at all clear from the facts stated by the Court that the plaintiffs were actually disadvantaged in even the slightest degree by the unavailability of welfare payments in their new states of residence. Since the Court apparently did not consider the fact important enough to mention, it could be assumed that the states from which the plaintiffs came had no welfare scheme at all or that the plaintiffs were ineligible for welfare under the eligibility standards of those states. Under that assumption, the plaintiffs' net position after moving would be at least as good as their position before moving. In fact, their position might have improved slightly since they would now be eligible for benefits in the new state once a year of residence had passed. It would seem nonsensical to assert that plaintiffs were somehow disadvantaged or penalized in their interstate movement by the absence of welfare benefits in the new states. Since the Court did not indicate whether the plaintiffs relinquished welfare benefits in the states from which they moved, it surely did not rely on that fact in reaching its conclusion. In effect, the Court seems to have held that the plaintiffs were penalized in their interstate movement by the absence of welfare payments in their new states even though they did not forego any welfare payments by leaving the states of their former residence.

If, on the other hand, we assume that the plaintiffs by moving to the defendant states were forced to relinquish an established right to welfare in the states from which they came, the closest analogy to the *Sherbert* problem is the withdrawal of welfare benefits by the plaintiffs' old states of residence. The old states of residence presumably conditioned their welfare benefits upon plaintiffs' remaining in those states, thus putting the plaintiffs to the choice between continued receipt of welfare benefits and exercise of their fundamental right to travel out of the state. Thus, the old states of residence penalized the plaintiffs' exercise of their right to travel in the *Sherbert* sense by rewarding nonexercise of the right with continued payment of welfare benefits.

Even if we accept at face value the Court's assertion in *Shapiro* that ineligibility for welfare in the new states of residence penalized the plaintiffs' fundamental right to travel in the *Sherbert* sense, the

55. Shapiro v. Thompson, 394 U.S. 618, 649-50 (1969) (Warren, C.J., dissenting).

analytical consequences of the *Shapiro* holding are unacceptably broad. If the unavailability of welfare payments in the new states burdened the plaintiffs' right to travel to those states, the fact that those states chose to pay welfare to other residents in no way increased the burden on the plaintiffs' right to travel. In other words, if the defendant states had provided no welfare system at all, the unavailability of welfare benefits to the plaintiffs would have constituted exactly the same burden on plaintiffs' right to travel to those states. Thus, the Court's holding in *Shapiro* leads inescapably to the conclusion that any state that does not have a system of welfare has burdened the fundamental right of all indigents to travel into that state and must under the requirements of substantive due process demonstrate a compelling state interest to justify its refusal to enact a welfare statute.[56] The same problem would be encountered by any state whose existing welfare scheme provides lower benefits than those available in other states or whose eligibility standards exclude persons or families who would be eligible for welfare under the standards of other states. Because of differences in the size of benefits or the scope of eligibility provisions, some persons travelling from a state with more generous provisions to a state with less generous provisions would suffer a net reduction in welfare benefits. This net disadvantage or loss resulting from such a move would constitute precisely the same sort of burden on the right of those persons to travel as did the net loss of welfare benefits suffered by plaintiffs in *Shapiro*. Thus, all states would be required under substantive due process to demonstrate a compelling state interest for their refusal to offer welfare benefits at least as high as the most generous available anywhere in the United States or to have eligibility provisions at least as liberal as the most liberal in force in any of the other forty-nine states.

Once established (as it seems to be in *Shapiro*), such a principle would be virtually unlimited in its applicability. It would seem to apply any time a state or political subdivision of a state offers lower quality schools than those available in some other state, has less regular garbage collection than that available in some other state, provides more limited water and sewer service than that available in some other state, contains lower quality roads than those provided in some other state, or charges higher state university tuition than that charged for a comparable education in some other state. Travellers from those other states will suffer a loss in benefits of residence in the new state as compared with those available in the old and thus experience precisely the same sort of disincentive to

56. *Contra*, Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972).

travel as that experienced by the plaintiffs in *Shapiro*. Under *Shapiro* the new state in each of these situations has burdened or penalized the fundamental right of those who would travel to the state from some state with greater benefits for residents, and it would be forced by the requirements of substantive due process to demonstrate a compelling state interest to justify its failure to provide the particular benefits at the level existing in the state from which the traveller came.

It is interesting to note in this connection that the Court in *Shapiro* focused only on the disadvantage of loss of welfare payments suffered by plaintiffs as a result of their move without considering the possibility that other benefits of residence in the defendant states, such as more readily available public housing or higher quality public schools, offset the loss of welfare and resulted in a net gain in total benefits provided to the plaintiffs. Thus it would seem that a state could not avoid constitutional attack on its comparatively inferior garbage collection or water and sewer service by a demonstration of a net gain in total state benefits by any move into the state by virtue of the superior quality of its schools, highways, housing, health care facilities, and other services.

Obviously it was not the intent of the Court in *Shapiro* to create such a massive constitutional quagmire. In the face of these obviously unacceptable, yet analytically unavoidable applications of the *Shapiro* rationale, it could be argued that the burden on the fundamental right to travel identified in *Shapiro* should be considered a burden only for purposes of the equal protection clause. The first problem with such an attempt to confine the *Shapiro* rationale is that the burden on the right to travel posed by the absence of welfare in the new state is a simple fact that remains unchanged whether one measures the burden against the requirements of due process or equal protection.[57] In fact, the *Sherbert* case from which the Court purports to draw its peculiar notion of penalty was a substantive due process decision: the state statute must be justified by a compelling state interest because it exacted a price for the exercise of a fundamental right. But even if this logical defect is overlooked, the suggested limitation does not eliminate the undesirable overbreadth of the *Shapiro* reasoning. For instance, assume

57. [A] law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a state or federal regulatory law, to be tested against the Due Process Clause of the Fourteenth or Fifth Amendment. (Emphasis supplied by Court). Shapiro v. Thompson, 394 U.S. 618, 643-44 (1969) (Stewart, J., concurring); *accord, id.* at 659 (Harlan, J., dissenting) (quoted at note 46 *supra*).

that the welfare statute in State X makes benefits available only to those with a net yearly income of less than $1,500, while the statute in State Y makes similar benefits available to individuals with net incomes of less than $2,500. An individual in State Y with a net annual income of $2,000 who was receiving welfare benefits from State Y would, if he moved to State X, be completely ineligible for welfare benefits. This loss of benefits would burden his fundamental right to travel to State X from State Y, thus subjecting State X to the substantive due process requirement that it show a compelling state interest for its more restrictive eligibility standards. If this due process argument is met with the suggested objection that *Shapiro* establishes such a burden only for purposes of equal protection, the traveller simply could recast his objection in terms of equal protection. He would point out that State X in its eligibility requirements discriminates between two classes of persons in State X: those with net incomes over $1,500, and those with net incomes below $1,500. In the case of our hypothetical traveller this discrimination between these two classes in State X results in his loss of welfare benefits when he moves to State X from State Y. Thus, the classification chosen by State X has served to penalize or disadvantage our traveller in his move from State Y. It seems obvious that such a result would not have been intended by the Court in *Shapiro*, yet State X is not protected from that result by the suggestion that the *Shapiro* rationale is limited to equal protection cases.

Another attempt to limit the applicability of the *Shapiro* rationale has emerged in the opinions of Justice Marshall subsequent to *Shapiro*. The cornerstone of Marshall's position is a cryptic footnote in the *Shapiro* opinion disclaiming any view of the validity of residence requirements for tuition-free education or licenses to practice a profession or for hunting and fishing. According to the footnote, "[s]uch requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel."[58] From this disclaimer, Marshall has concluded that only sufficiently important[59] disabilities resulting from interstate travel are "*penalties*" triggering strict equal protection review and that other less important disabilities do not trigger strict review.[60] On this basis, he apparently has conceded that the *Shapiro* rationale may not require the subjecting of residence requirements for instate tuition eligibil-

58. 394 U.S. at 638 n.21.

59. Sosna v. Iowa, 419 U.S. 393, 418-20 (1975) (Marshall, J., dissenting).

60. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-57 (1974).

ity to the compelling interest test.[61] Somehow, Justice Marshall seems to feel that he has resolved the analytical problems created by *Shapiro* with the simple device of italicizing the word "penalty" when discussing certain disadvantages incurred as a result of interstate travel.[62]

In fact, as Justice Rehnquist has pointed out, it is very difficult to perceive any doctrinal basis for Justice Marshall's assertion that some penalties on the right to travel are "*penalties*" while others are merely "penalties."[63] Any disability imposed by the state as a result of travel, however unimportant, would seem to be a penalty on the exercise of the right to travel. Of course, if Marshall were simply contending that only the unequal regulation of a fundamental constitutional right, such as the right to vote, constitutes a penalty, the fundamental rights branch of equal protection would require the application of the compelling interest test without any reference to the right to travel.[64] But the list of Marshall's established "*penalties*" includes interference with the individual's interest in welfare,[65] free medical care,[66] and the availability of a divorce.[67] None of these interests qualify as fundamental constitutional rights whose unequal regulation must be subjected to the compelling interest test under the "fundamental rights" branch of strict equal protection. Nor is the list of "*penalties*" restricted by Justice Marshall to those disabilities that may have the effect of actually deterring interstate travel.[68] Thus, the conclusion seems inescapable that inclusion in or exclusion from Marshall's list of disabilities that qualify as "*penalties*" is, as Justice Rehnquist observed, simply a matter of "*ipse dixit*."[69]

In *Dandridge v. Williams*,[70] Justice Marshall failed to persuade the majority that *Shapiro* should be read as declaring the right to welfare to be a fundamental right for purposes of strict equal protection since in *Shapiro* it was the right to welfare that actually was regulated unequally and it was the unequal treatment that was subjected to the compelling interest test. In his dissent in

61. *See id.* at 258-59. *But see* Vlandis v. Kline, 412 U.S. 441, 455 (1973) (Marshall, J., concurring).

62. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 257 (1974); Dunn v. Blumstein, 405 U.S. 330, 340 (1972).

63. Memorial Hospital v. Maricopa County, 415 U.S. 250, 284 (1974) (Rehnquist, J., dissenting).

64. *See* text accompanying notes 34-37 *supra*.

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

66. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

67. Sosna v. Iowa, 419 U.S. 393, 418 (1975) (Marshall, J., dissenting).

68. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255-56 (1974).

69. *Id.* at 285 (Rehnquist, J., dissenting).

70. 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

Dandridge, Marshall argued that "when a benefit, even a 'gratuitious' benefit, is necessary to sustain life, stricter constitutional standards . . . are applied to the deprivation of that benefit."[71] When Marshall later finds that denials of such "necessities of life"[72] as welfare benefits and free medical care constitute "*penalties*" on the right to travel while other disabilities are not "*penalties*," one is left with the suspicion that Marshall's italicized "penalty" is simply a reincarnation of his *Dandridge* dissent.

Since the defendant states did not penalize or burden the right to travel in any ordinary sense, since it seems the Court was not even concerned with whether the plaintiffs suffered an actual disadvantage because of their move (as a result of loss of payments by the old state of residence), and since it seems clear that the Court would find unacceptable the breadth of the principles that are the logically unavoidable result of the *Shapiro* reasoning,[73] the Court must actually have been concerned with some aspect of the residence requirements other than the fact that unavailability of welfare in the defendant states burdened the fundamental right of the plaintiffs to travel to those states. This gap between the intuitive policy concerns of the Court and its articulated reasoning emerges with greater clarity in the Court's application of the *Shapiro* reasoning in *Dunn v. Blumstein*.[74]

III. *Dunn v. Blumstein*

In *Dunn*, Tennessee's residence requirements for voting in county and state elections were challenged as violations of the due process and equal protection clauses of the fourteenth amendment. Tennessee required residence in the state for one year and in the county for three months as prerequisites to voting. Noting that the one-year durational residence requirements discriminated between recently arrived citizens and long-term citizens in regulating exercise of the fundamental right to vote, the Court subjected the requirement to the second or "fundamental rights" branch of the strict equal protection doctrine and demanded that the discrimination be justified by a compelling state interest. Since none of the reasons advanced by the state in support of the unequal regulation of the fundamental right to vote were found by the Court to be compelling, that residence requirement was held to violate the equal protection clause.

71. *Id.* at 522.
72. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259-60, 260 n.15 (1974).
73. *See* Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972).
74. 405 U.S. 330 (1972).

Had the Court approached the plaintiff's claims in the order consistently suggested by Justice Harlan in cases such as this,[75] it would have determined first whether this regulation of the fundamental right to vote violated the requirements of substantive due process. Since the restricted right in this case was a fundamental right, the strict due process doctrine would require that the restriction be justified by a compelling state interest, whether or not the restriction was equally imposed. In light of its discussion of the equal protection issue,[76] it is clear that the Court felt that the restriction was not supported by any compelling state interest.[77] Thus, had Justice Harlan's advice been followed, the residence requirement would have been found unconstitutional on the basis of plaintiff's claim that it violated substantive due process. Instead, however, following an emerging pattern in right-to-vote cases,[78] the Court overlooked the invalidity of the unjustified restriction on a right in order to address the inequality issue.

Nor did the Court address plaintiff's contention that the residence requirement restricted his fundamental right to travel in violation of the strict substantive due process doctrine. As was suggested in the discussion of *Shapiro* above,[79] such a rationale would seem to be the logically inevitable result of the *Shapiro* finding that such residence requirements "penalized" the fundamental right to travel in the *Sherbert* sense of making the exercise of the right costly. Instead of applying either suggested strict substantive due process ground, the Court offered the *Shapiro* equal protection reasoning as an alternative rationale for its finding that the residence requirement must be justified by a compelling state interest.[80] According to Justice Marshall, speaking for the Court, the *Shapiro* reasoning was directly applicable and required the conclusion that the durational residence requirement discriminated between two classes of residents in such a way that it penalized the fundamental right to travel.[81] Thus, the second or "fundamental rights" branch

75. *See* note 46 *supra*.

76. 405 U.S. at 345-60.

77. Since the issue was couched in terms of equal protection, the state was required to justify restricting the right to vote of one class of residents while allowing other residents to exercise that right unrestricted. Thus, the grounds offered by the state to justify the disadvantageous treatment of the one class of residents are the same as the grounds that would be offered to justify restricting the right to vote of that class.

78. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

79. *See* text accompanying notes 44-74 *supra*.

80. 405 U.S. at 338-42.

81. Unlike *Shapiro*, in which one could assume arguendo that plaintiffs did not give up similar welfare benefits when they left their old state, it is clear in *Dunn* that plaintiff, by moving, did suffer the loss of the ability to vote in elections in his old state. As in *Shapiro*,

of the strict equal protection doctrine required that the discrimination be found to violate the equal protection clause unless a compelling interest could be shown by the state to justify the discrimination.

In an attempt to avoid this application of *Shapiro* to the residence requirement in *Dunn*, the state had argued that the material facts of *Shapiro* were distinguishable from those in *Dunn*. The state argued in *Dunn* that the residence requirements in *Shapiro* penalized the right to travel because they were intentionally designed to deter persons from moving into the state, but that no similar design could be inferred from the requirements in *Dunn*.[82] It can be assumed that the unavailability of welfare would be considered by low income persons deciding whether to move to the state and might deter them from making the move. In fact, the Court in *Shapiro* pointed out that the District of Columbia had admitted in pleading and argument an awareness of this possible effect and an intention to deter movement of low income persons to the state.[83] On the other hand, the state argned, no such deterrent effect on interstate relocation would result from the residence requirements questioned in *Dunn*. The inability to vote in state elections for one year after moving to the state simply would not be considered by a person in deciding to move. Since no such deterrent effect is even remotely likely, it would be difficult to infer any intention by the State of Tennessee to deter movement to the state through the use of the questioned residence requirement.

Although the illogic of the *Shapiro* characterization of the residence requirements as a "penalty" on the right to travel could have been eliminated by accepting this distinction proferred by Tennessee, the Court in *Dunn* specifically rejected that reading of *Shapiro*.[84] The Court effectively conceded that not the slightest intentional or incidental interference with anyone's interstate travel resulted from the questioned residence requirements;[85] yet it concluded that the residence requirements "penalized" the fundamental right to travel in some uncommon sense of that word. Since there was in fact no regulation of or effect on travel, the "penalty" ration-

however, that *Sherbert*-style "penalty" on the right to travel or reward for nonexercise of the right was imposed by the old state of residence. Because of the Voting Rights Act of 1965, plaintiff's move in *Dunn* did not result in any net loss in his ability to vote in federal elections. 42 U.S.C. § 1973aa-1(a)(2) (1970).

82. Brief for Appellants at 13, Dunn v. Blumstein, 405 U.S. 330 (1972) (quoted in 405 U.S. at 339).

83. 394 U.S. at 629.

84. "This view represents a fundamental misunderstanding of the law." 405 U.S. at 339.

85. *Id.* at 340-41.

ale can hardly be accepted as an adequate description of the underlying concern that caused the Court to subject the Tennessee residence requirements to the compelling state interest test.

The Court could have rested its requirement of a compelling state interest solely on a finding that the residence requirements unequally regulated the fundamental right to vote. If it wished an alternative rationale for requiring a compelling state interest, the Court could have employed strict substantive due process on the ground that the residence requirements restricted the fundamental right to vote. With such strong bases for its holding in well-established doctrine, why did the Court reject Tennessee's explanation of *Shapiro* and adopt the least persuasive version of the *Shapiro* rationale as an alternative grounds for its holding in *Dunn*? In view of the logical defects in *Shapiro*, it hardly seems likely that the Court found the articulated reasoning in that decision compelling. The explanation for the appeal of the *Shapiro* rationale must lie in intuitive policy concerns that are only imprecisely articulated in the *Shapiro* and *Dunn* opinions. The clearest insight into the underlying policy concern of the Court in *Shapiro* and *Dunn* is contained in a pregnant footnote to Marshall's majority opinion in *Dunn*:

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.[86]

Marshall appears to distinguish between *Shapiro-Dunn* and his hypothetical case on the ground that the hypothetical loss of a driver's license is not a "*penalty*" (emphasis his) resulting from interstate relocation because all long-time residents of the new state suffer the same disability. In view of the usual meaning of the word "penalty," such a distinction is nonsense. In fact, the hypothetical youth lost the right to drive precisely because he moved interstate. The resulting loss of the driver's license will be the same disadvantage, disincentive, cost, net loss of benefits, or "penalty" to the hypothetical youth whether or not all others in his new state suffer the same disability.

The policy concern thrown into clear relief by Marshall's footnote is not a concern with the penalty or cost or disadvantage incurred as a result of interstate travel, but with the fact of *discrimination* against newcomers in favor of long-time residents. For Marshall (and, I submit, for all others in the majority in *Shapiro* and *Dunn*), it is the discrimination between these two classes of

86. *Id.* at 342 n.12.

residents that calls for the application of the strict equal protection standard.[87] It is the thesis of this article that the Court by requiring a showing of compelling state interest to justify the discrimination in *Shapiro* and *Dunn* was intuitively establishing "newcomers" as a suspect class entitled to the protection of the first branch of the strict equal protection doctrine. Any doubt that the Court in *Shapiro* and *Dunn* was really concerned with the nature of the disadvantaged class rather than with any effect on the right to travel is eliminated by a reading of the Court's application of the *Shapiro-Dunn* rationale in *Memorial Hospital v. Maricopa County*.[88]

IV. *Memorial Hospital v. Maricopa County*

The state action alleged to violate the requirements of equal protection in *Maricopa* was an Arizona statute requiring that an indigent reside in a county for at least one year in order to be eligible for nonemergency medical care at the county's expense.[89] The case arose out of Maricopa County's refusal to supply nonemergency medical care to an indigent patient who had moved to the county from the State of New Mexico approximately one month prior to his request for care. Purporting to apply the *Shapiro-Dunn* rationale, the Court held that Arizona's discrimination in the distribution of free medical care between new and old residents of a county was unequal treatment that penalized "indigents for exercising their right to migrate to and settle in that State."[90] Since the county was unable to convince the Court that the state interests served by the residence requirement were compelling, the residence requirement was held to violate the standards of the second or "fundamental rights" branch of the strict equal protection doctrine.

As in *Shapiro*, the Court made no attempt to determine whether or not the recently arrived indigent had given up similar

87. This focus on the class subjected to discrimination rather than on the effect on the right to travel is strongly suggested at several critical points in the *Shapiro* and *Dunn* opinions. For example, in *Shapiro* the Court said:

> There is no dispute that the effect of the waiting period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction.

394 U.S. at 627. Similarly, in *Dunn*, the Court stated:

> [Durational residence] laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying the opportunity to vote.

405 U.S. at 334-35.

88. 415 U.S. 250, 254-62 (1974).

89. The statute made emergency medical care available to indigents without the restriction of a durational residence requirement.

90. 415 U.S. at 261-62.

free medical care in New Mexico by moving to Maricopa County, Arizona. While one might argue that it is reasonable to presume that the plaintiffs in *Shapiro* gave up established rights to welfare in their old states in order to move to the defendant states, it seems considerably less likely that any indigents by moving to Maricopa County, Arizona, from the other forty-nine states would be giving up a right to medical care in their old states comparable to that provided by Maricopa County.[91] Thus any particular indigent moving to Maricopa County from outside the State of Arizona would probably experience a *net gain* rather than a net loss in the availability of free medical care as a result of his interstate move. After his move to Maricopa County he would at least be entitled to free emergency medical care immediately and could expect free nonemergency medical care after one year's residence in the county. To characterize broadly the possibility of such a net gain by the interstate move as a "penalty" on the indigent's interstate relocation in Maricopa County defies common sense, yet that is the effect of the Court's holding since it contains no indication that the particular indigent suffered a net loss of medical benefits by his interstate move to Maricopa County.

Even if we accept the Court's apparent view that the *Shapiro-Dunn* "penalty" rationale does not require that the traveller suffer any net loss or disadvantage and applies even when the traveller has experienced an improvement in his situation by virtue of the interstate move, the *Shapiro-Dunn* rationale simply cannot be made to fit the facts of the *Maricopa* case. In order to determine whether the second or "fundamental rights" branch of the strict equal protection doctrine applied to the classifications created by the Arizona residence requirement in *Maricopa*, the Court quoted the passage from the *Shapiro* opinion that has come to be viewed as the key to that decision:

> The Court observed that those requirements created two classes of needy residents "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class [was] granted and the second class [was] denied welfare aid . . . ."[92]

Since the thrust of the *Shapiro* rationale is that such a distinction must be justified by a compelling interest because it discriminates against certain persons solely on the ground that they have recently

91. *See generally* DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT ON MEDICAL RESOURCES AVAILABLE TO MEET THE NEEDS OF PUBLIC ASSISTANCE RECIPIENTS (Comm. Print 1961).

92. 415 U.S. at 254 (quoting 394 U.S. at 627).

exercised the fundamental right of *interstate* travel, the word "jurisdiction" in the Court's quote from *Shapiro* must be read to mean "state." Indeed, later in the *Shapiro* opinion a nearly identical statement that the residence requirements denied "welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction" was followed immediately by the statement, "but in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[93] The Court acknowledges this as its reading of the *Shapiro* rationale by summarizing its holding in *Maricopa* with the statement that "the right of *interstate travel* must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."[94] The Arizona county-residence requirement, however, did not grant free medical care to one class of residents and deny it to a second class solely on the ground that the second group recently had exercised its fundamental right to travel interstate. All indigent residents of Arizona, whether recent arrivals from out-of-state or lifelong residents of the state, were subject to the requirement that they reside in the county for at least one year before receiving medical care at the expense of that county. The class discriminated against by the residence requirement was not determined by interstate movement but rather included all state residents, new or old, who had recently located in any county. In fact, the Arizona statute under attack placed residents recently arrived from out of state into the general pool of state residents and subjected them to the same disability as older residents on precisely the same basis.[95] Under the standards laid down in Marshall's definitive footnote in *Dunn*, this would seem to put the Arizona statute squarely within the category of cases that do not present a penalty on the right to interstate travel.[96] Paraphrasing the Marshall footnote: In such a case the new state's county-residence requirement is not a *penalty* imposed

93. 394 U.S. at 634; *accord, id.* at 638, 638 n.21, 644 (Stewart, J., concurring), 659 (Harlan, J., dissenting).

94. 415 U.S. at 261 (emphasis added).

95. According to the Arizona Supreme Court opinion in the case:

> The requirement applies to all citizens within the state including long term residents of one county who move to another county. Thus, the classification does not single out nonresidents nor attempt to penalize interstate travel. The requirement is uniformly applied.

Maricopa County v. Superior Court, 108 Ariz. 373, 375, 498 P.2d 461, 463 (1972); *accord*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 270 (1974) (Douglas, J., concurring).

96. 405 U.S. at 342 n.12 (quoted in text accompanying note 86 *supra*).

solely because the newcomer is a new resident of the state; indeed, all residents of the state, old and new, must live in the county for at least one year in order to receive free medical care from that county. Just as no resident of the state in the Marshall footnote, whether old or new, could obtain a driver's license until he reached the age of eligibility, so no resident of Arizona, old or new, could obtain medical care from the county until he had resided in that county for one year. Thus, one would conclude that *Shapiro* and *Dunn* do not require that Arizona show a compelling interest but only the usual rational basis for the discrimination in the residence requirement.

In spite of the inadequacy of the *Shapiro-Dunn* "penalty" rationale to support the Court's holding in *Maricopa*, the Court summarily dismissed this objection to its application of the rationale by the bold assertion that the indigent in *Maricopa* was "effectively penalized for his interstate migration, although this was accomplished under the guise of a county residence requirement."[97] The best explanation for the Court's insistence that the *Shapiro-Dunn* rationale requires a compelling interest to justify the residence requirement in *Maricopa* is that the underlying policy concern which caused the Court to impose the compelling interest test on the classifications in *Shapiro* and *Dunn* is present in *Maricopa*, even though the articulated rationale of *Shapiro* and *Dunn* does not apply to *Maricopa*. As suggested in the discussion of *Dunn*, the Court's intuitive concern is not with the penalty or cost or disadvantage incurred as a result of interstate travel, but with the fact of discrimination by a governmental unit against newcomers to that unit. It would be difficult to find a clearer indication of this underlying concern in *Maricopa* than the Court's quotation of the following admonition from the Bible: " 'Ye shall have one manner of law, as well for the stranger, as for one of your own country,' Leviticus 24:22."[98] Since in *Maricopa* the Court insisted on applying the compelling interest test to discrimination against newcomers, even though unlike *Shapiro* and *Dunn* the newcomers discriminated against as a class could not be equated with the class of recent exercisers of the right to travel interstate, the inescapable conclusion is that the Court has intuitively established newcomers to a governmental unit as a "suspect class" entitled to strict equal protection under the laws of that unit. Only that conclusion explains adequately the apparent inconsistencies and logical gaps in the Court's position that *Shapiro*, *Dunn*, and *Maricopa* are analogous cases in which the equal protec-

97. 415 U.S. at 256.
98. *Id.* at 261.

tion clause requires a compelling state interest to justify the discrimination.

Possibly the best evidence that the articulated rationale of *Shapiro, Dunn*, and *Maricopa* does not accurately describe the actual concerns of the Court in those cases is the Court's refusal to find that the *Shapiro-Dunn* rationale requires the application of the compelling interest test in equal protection cases in which the basis of the disadvantaged classification is the exercise of a fundamental right other than travel. One week after release of the opinion in which the Court strained unconvincingly to apply the *Shapiro-Dunn* rationale in *Maricopa*, the Court in *Johnson v. Robison*[99] refused to apply the rationale to a set of facts indistinguishable from *Shapiro* and *Dunn* in terms of the "penalty" imposed by the classification on the exercise of a fundamental right.[100]

In *Johnson*, the Court faced a challenge to the constitutionality of the Veterans' Readjustment Benefits Act of 1966,[101] which provided educational benefits to selective service registrants who were required to serve on active duty with the armed forces but denied such benefits to selective service registrants who were required to perform alternative service because of "conscientious-objector" status. Conscientious-objector status was conferred by statute only on individuals "who, by reason of religious training and belief" were opposed to participation in "war in any form."[102] Thus, under the *Shapiro-Dunn* reasoning, it would seem clear that denial of benefits to the class who performed alternative service as conscientious objectors constituted unequal treatment on the basis of a classification that penalized the fundamental right to free exercise of religion. As a result, one would have expected the Court to subject the discrimination to the compelling interest test under the fifth amendment parallel to the equal protection requirements imposed in *Shapiro* and *Dunn*. In fact, however, the Court explicitly measured the discrimination only against the requirement that the classification " 'be reasonable, not arbitrary.' "[103] Since the Court found "a rational basis for Congress' classification,"[104] the unequal treatment was found not to violate equal protection.[105]

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99. 415 U.S. 361 (1974).

100. *See* United States v. Ricketson, 498 F.2d 367, 375 (7th Cir. 1974).

101. Act of Mar. 3, 1966, Pub. L. No. 89-358, 80 Stat. 12 (codified in scattered sections of 38 U.S.C.).

102. 50 U.S.C. App. § 456(j) (1970).

103. 415 U.S. at 374 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) & Reed v. Reed, 404 U.S. 71, 76 (1971)).

104. *Id.* at 381-82.

105. The theoretical inconsistency between *Shapiro-Dunn-Maricopa* and *Johnson* can hardly be explained by a simple shift in the political alignments among the Justices. Justice

The plaintiff's argument that a *Shapiro*-style analysis required the application of the compelling interest test was dispensed with in a footnote to Justice Brennan's majority opinion. According to the footnote, the discrimination was not subjected to the compelling interest test because the Court concluded that the denial of benefits did not violate the plaintiff's substantive first amendment right to free exercise of religion.[106] This reasoning is inconsistent with *Shapiro*, *Dunn*, and *Maricopa* because nowhere in these cases is there the slightest hint that the *Shapiro* strict equal protection rationale applies only when the discrimination is first found to violate the fourteenth amendment substantive due process right to travel.[107] As suggested earlier in the discussion of *Shapiro*,[108] the Court would probably find completely unacceptable any inference from the *Shapiro* "penalty" rationale that the statutes in *Shapiro, Dunn*, and *Maricopa* infringed the right to travel in violation of substantive due process. *Shapiro, Dunn*, and *Maricopa* must be read to hold that equal protection requires the application of the compelling interest test to a classification that in some sense penalizes a fundamental right, even though the statute is not found to violate directly a substantive fundamental right. In other words, far from providing a basis for distinguishing *Shapiro, Dunn*, and *Maricopa* from *Johnson*, the Brennan footnote would be equally applicable to *Shapiro, Dunn*, and *Maricopa* and would require the opposite result in those cases.

No element of the *Shapiro* "penalty-on-a-fundamental-right" rationale suggests that its applicability should be confined to the fundamental right to travel and not extended to other fundamental rights. The right to free exercise of religion, the exercise of which formed the basis of the disadvantaged classification in *Johnson*, was certainly as fundamental as the right to travel, the exercise of which was the basis of the classifications in *Shapiro* and *Dunn*.[109] And the

Marshall, who wrote the opinions for the Court in *Dunn* and *Maricopa*, concurred by silence in Justice Brennan's opinion for the Court in *Johnson*. Justice Brennan, on the other hand, had written for the Court in *Shapiro* and concurred by silence in Marshall's opinion for the Court in *Dunn* and *Maricopa*.

106. 415 U.S. at 375 n.14.

107. Justice Harlan demonstrated in his dissent in *Shapiro* that if the applicability of the *Shapiro* equal protection rationale in *Shapiro, Dunn*, and *Maricopa* had depended upon a prior finding that the classification "penalized" the right to travel in violation of substantive due process, there would have been no need to reach the equal protection question at all. 394 U.S. at 659; *see* note 46 *supra*.

108. *See* text accompanying notes 44-74 *supra*.

109. In Sherbert v. Verner, 374 U.S. 398 (1963), on which the *Shapiro* Court relied for the penalty rationale, a state interference with the right to free exercise of religion was invalidated on substantive due process grounds for failure to meet the compelling interest test applied by the Court.

loss of economic benefits in *Johnson* was precisely the same sort of penalty on the exercise of the fundamental right as the loss of economic benefits in *Shapiro* and *Maricopa*.[110] In terms of the articulated rationale of *Shapiro*, there simply is no distinction between *Shapiro* and *Johnson*. The opposite results in the two cases are best explained in terms of the thesis that the concern of the Court in *Shapiro, Dunn*, and *Maricopa* is with the suspect nature of the category "newcomers" rather than with any effect on the exercise of a fundamental right. While the right to travel and the right of free exercise of religion may be equally fundamental and may have been equally "penalized" in the *Shapiro* sense, only the exercise of the right to travel creates the class of "newcomers."

In *Johnson*, the articulated rationale of *Shapiro* and *Dunn* fits perfectly because the basis of the disadvantaged classification was the exercise of a fundamental right. Yet the Court refused to apply the rationale because the underlying concern of the Court in *Shapiro* and *Dunn* was not present in *Johnson*. The exercise of the fundamental right in *Johnson* had not created the suspect class of newcomers to a governmental unit. In *Maricopa*, on the other hand, the articulated rationale of *Shapiro* and *Dunn* simply did not fit the facts because the disadvantaged class was not confined to recent exercisers of the fundamental right to travel interstate—all residents of the state were equally subjected to the same requirement of one year's residence in the county. Yet the Court insisted on applying the *Shapiro-Dunn* rationale in *Maricopa* because the underlying concern of the Court in *Shapiro* and *Dunn* also was present in *Maricopa*. The result of the statute in *Maricopa* was discrimination by the county governmental unit against the suspect class of newcomers to that unit. The existence of that suspect class triggered strict equal protection review in *Shapiro, Dunn*, and *Maricopa*, and the absence of that class in *Johnson* resulted in the application of the more tolerant standard of equal protection review.

Since its decision in *Maricopa*, the Court has had one further encounter with the question of the constitutional validity of a state durational residence requirement. Unfortunately, the Court's resolution of that issue in the case of *Sosna v. Iowa*[111] contributes little, if anything, to an understanding of the conceptual dynamics of the *Shapiro-Dunn-Maricopa* rationale.

110. *But see* Vlandis v. Kline, 412 U.S. 441, 452-53, 452 n.9 (1973); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). *See also* Memorial Hospital v. Maricopa County, 415 U.S. 250, 259-60, 260 n.15 (1974); text accompanying notes 58-72 *supra*.

111. 419 U.S. 393 (1975).

V. *Sosna v. Iowa*

In *Sosna*, a federal district court had upheld the constitutional validity of an Iowa statutory requirement that a petitioner in a divorce action be a resident of the state for one year preceding the filing of the petition. According to the appellant, the *Shapiro-Dunn-Maricopa* line of authority required a finding that the requirement of one year's residence as a condition for eligibility for divorce created a classification that penalized the right to travel and therefore violated the equal protection clause unless supported by a compelling state interest. This contention that the "fundamental rights" branch of the strict equal protection doctrine required a showing of a compelling state interest to justify the discrimination against new residents was of course the core of the *Shapiro-Dunn-Maricopa* holdings. It is precisely this contention, however, that the Court's opinion in *Sosna* conspicuously failed to discuss in the process of affirming the district court's holding that the residence requirement did not violate equal protection. Instead, the Court simply distinguished *Shapiro, Dunn,* and *Maricopa* from *Sosna* on the ground that, while the "budgetary or record keeping considerations" offered as justifications for the residence requirements in *Shapiro, Dunn,* and *Maricopa* were "insufficient to outweigh the constitutional claims of the individuals,"[112] the state interest offered in support of the residence requirement in *Sosna* required "a different resolution of the constitutional issue presented."[113] The state interests held to be sufficient to justify the discrimination in *Sosna* were the "state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State" and "a desire to insulate divorce decrees from the likelihood of collateral attack" in other states that retained an interest in the status of the marriage.[114] The problem presented by the Court's approach in *Sosna* is that it never directly stated the standard, rational basis or compelling interest or something in between, against which it was measuring the sufficiency of the state interest. Thus, it is not clear from the opinion whether the Court has found the *Shapiro-Dunn-Maricopa* requirement of a compelling interest satisfied in this case or whether it has retreated from the *Shapiro-Dunn-Maricopa* compelling interest requirement and returned to some standard closer to the usual rational basis requirement.

Since the members of the majority in *Sosna* had split on the question of the appropriate standard in *Maricopa* and *Dunn*, the

112. *Id.* at 406.
113. *Id.* at 409.
114. *Id.*

failure of the majority opinion to state explicitly its standard is probably more than accidental. Justice Rehnquist, who authored the majority opinion in *Sosna*, had dissented strongly in *Maricopa*, specifically on the issue of the standard that should be used to measure the sufficiency of the state interest.[115] Since Justice Rehnquist found the "penalty-on-the-right-to-travel" rationale logically defective for many of the reasons discussed earlier, it was his opinion that the usual rational basis test should have been applied in *Maricopa*. Thus it is reasonable to conclude that the standard he found satisfied by the state's interest in *Sosna* was the rational basis standard. Justices Burger and Blackmun, who had earlier indicated dissatisfaction with the *Shapiro-Dunn-Maricopa* rationale,[116] joined with Justice Rehnquist in his majority opinion and can be assumed to share his views about the standard that should be applied. On the other hand, Justice Rehnquist was joined also in his majority opinion by Justices Stewart and Powell, who apparently concurred in the Court's opinion in *Maricopa*, and by Justice Douglas, who, while expressing doubts about the "penalty-on-the-right-to-travel" rationale in his separate opinion in *Maricopa*,[117] concurred in the result in that case and apparently concurred in the Court's opinion in *Dunn*. These three Justices, then, either retreated from the *Shapiro-Dunn-Maricopa* requirement of a compelling state interest or found that requirement satisfied in this case. If these three Justices agreed with Justice Rehnquist that the standard should now be rational basis, he presumably would have stated that standard in his opinion and overruled *Shapiro*, *Dunn*, and *Maricopa*. Thus, it is reasonable to assume that at least two of these three Justices applied the compelling interest test required by *Shapiro, Dunn*, and *Maricopa* and found it satisfied in *Sosna*.

In fact, the concurrence of these three Justices in Justice Rehnquist's unspecific opinion is probably nothing more than a further demonstration of the validity of Justice Marshall's "sliding scale" analysis of the standard of justification required of the state in cases of unequal treatment of individuals.[118] Certainly Iowa's interest in avoiding the destruction or dislocation of marital relationships and child custody arrangements in which other states retained a continuing interest is a greater justification for discrimination against newcomers than the purely internal bureaucratic and budg-

115. 415 U.S. at 277-88.

116. *See id.* at 270 (Burger, C.J., & Blackmun, J., concurring in the result); Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

117. 415 U.S. at 270 (Douglas, J., concurring).

118. *See* text accompanying notes 42-43 *supra*.

etary state interests advanced as justifications in *Shapiro, Dunn*, and *Maricopa*. But the interests advanced by Iowa hardly seem to be as "compelling" as those customarily required by the Court as justification when the inequality involves access to the ballot or is based upon racial classification.[119] On the other hand, the evil resulting from the discrimination in *Sosna* does not seem as serious to the majority as the evil of discrimination based on race or discrimination in the regulation of access to the ballot. The majority, applying the Marshall sliding scale of strictness without any explicit statement of the standard of strictness being applied, found the justification for the discrimination to be adequate.

Unfortunately, the majority failed to state which of Marshall's sliding scales they were applying—the sliding scale of importance of the individual interest unequally regulated or the sliding scale of the invidiousness of the classification chosen by the state. Because of this inconsiderate theoretical oversight, the *Sosna* decision contributes very little toward validating or discrediting the thesis that *Shapiro, Dunn*, and *Maricopa* establish "newcomers" as a suspect category—that is, that the underlying concern of the Court in each of those cases was with a defect in the classification rather than with any effect on the fundamental right to travel. Translated into the terms of the Marshall sliding-scale analysis, the thesis would be that *Shapiro, Dunn, Maricopa*, and *Sosna* actually reflect the Court's intuitive application of the sliding scale of invidiousness of the classification to the class "newcomers" rather than the sliding scale of importance of the individual interest to the interest in freedom to travel. If in fact *Shapiro, Dunn*, and *Maricopa* establish "newcomers" as a suspect class, *Sosna* does indicate that a majority of the current Court will be satisfied with somewhat less "compelling" reasons for discrimination against newcomers than they would have required for discrimination against a racial minority. Thus, after *Sosna* one might conclude that the line of cases from *Shapiro* through *Sosna* establishes newcomers as a class that will be viewed by the Court with about the same level of suspicion as that accorded classification on the basis of sex.

VI. NEWCOMERS AS A SUSPECT CLASS

None of the reasoning in the classic cases applying strict equal protection to unequal regulation of fundamental rights provides a

119. As the Court noted, at least two states seem to be able to do without such a residence requirement. 419 U.S. at 404-05 n.15. Also, the Supreme Court of Alaska refused to regard interests similar to those offered by Iowa as compelling and held the state's residency requirement for divorce unconstitutional on the basis of the *Shapiro* rationale. State v. Adams, 522 P.2d 1125 (Alaska 1974).

firm theoretical basis for the *Shapiro-Dunn* rationale, and the extension of the classic reasoning to accommodate the *Shapiro* and *Dunn* holdings gives rise to unacceptable analytic consequences in other cases. On the other hand, reading *Shapiro, Dunn*, and *Maricopa* to establish "newcomers" as a suspect class is perfectly consistent with the reasoning of the Court in the classic cases creating the suspect class rationale for strict equal protection. In fact, "newcomers" would be an entirely appropriate addition to the limited list of suspect classes aside from any implication to that effect in *Shapiro, Dunn*, and *Maricopa*.

It is generally assumed that the purpose of those who authored and adopted the fourteenth amendment equal protection clause was the protection of black citizens from disadvantageous treatment by state governments under the control of whites.[120] Although the general language of the clause has traditionally been held to invalidate all irrational unequal treatment by a state, this legislative purpose or history could have been used as a basis for confining strict equal protection to cases of discrimination against blacks. Instead, the Court has adopted a broader perspective and has applied strict equal protection whenever the disadvantaged group occupies the same position with respect to state government as that occupied by blacks. Thus, disadvantageous state treatment of a class composed of citizens of oriental descent[121] or a class composed of alien residents[122] will be subjected to strict scrutiny.

The Court has indicated several significant factors in the composition of a group that in some combination will trigger strict review of disadvantageous state treatment of the group. First, the disadvantaged group must be a political "minority"; that is, the group must be incapable of protecting its interests through the usual political processes.[123] The fourteenth amendment and all other individual rights in the Constitution are a last resort to protect the rights of minorities and individuals after the majoritarian legislative

120. *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955); Black, *supra* note 5, at 423. For a discussion of the legislative history of the equal protection clause see Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

121. Oyama v. California, 332 U.S. 633, 644 (1948).

122. Graham v. Richardson, 403 U.S. 365, 372 (1971); *accord*, *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

123. According to the Court in *San Antonio Indep. School Dist. v. Rodriguez*, the "traditional indicia of suspectness" are that the class be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. 1, 28 (1973); *accord*, Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974).

process has failed to accommodate those interests.[124] Certainly "newcomers" as a class are almost always a minority in the governmental unit, unable to protect their interests through the political process. The fact that one remains a member of the class only for a certain period of time, gradually acquiring the perspective and vested interests of the "old-timers," assures the continuance of both the minority status and the political impotence of the "newcomer" class.

On the other hand, not every class that constitutes a political minority is considered a suspect class entitled to strict equal protection. Indeed, any group that suffers a relative disadvantage as a result of the passage of any legislative measure probably will be a minority in terms of the effect of that legislation. Since the controlling majority is unlikely to disadvantage itself very often, the majoritarian legislative process will almost always assure that any relative disadvantage will be borne by a group that is a political minority *on that issue*. Thus, the second requirement for a suspect class seems to be that the minority be an usually likely candidate for

124. In *Johnson v. Robison*, the Court quoted the district court's statement of the rationale behind the suspect classification doctrine: "[W]here legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down." 415 U.S. at 375 n.14. Thus, it would hardly seem necessary as a matter of constitutional or political theory to provide strict protection of the political majority against a majoritarian legislative decision to disadvantage the political majority in favor of some politically powerless minority.

This view of the rationale for strict judicial scrutiny of suspect classifications would explain the apparent inconsistency between the application of a strict standard of review to the sex discrimination in Frontiero v. Richardson, 411 U.S. 677 (1973), and a tolerant rational basis test to the sex discrimination in Kahn v. Shevin, 416 U.S. 351 (1974). The history of disadvantageous treatment of women by the male-dominated legislative process makes the disadvantageous treatment of women in *Frontiero* immediately "suspect." 411 U.S. at 686 n.17. On the other hand, males would not seem to need "extraordinary protection" from the decision of the male-dominated legislature in *Kahn* to favor females at the expense of males. Since one confidently can assume that the interests of the politically powerful male class will be adequately protected by the male-dominated legislature, the presumption of constitutionality inherent in the tolerant rational basis test would seem to be appropriate.

A similar explanation could be offered for the Court's otherwise inexplicable holding in DeFunis v. Odegaard, 416 U.S. 312 (1974), that the equal protection issue was moot. Since by all recent standards of mootness the issue was still ripe for decision, *e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972), the Court's holding can be viewed as an unprincipled attempt to avoid the application of strict scrutiny or the compelling interest test to compensatory discrimination by a state law school in favor of black applicants at the expense of whites. Consistency and candor would have been far better served by a direct application of the tolerant rational basis standard to that racial discrimination on the simple ground that there was no reason to be unusually suspicious of a decision of the white political majority to favor blacks at the expense of whites.

In view of the underlying rationale for the suspect classification doctrine and the Court's actions in *Kahn* and *DeFunis*, it seems quite likely that it is not the basis of the classification (sex or race), but rather the disadvantaged class (women or blacks) that is constitutionally suspect.

pervasive discriminatory treatment on a wide range of issues.[125] To be such a likely candidate, a minority should have an easily identifiable membership at any given time, and the criteria for membership must be such that no significant number of the political majority run the risk of falling into the class in the future as a result of changing circumstances. In the oft-quoted words of Mr. Justice Stone's famous footnote in *United States v. Caroline Products Co.*,[126] the minority must be "discrete and insular."[127] Since even in our mobile society the vast bulk of the political majority does not expect to suffer membership in the class "newcomers" any more than it expects to suffer membership in the class of blacks or aliens, relatively little political inclination is present to protect the interests of the class. In fact, the majority's inclination is almost automatically the opposite. As with blacks and aliens, the members of the class of "newcomers" are viewed as sufficiently different by oldtimers in the political majority of any governmental unit that the class is easily stereotyped as ignorant, unreliable, or in some other way inadequate and unworthy of full participation in the society. Such stereotypical reasoning was specifically offered in justification for the residence requirements in *Shapiro*,[128] *Dunn*,[129] and *Maricopa*.[130]

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." Newcomers are certainly among the most common victims of this discriminatory instinct. From the earliest loose associations of child playmates, through the social cliques of high school and the fraternities and sororities of college, to the political organizations on the local, state, and national level, newcomers have traditionally suffered discrimination simply because they are newcomers. As with

125. One commentator has pointed out the similarities between sex and race discrimination in that both classifications create "large, natural classes" and are "highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions." Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971) [hereinafter cited as *Sex Discrimination*]. The plurality in *Frontiero* adopted this line of reasoning, noting also that both characteristics "frequently [bear] no relation to ability to perform or contribute to society." 411 U.S. at 686. *See also* Sei Fujii v. State, 38 Cal. 2d 718, 732-33, 242 P.2d 617, 627 (1952) (alienage does not establish a person as disloyal and uninterested in the welfare of the community); *Developments, supra* note 28, at 1127.

126. 304 U.S. 144 (1938).

127. *Id.* at 153 n.4.

128. 394 U.S. at 631-32.

129. 405 U.S. at 354-56.

130. 415 U.S. at 266.

other psychological phenomena, varied and complex explanations are possible, but the tendency to discriminate against newcomers is verified by experiences in everyone's life. Such a minority would seem to be a particularly appropriate subject for the special protection afforded suspect classes like blacks and aliens.[131]

Finally, a presumption against the constitutionality of discriminatory treatment of certain minorities arises from a long history of irrational or unnecessary legal discrimination against the minority.[132] As is the case with blacks and aliens, the social tendency to exclude newcomers has regularly been embodied in state law. Exercise of the franchise,[133] eligibility for state office,[134] access to state courts in divorce cases,[135] availability of welfare payments,[136] and availability of in-state college tuition benefits[137] all traditionally have been conditioned upon durational residence requirements in addition to simple state citizenship.

Although it seems clearly reasonable to distinguish transients from bona fide residents,[138] it is difficult to justify differences in

131. *See generally Sex Discrimination, supra* note 125, at 1507-08.

132. *See* Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); Sei Fujii v. State, 38 Cal. 2d 718, 738-52, 242 P.2d 617, 630-39 (1952) (Carter, J., concurring); Black, *supra* note 5, at 424-25; *Developments, supra* note 28, at 1127; *Sex Discrimination, supra* note 125, at 1507-08.

133. *See* Cocanower & Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477, 484-85 (1970); Comment, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359 (1970); *cf.* Dunn v. Blumstein, 405 U.S. 330 (1972).

134. *E.g.*, CAL. CONST. art. V, § 2 (residence requirement of 5 years for governor); GA. CONST. art. V, § 2-3006 (governor must have been a United States citizen for 15 years and state resident for 6 years); N.Y. CONST. art. IV, § 2 (requirement of 5 years durational residence for governor); *see* Comment, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357 (1973).

135. *E.g.*, CAL. CIV. CODE § 4530 (West 1970) (6 montbs in state, 3 months in county); IOWA CODE ANN. § 598.6 (Supp. 1975-76) (one year in state); PA. STAT. ANN. tit. 23, § 16 (Supp. 1974) (6 months in state). For a collection of the various state requirements see NATIONAL LEGAL AID & DEFENDERS ASS'N, DIVORCE, ANNULMENT AND SEPARATION IN THE UNITED STATES (1973). *See also* Comment, *The Demise of the Durational Resident Requirement*, 26 SW. L.J. 538 (1972).

136. *See* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CAL. L. REV. 567 (1966); Note, *Residence Requirements in State Public Welfare Statutes—I*, 51 IOWA L. REV. 1080 (1966); *cf.* Shapiro v. Tbompson, 394 U.S. 618 (1969).

137. Bornstein, *Residency Laws and the College Student*, 1 J. LAW & EDUC. 349 (1972); Spencer, *The Legal Aspects of the Nonresident Tuition Fee*, 6 ORE. L. REV. 332 (1927); *see* Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). The holding in *Starns* and the suggestion in *Vlandis* (412 U.S. at 452 n.9) that durational residence requirements for in-state tuition do not violate equal protection already seem inconsistent with *Shapiro, Dunn*, and *Maricopa*. 412 U.S. at 455 (Marshall, J., concurring). A direct recognition that newcomers are a suspect class would seem to dictate a finding that such residence requirements violate the equal protection clause unless justified by some compelling state interest.

138. The Court has recognized this distinction in upholding reasonable disadvantages

treatment between new and old bona fide residents of the state in the distribution of the benefits and responsibilities of state citizenship. As the Supreme Court commented in the course of the *Shapiro* opinion, admitting the validity of such a distinction "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection."[139] One is left, as is the Court, with the presumption that most instances of such discriminatory treatment are explained by the social tendency to discriminate against newcomers as newcomers, rather than by any reasonable state objective that necessitates the unequal treatment. That presumption of irrationality is tantamount to the establishment of "newcomers" as a suspect class.[140]

Of course, it is not coincidence that the factors that traditionally have established a class as suspect apply with considerable force to the class of "newcomers" entitled to strict equal protection under *Shapiro, Dunn,* and *Maricopa*. It was precisely this set of intuitive concerns that brought the Court to the results in *Shapiro, Dunn, Maricopa,* and *Johnson*, although the articulated rationale was logically inadequate to accommodate the results in each of those cases.

In an effort to place the *Shapiro* holding on a sounder theoretical footing, the plaintiff in *Dunn* suggested on appeal to the Supreme Court that *Shapiro* should be read as holding that a "classification on the sole basis of exercising a constitutionally protected right" is a suspect class for purposes of strict equal protection.[141] The Marshall opinion for the Court in *Dunn*, however, made no mention of that suggested reading of *Shapiro*. Such a reading would be a step closer to the intuitive concerns of the Court in *Shapiro*, in that it focuses on a defect in the classification rather than on any effect on a fundamental right. But that suspect class rationale is constructed solely out of the vague implications of *Shapiro* and is not independently defensible on the basis of the reasoning of the classic suspect category cases. The class of "recent exercisers of a fundamental right" is really many classes of widely varying content that have rarely if ever been identified as discrete classes or subjected to any

placed upon transient nonresidents. Starns v. Malkerson, 326 F. Supp. 234, 241 (D. Minn. 1970), *aff'd. mem.*, 401 U.S. 985 (1971). *See generally* Vlandis v. Kline, 412 U.S. 441, 452-53 (1973); Dunn v. Blumstein, 405 U.S. 330, 334 (1972).

139. 394 U.S. at 632.

140. As Justice Traynor said: "Any state legislation discriminating against persons on the basis of [a suspect classification] has to overcome the strong presumption inherent in this constitutional policy." Perez v. Sharp, 32 Cal. 2d 711, 719, 198 P.2d 17, 21 (*sub nom.* Perez v. Lippold) (1948). *See also* Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); *Developments, supra* note 28, at 1101.

141. Brief for Appellee at 48, Dunn v. Blumstein, 405 U.S. 330 (1972).

unequal treatment by the state. No traditional pattern of irrational discrimination against the many diverse groups defined by recent exercise of one of the several fundamental rights is apparent, nor does the class of recent exercisers of any given fundamental right at any given time necessarily represent a minority, much less a minority that is customarily insular and politically impotent. In short, the philosophical underpinnings for the suspect category rationale simply do not apply with any persuasive force to the amorphous class of "recent exercisers of a fundamental right." Furthermore, such a suspect class would be subject to Justice Harlan's objection to the articulated rationale of *Shapiro*—that is, that it is a completely unnecessary addition to established substantive due process doctrine. Justice Harlan would argue, as he did in *Shapiro*, that cases of disadvantageous treatment of such a class should be dealt with as potential violations of the substantive right the exercise of which defines the class.[142]

Because the suggestion that "recent exercisers of a fundamental right" are a suspect class does not accurately reflect the underlying policy concerns of the Court in *Shapiro* and *Dunn*, it has proved no more adequate than the articulated rationale of *Shapiro* and *Dunn* in accommodating the apparently inconsistent applications since *Dunn* of the *Shapiro* rationale. The Court in *Maricopa* insisted that *Shapiro* and *Dunn* required application of the compelling interest test to a class that in fact was not defined in terms of recent exercise of the fundamental right to travel interstate or recent exercise of any other recognized fundamental right. The common characteristic of the disadvantaged class in *Maricopa* was merely recent arrival in the county, whether from out of state or from another county within the state. Nor does adding "recent exercisers of a fundamental right" to the list of suspect categories explain the holding in cases like *Johnson*. There the disadvantaged class was defined specifically in terms of recent exercise of the fundamental right to free exercise of religion, yet the Court refused to subject the classification to the compelling interest test. A finding that "recent exercisers of a fundamental right" constituted a suspect category would have necessitated the application of the compelling interest test, which would probably have required a finding that the discrimination violated equal protection.

The apparent inconsistencies in the application of the *Shapiro-Dunn* rationale in *Maricopa* and *Johnson* are explained only by the recognition that *Shapiro* and *Dunn* establish "newcomers" as a sus-

142. Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting) (quoted at note 46 *supra*).

pect category entitled to strict equal protection. A forthright recognition by the Court of this analytical consequence of its holdings in *Shapiro, Dunn, Maricopa*, and cases like *Johnson* would bring the Court back to a workable articulation of its original instinct in *Shapiro*—that is, that the problem involved something inherently defective about the class chosen rather than some interference with a fundamental right. The conceptual confusion created by the rationale in *Shapiro* has grown to the point that Justice Marshall was moved to assert in his opinion for the Court in *Maricopa* the novel notion that the fundamental right to travel provides equal protection. According to Justice Marshall:

> [T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.[143]

Until the Court's analytical misstep in *Shapiro*, one confidently would have assumed that it was the equal protection clause that guaranteed equal protection for all state residents, new or old. It hardly seems wise to burden an already overworked fundamental right to travel with the job of providing precisely the kind of protection against unequal distribution of government benefits that the equal protection clause traditionally has been held to provide.

143. 415 U.S. at 261.