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Durational Residency Requirements in State Elections: Blumstein v. Ellington

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NOTES

DURATIONAL RESIDENCY REQUIREMENTS IN STATE ELECTIONS: BLUMSTEIN v. ELLINGTON

On June 12, 1970, James F. Blumstein[1] established his home in Nashville, Tennessee, with the intention of remaining in the community indefinitely. On July 1, 1970, he attempted to register to vote in Davidson County and was refused. He was informed that in order to qualify for registration he must have been a resident of Davidson County for the three-month period preceding the forthcoming election, to be held August 6, 1970, and a resident of the State of Tennessee for the one-year period preceeding that election.[2] After exhausting his state remedies[3] and failing in his efforts to obtain extraordinary relief,[4] Blumstein brought a declaratory judgment action in his own behalf and on behalf of all others similarly situated[5] before a three-judge district court.[6] On August 31, 1970, the United States District Court for the Middle District of Tennessee struck down the Tennessee durational residency requirement for voting in a state election as a violation of the equal protection clause of the fourteenth amendment.

The practical effect of this decision, if upheld, could be enormous. Every state currently has a durational residency requirement varying

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1. —F. Supp.—(M.D. Tenn. Aug. 31, 1970) (Hereinafter cited as Blumstein). Since Blumstein, four other states have passed on the question of residency requirements. A three-judge United States District Court for the Eastern District of Virginia invalidated Virginia's one-year residency requirement. *Bufford v.* Holton, 39 U.S.L.W. 2253 (E.D. Va. Oct. 27, 1970). On October 7, 1970, the Court of Appeals of California overturned that state's one-year residency requirement. *Keane v.* Mihaly, 90 Cal. Rptr. 263,—P.2d—(1970). On October 26, the Vermont one-year residency requirement was nullified. Kohn *v. Davis,* 39 U.S.L.W. 2253 (D. Vt. Oct. 26, 1970). However, a three-judge United States District Court, convened in Arizona, upheld a one-year residency requirement in that state. *Cocanower v.* Marston, —F. Supp. —(D. Ariz. Sept. 21, 1970). Since the legal issues raised in these three cases are identical to those considered in Blumstein, the cases will be treated as one.

2. Tenn. Const. art. IV, § 1; Tenn. Code Ann. §§ 2-201, -304 (1956).

3. Appeal to Davidson County Election Commission pursuant to Tenn. Code Ann. 2-319 (1956).

4. A temporary injunction permitting Blumstein and all others similarly situated to register was denied as too disruptive of the election process. A second motion seeking to allow Blumstein to file a sealed provisional ballot with the clerk of the court pending the outcome of his action was denied on the same ground.

5. *See* Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964).

6. *See* Declaratory Judgment Act 28 U.S.C. §2281 (1964), which requires a three judge court to be convened under 28 U.S.C. § 2284 (1964).

from a high of two years in Mississippi[7] to a low of ninety days in Pennsylvania[8] and three months in New York.[9] In addition, 42 states require residence in the county for periods ranging from six months to 30 days, and 36 states require residence in the precinct for periods ranging from one year in Mississippi to ten days in Iowa, Nebraska, Nevada, Wisconsin, and Wyoming.[10] All three requirements are potential sources

7. Miss. Code Ann. § 3235 (1942).
8. Penn. Const. art. VII, § 1.
9. N.Y. Const. art. II, § 1.
10.

Minimum Length of Residency Requirements for 1968 General Elections by State

	State	County	Precinct
Alabama	1 year	6 months	3 months
Alaska	1 year	none	30 days
Arizona	1 year	30 days	30 days
Arkansas	1 year	6 months	30 days
California	1 year	90 days	54 days
Colorado	1 year	90 days	20 days
Connecticut	6 months	6 months in town	none
Delaware	1 year	3 months	30 days
District of Columbia	1 year	none	none
Florida	1 year	6 months	45 days
Georgia	1 year	6 months	none
Hawaii	1 year	3 months	3 months
Idaho	6 months	30 days	none
Illinois	1 year	90 days	30 days
Indiana	6 months	60 days in township	30 days
Iowa	6 months	60 days	10 days
Kansas	6 months	none	30 days
Kentucky	1 year	6 months	60 days
Louisiana	1 year	6 months	3 months
Maine	6 months	3 months in city	none
Maryland	1 year	6 months	6 months
Massachusetts	1 year	none	6 months
Michigan	6 months	30 days in city	none
Minnesota	6 months	none	30 days
Mississippi	2 years	none	1 year
Missouri	1 year	60 days	none
Montana	1 year	30 days	none
Nebraska	6 months	40 days	10 days
Nevada	6 months	30 days	10 days
New Hampshire	6 months	6 months in town	none
New Jersey	6 months	40 days	none
New Mexico	1 year	90 days	30 days
New York	3 months	3 months	3 months
North Carolina	1 year	none	30 days
North Dakota	1 year	90 days	30 days
Ohio	1 year	40 days	40 days
Oklahoma	6 months	2 months	20 days
Oregon	6 months	30 days	30 days
Pennsylvania	90 days	none	60 days in district
Rhode Island	1 year	6 months in city	none

of disenfranchisement for movers.

Combining the pervasiveness of durational residency requirements and the mobility of our population results in a loss of voting rights for a major segment of our population. The Census Bureau estimates that approximately one-sixth of our people move their residence from one state to another every decade.[11] As a result, it has been estimated that residency requirements disenfranchised five million citizens in 1954,[12] between five and eight million in 1960,[13] almost fifteen million in 1964,[14] and another five to eight million in 1968.[15] In Indiana, approximately 13,900 persons are disenfranchised every election for failure to comply with the sixty-day township residency requirement because of an inter-county, intrastate move.[16] Coupled with the loss of rights suffered by those moving into the state and unable to comply with the six-month state residency requirement, this creates a loss of potential voters significant enough to cause an impact on election results. Moreover, the class of people who move are, "as a single gross category . . . men who tend to be somewhat better educated and who have considerably better jobs and higher incomes than the natives of the region they leave";[17] the class of

South Carolina	1 year	6 months	3 months
South Dakota	1 year	90 days	30 days
Tennessee	1 year	3 months	none
Texas	1 year	6 months	none
Utah	1 year	4 months	60 days
Vermont	1 year	90 days in town	none
Virginia	1 year	6 months	30 days
Washington	1 year	90 days	30 days
West Virginia	1 year	60 days	none
Wisconsin	6 months	none	10 days
Wyoming	1 year	60 days	10 days

U.S. SENATE, OFFICE OF THE SECRETARY, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 252-59 (1968).

11. *See* 115 CONG. REC. 551-78 (1969).

12. Goldman, *Move-Lose Your Vote,* 45 NAT'L. MUN. REV. 61 (1956).

13. REPORT OF THE PRESIDENTS COMMISSION ON REGISTRATION AND VOTING PATIICIPATION 13 (1963). *See also* Note, *Elections—Qualification of Voting—Residency Requirements Reduced for Voting in Presidential Elections—Uniform Act for Voting by New Residents in Presidential Elections,* 77 HARV. L. REV. 574 (1964).

14. *Hearings on S. 596, S. 546, S. 188 and S. 1881 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration,* 90th CONG., 1st SESS. 21 (1967).

15. *See* Gallop Poll of December 11, 1968 estimating 5 million; Library of Congress estimating 5 to 8 million (115 CONG. REC. S. 2113 (daily ed. Feb. 28, 1969)); Bureau of Census estimating 5.5 million (115 CONG. REC. H. 12156 (daily ed. Feb. 28, 1969)).

16. Note, *The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers,* 43 IND. L.J. 901, 903 (1969).

17. A. CAMPBELL, P. CONVERSE, W. MILLER, D. STOKES, THE AMERICAN VOTER: AN ABRIDGEMENT 233 (1964).

people who are most likely to vote if given the opportunity.[18] Consider the possible effect of the disenfranchisement of five million potential voters on an election such as the 1960 presidential election, when John Kennedy defeated Richard Nixon by barely 100,000 votes (34,226,925 to 34,108,662).[19] While the 1970 Voting Rights Act has taken presidential elections out of the control of state durational residency requirements,[20] the problem still exists on a state level. The 1970 Indiana General Election is a prime example of the potential effect on a non-presidential level. The race for the United States Senate was decided by only 4,383 votes, while other state offices were won or lost by margins as low as 7,416 and 476.[21] When you consider that almost 14,000 citizens lost the right to vote from intrastate movement alone, the significance of the durational residency requirements on elections such as this one is made clear.

Apart from the possible result-altering effect on elections, disenfranchisement may also create less tangible, but no less serious harms in its permanent effect on the individual whose rights have been denied:

> Apart from the possible effects upon election results, [these archaic residency requirements] produce apathy and bitterness in such people [disenfranchised voters] toward governments which cheat them of their democratic birthright merely because they move their residence.[22]

While the *Blumstein* decision has potential effects of great significance, it is nonetheless a surprise that it was decided at all. In two cases decided in 1969, the United States Supreme Court dismissed attacks on state election laws for mootness.[23] In both, as in *Blumstein,* the election had been held by the time of trial and the plaintiffs would have satisfied the requirements prior to the next election. Since standing to challenge the relatively short county residency requirements would not mature until a person moved into the county within three months of an election, only extraordinary judicial expedients would permit a plaintiff to exhaust state remedies and complete a law suit prior to the election.[24] On the

18. *See* generally N. PIERCE, THE PEOPLES PRESIDENT (1968); R. LANE, POLITICAL LIFE (1959).
19. 1961 WORLD ALMANAC 240.
20. Pub. L. 91-285, § 202(c) (June 22, 1970) (Voting Rights Amendments of 1970), *amending,* 42 U.S.C.A. § 1971 (Supp. V 1965-69).
21. Vote totals as certified by Secretary of State subject to possible recount.
22. S. REP. No. 80, 88th Cong., 1st Sess. 13 (1963).
23. *See Hall v.* Beals, 396 U.S. 45 (1969); *Brockington* v. *Rhodes,* 396 U.S. 41 (1969).
24. 396 U.S. at 50.

surface it appeared as if county durational residency requirements were immune from review.

Even if the issue could reach a decision on the merits, as recently as 1965 the Supreme Court in *Drueding v. Devlin*[25] had affirmed a state's durational residency requirement substanially identical to Tennessee's on the ground that such requirements are permissible unless they are "so unreasonable that they amount to an irrational or unreasonable discrimination."[26] Such a presumption of validity would be extremely difficult for an aggrieved plaintiff to overcome. Nevertheless, the *Blumstein* case was heard and decided for plaintiff on the merits. The following analysis explores both the process and the validity of that decision.

I. The Mootness Issue

The court dismisses *Hall v. Beals*[27] as inapplicable on the issue of mootness. While the *Hall* court noted that the election was over and plaintiffs would fulfill the residency requirement by the next election, it stated that its mootness holding was apart from these considerations. What the court found determinative in its mootness holding was the fact that the Colorado statute under attack had been amended prior to the action such that the plaintiff would have been permitted to vote in the previous election. Since the offending statute no longer existed, a decision voiding it would have no effect. The mootness doctrine is merely the courts' self-imposed restraint against wasting its time rendering decisions on controversies already resolved. The amendment resolved the controversy before the court by reducing the length of the residency requirement so that plaintiff would not have been affected by it. Moreover, since he had never been a member of the class affected by the new statute, he had no standing to challenge it. Since plaintiff's controversy over the original statute had been settled by the amendment and he lacked standing to challenge the new statute, the *Hall* court properly refused to consider the case further.

In *Brockington v. Rhodes,*[28] the statute had also been amended, but here the plaintiff was still a member of the class denied the right to vote under the amended statute. The Supreme Court refused to find mootness either in the statutory amendment or the subsequent election but based its holding of mootness on the ground that plaintiff "sought only a writ of mandamus to compel the appellees to place his name on the

25. 380 U.S. 125 (1965), *aff'd per curiam,* 234 F. Supp. 721 (D. Md. 1964) [Hereinafter cited as Drueding].
26. 234 F. Supp. at 725.
27. 396 U.S. 45 [Hereinafter cited as Hall].
28. 396 U.S. 41 [Hereinafter cited as Brockington].

ballot as a candidate for a particular office in a particular election. . . ."[29] Such relief was plainly impossible. Since the statute in *Blumstein* had not been amended, plaintiff was still agrieved by the statute and had requested appropriate and available relief in terms of a declaratory judgment in a class action. There is language in *Brockington* that indicates that the result may have been different had plaintiff there done likewise:

> He did not sue for himself and others similarly situated as independent voters, as he might have . . . [and] [h]e did not seek a declaratory judgment, although that avenue too was open to him.[30]

This language, coupled with the negative implication of the refusal of either court to hold the passing of the election as dispository, would seem to indicate that the Supreme Court is ready to hear a case such as *Blumstein* on the merits.

The loophole in the mootness doctrine which permitted *Hall, Brockington,* and now *Blumstein* to get beyond the passing of the election was first put forth in 1911 in *Southern Pacific Terminal Company v. Interstate Commerce Commission.*[31] The case concerned a short term cease and desist order from the Interstate Commerce Commission which expired before the action could be heard: "The questions involved are usually continuing . . . and their consideration ought not to be, as they might be, defeated by short term orders, *capable of repetition yet evading review. . . .*"[32]

It is the repetitive nature of the offense that escapes the mootness doctrine purpose of avoiding academic decisions. Election cases seem particularly susceptable to the abuse. Since standing to challenge an election law does not arise until a person is refused his right to register shortly before an election, a holding that the passing of the election renders the case moot would constrict the time available for challenge too tightly to permit judicial review. Yet, the same problem would be certain to re-occur with every election. Because of the certainty of repetition and difficulty of review, a decision on the merits, despite the passing of the election immediately involved, would not be merely an academic decision of an already settled controversy. The doctrine was applied in *Gray v. Sanders,*[33] an election case decided in 1963. The court

29. *Id.* at 43.
30. *Id.*
31 219 U.S. 498 (1911).
32. *Id.* at 515 (emphasis added).
33. 372 U.S. 368 (1963).

there ruled that completion of the election did not make the case moot when the challenged "[a]ct remains in force, and if the complaint were dismissed it would govern future elections."[34]

In 1969 the Supreme Court decision in *Moore v. Ogilvie*[35] removed all doubt that the "capable of repetition, yet evading review" exception to the mootness doctrine applies to cases alleging deprivation of election rights:

> While the 1968 election is over, the burden . . . allowed to be placed . . . remains and controls future elections . . . The problem is therefore "capable of repetition, yet evading review." . . . The need for its resolution thus reflects a continuing controversy. . . .[36]

II. The Merits

Durational residency requirements established two classes of citizens, movers and non-movers, which became a basis for determining the availability of the ballot. This classification would be offensive to the fourteenth amendment concept of equal protection if the state could not justify the distinction. The first crucial question on the merits the *Blumstein* court had to meet was the establishment of the proper standard by which to evaluate the justification for the Tennessee requirements. The traditional standard utilized when state statutes were challenged on equal protection grounds was reaffirmed in *Drueding,* a case upholding a state durational law; the state, in order to prevail, need only show that a classification is reasonably related to the governmental objective involved.[37] A typical statement of the standard requires that state classifications be "utterly lacking in rational justification"[38] before they will

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34. *Id.* at 376.
35. 394 U.S. 814 (1969).
36. *Id.* at 816.
37. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961); Flemming v Nestor, 363 U.S. 603, 604 (1960); Allied Stores v. Bowers, 358 U.S. 522, 527 (1959); Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 552, 556 (1947); Linley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
38. "[T]he Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Flemming v. Nestor, 363 U.S. 603, 611 (1959). Another extreme example of the standard is illustrated by the following:

> a state statute may not be struck down as offensive of equal protection in its schemes of classifications unless it is obvioulY arbitrary, and that, except in the case of statutes whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality.

McGowan v. Maryland, 366 U.S. 420, 535 (1961).

be found in violation of the equal protection clause.

Exceptions to the Drueding Standard

In 1965, the time of the *Drueding* decision, there were two lines of cases developing exceptions to this standard which would cast doubt on the *Drueding* holding. The first of these exceptions imposed a higher standard of justification before a state could make a classification abridging fundamental rights. This standard was imposed as early as 1941 to strike down an Oklahoma statute providing for involuntary sterilization of certain classes of criminal offenders.[39] This standard was given its present formulation in the civil rights cases of the late 1950's.[40] By 1963 the exception was firmly entrenched that no fundamental right could be abridged without a state showing of a compelling interest.[41] In those matters classed as fundamental, the "rational relation" test was dead. All that remained was the classification of voting as one of those fundamental rights entitled to the protection of the compelling state interest test.

The second line of cases established the necessity for the stricter compelling state interest test in those cases where classifications are based on "suspect criteria." The first criterion to be so classified was race. The Japanese resettlement cases of World War II first produced this stricter standard:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.[42]

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39. We are dealing here with legislation which involves one of the basic civil rights of man . . . strict scrutinizing of the classification which a State makes . . . is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws.

Skinner v. Oklahoma, 316 U.S. 535, 541 (1941).

40. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Litle Rock, 361 U.S. 516, 524 (1959). In NAACP v. Alabama, 357 U.S. 449 (1958) the Court stated: ". . . to justify the deterrent effect . . on the free exercise . . . of their constitutionally protected right . . . a . . . subordinating interest of the state must be compelling." *Id.* at 463.

41. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Sherbert v. Verner, 374 U.S. 398, 406 (1963).

42. Korematsu v. United States, 323 U.S. 214, 216 (1943).

The suspect nature of classifications based on race was well established by 1964,[43] and a new category, religion, was added to the list.[44] Soon wealth[45] and political beliefs[46] would join race[47] as suspect criteria. The single step remaining was to find a classification based on movement of residence to be suspect.

Exceptions Extending to Voting and Residency

By the time *Drueding* was decided, two cases had already cast doubt on its holding by finding voting to be a fundamental right requiring the compelling state interest test.[48] Both were decided less that a year before *Drueding*. It is difficult to reconcile the strong commitment of *Reynolds*, applying the compelling state interest test, and the application of the lesser standard in *Drueding* less than a year later. The difference in facts-*Reynolds* was concerned with the dilution of votes through a failure to reapportion, while *Drueding*, like *Blumstein*, concerned the denial of the right to vote through durational residency requirement-does not seem to account for the difference in theory.

A United States District Court, in dicta, upheld the *Drueding* standard by suggesting an immediacy of need standard for determining what is a fundamental right:

> But certainly it takes little logic to conclude that the need for food, clothing and shelter has an aspect of immediacy which differentiates it in kind from the right to vote.[49]

This distinction has not been adopted, and more recent Supreme Court

43. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Oyama v. California, 332 U.S. 633, 640 (1948); Korematsu v. United Sates, 323 U.S. 214, 216 (1944); Hirabayshi v. United States, 320 U.S. 81, 83 100 (1943).

44. *See* Braunfield v. Brown, 366 U.S. 599, 603 (1961).

45. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

46. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968).

47. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

48. In Wesberry v. Sanders, 376 U.S. 1 (1964), the Court noted:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. at 17-18. In Reynolds v. Sims, 377 U.S. 533 (1964), it stated:

> Undoubtedly the right of sufferage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of its citizens to vote must be carefully and meticulously scrutinized.

Id. a 562.

49. Green v. Dept. Pub. Welfare, 270 F. Supp. 173, 178 (D. Del. 1967).

opinions indicate that the *Reynolds* standard has been affirmed.[50] As the *Blumstein* court pointed out, any doubts of the proper standard to be applied were put to rest by the *Evans v. Cornman*[51] decision handed down on June 15, 1970:

> Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges . . . . And before that right can be restricted, the purpose of the restrictions and the asserted overriding interests served by it must meet close constitutional scrutinizing.[52]

Consequently, the fundamental nature of the voting privilege appears to call for the adoption of the compelling state interest standard.

The second line of cases developing the suspect criteria rationale for requiring a compelling state interest standard were merged with a long line of cases supporting the right to travel[53] in *Shapiro v. Thompson.*[54] *Shapiro* added interstate travel to the list of suspect criteria for classification as they held durational residency requirements for welfare unconstitutional.[55] While the court in *Shapiro* specifically left open the application of its holding to voter residency requirements,[56] a three-judge District Court in Massachusetts adopted the *Shapiro* rationale to

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50. In *Kramer v. Union Free School Dist.,* 395 U.S. 621 (1969), a bachelor who lived with his parents and owned no property was denied the right to vote in a school district election. The cour held,

> . . . if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denied the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest.

Id. at 627.

51. 398 U.S. 419 (1970).

52. *Id.* at 422.

53. *See, e.g.,* United States v. Guest, 383 U.S. 745, 757 (1966).

54. 394 U.S. 618 (1969) [Hereinafter cited as *Shapiro*].

55. *Id.* at 634:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and . . . permissible state objectives will suffice to justify the classification. The waiting period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from state to state or to the District of Columbia 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.

56. *Id.* at 638 n. 21:

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

void Massachusetts' one-year residency requirements in the state, although it did not have before it the additional six-month residency requirement in the precinct:

> This court finds no basis for any compelling state interest to be served by singling out interstate movers as a class of persons for whom an additional six months residency is mandatory.[57]

It appears that the use of the suspect criterion of movement to deny the franchise requires the showing of a compelling state interest. Under either analysis, the abridgement of fundamental rights or the suspect criteria, the *Blumstein* court correctly reached the conclusion that the standard against which the state's justification must be measured is that of a compelling state interest.[58]

The State Interest

Having determined the standard the justifications for durational residency requirements must meet to be compatable with the equal protection clause, examination of the interests of the state is now appropriate. Two major justifications have been put forth to support durational residency requirements. The first is to promote a more intelligent vote by insuring that voters have an opportunity to become familiar with local issues. The second is the prevention of fraud.[59] While *Blumstein* only dealt with the latter, the former deserves discussion as well.

The argument with respect to promotion of a more intelligent vote was raised and dismissed in the context of presidential elections before a three-judge federal court for the District of Columbia in a case challeng-

57. Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970).

58. It is on this point that the Arizona court, which upheld durational residency requirements, disagreed. The court applied the lesser standard of *Drueding*, nothing that the cases upholding the stricter standard involved special elections and that the right here involved was only temporarily lost. Cocanower v. Marston,— F. Supp.— (D. Ariz. Sept. 21, 1970). It would seem, however, that there would be even more reason for applying a strict standard in cases involving general elections than in the relatively unimportant school district and bond issue cases. The distinction does not seem to support the Arizona result. As for the second distinction, it would be extremely unfortunate if the Supreme Court were to uphold the deprivation of a right it has termed fundamental to all of our rights on the ground that it is only to be denied for six months to two years.

59. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Hall v. Beals, 292 F. Supp 610 (D. Colo. 1968) *vacated as moot*, 396 U.S. 45 (1969); Sola v. Sanchez Vilella, 270 F. Supp. 459 (D.P.R. 1967), *aff'd.*, 390 F.2d 160 (1st Cir. 1968); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd. per curiam*, 380 U.S. 125 (1965); Howard v. Skinner, 87 Md. 556, 40 A. 379 (1898).

ing the constitutionality of the 1970 Voting Rights Act.[60] The court found the gain in knowledge of local issues inconsequential when compared to the loss of the right to vote.[61] Although the state's interest is undoubtedly greater in seeking to insure knowledge of local issues before permitting one to vote in a local election, there are reasons to believe that no compelling state interest can be shown. First is the fact that durational residency requirements are unnecessary to accomplish the goal. Given modern campaign techniques involving public relations men, frequent television and radio appearances, and saturation press coverage, it is difficult to imagine a newcomer requiring a year to inform himself of the issues of the campaign and the facts relevant to them. Indeed, it is difficult to imagine a concerned voter unable to fully inform himself as to enough of the local issues and affairs to cast an intelligent vote in a matter of weeks. It is fair to assume that the newcomer has done some preliminary investigation of the community he is moving his family into before he actually arrives. Even if he has not, voter registration requirements, commonly ending registration a month before the elections for valid administrative reasons, have the effect of a minimal durational residency requirement more in line with the purpose of familiarizing the newcomer with local issues. The concerned voter does not need an additional durational residency requirement to cast an intelligent, informed vote.

However, what is done about the unconcerned voter? He is the basis of the second objection to the familiarization justification. For him, the durational residency requirement is ineffective. Regardless of how long he lives in the community, he may never become acquainted with issues or candidates beyond the party label. The key variable in voter information is voter concern, not length of residency. Any attempt to increase voter awareness of issues through residency requirements beyond those already imposed in registration is both unnecessary and ineffective.

A third objection to this rationale is that the state, whatever argument it may make, is not really concerned with assuring that voters are knowledgeable on local issues. Consider, for example, the use of absentee ballots. It is inconsistent to argue that a compelling need to assure knowledge of local issues and conditions justifies denying the vote to a resident of ten or eleven months, yet at the same time extend the

60. Christopher v. Mitchell, 39 U.S.L.W. 2196 (D.D.C. Oct. 2, 1970).

61. *Id.* a 2197:

A states interest in attempting to guarantee that every voter be familiar with local issues before he votes for President cannot be described as compelling when measured against the importance of the right to the transient citizen.

franchise through the use of absentee ballots to servicemen or students who may not have been in the state for years.[62] The entire issue may well be a smoke screen to provide a colorable state interest for an unnecessary restriction.

The major justification for durational residency requirements, however, is fraud. Preventing election fraud is a vital state concern. Colonizing, the practice of importing large numbers of non-residents to vote in an election, is a major target of durational residency requirements. In the period from 1868 to 1871, "Boss" Tweed's machine in New York City was so effective at colonizing that votes cast exceeded the total voting population by eight per cent.[63] While the politicians of today may be more subtle than the Tweed Ring, there is still sufficient evidence of election fraud to pose a major problem. However, it is one thing to say a state has a compelling interest in preventing election fraud, but it is quite another to say that there is a compelling interest in using durational residency requirements for that purpose.

There are three objections to the conclusion that prevention of fraud justifies durational residency requirements. The first objection is that durational residency requirements are unnecessary to identify voters as bona fide residents. The Voting Rights Act of 1970 recites the Congressional finding that a durational residency requirement "does not bear a reasonable relationship to any compelling state interest in the conduct of Presidential elections."[64] In the context of knowledge of local issues, the reference to presidential elections minimizes the applicability of the principal to state and local elections, but this limitation is less clear when the issue is fraud. While the relation is not exact, there is a similarity in the problem of preventing fraud in presidential or state and local elections. It appears, moreover, that states have been able to successfully determine bona fide residence for purposes other than voting.[65] Ascertainment of bona fide residence and prevention of fraud

62. *See* MacLeod & Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93 (1969):

> The anomalous situation which denies the vote to "new" residents of ten or eleven months while extending it fully in the form of absentee ballots to servicemen—no matter how long they have been away—belies the utter fully of the rationale used to support this second "purpose."

Id. at 115.

63. Note, *Federal Elections-The Disfranchising Residency Requirement*, 1962 U. ILL. L.F. 101, 103 n. 17.

64. Pub. L. No. 91-285, § 202(a)(b) (June 22, 1970), *amending*, 42 U.S.C.A. § 1971 (Supp. V 1965-70).

65. [I]n other areas where identification is needed states have been able to "winnow successfully from the ranks . . . those whose residence in the State is bona fide." In addition to divorce acions, states experience little difficulty in

need not rely on durational residency requirements.

A second objection to the fraud justification is that durational residency requirements are ineffective as a tool to combat fraud. The state commonly performs no investigation to determine duration of residency. The prospective voter merely swears that he has lived in the precinct and state for the proscribed period. This requirement adds little protection from deliberate fraud. It is just as easy to lie about how long you have been a resident as to lie about presently being a resident.[66] Although it may be marginally easier to determine duration of residency than bona fide residency by investigation, it is impractical enough to do either that the additional restriction would be an ineffective protection against fraud.

The third argument is that adopted by the court in *Blumstein.* There are less restrictive alternatives than durational residency requirements which are as effective in combating fraud. In *Shapiro,* the fraud argument was rejected on this basis. Even though it was admitted that safeguarding against fraud was a compelling state interest, the court pointed out that "less drastic means are available and are employed, to minimize that hazard."[67] Specifically, the *Shapiro* court referred to the "distinct and independent"[68] requirement that a welfare recipient be a bona fide resident, as well as meet the one-year waiting period requirement. The court found that the bona fide resident requirement was a complete and less onerous alternative to durational residency as a measure to prevent fraud. The less onerous alternative principal is in accord with well-recognized equal protection standards.[69]

Even if the less onerous alternative were to require greater state effort to administer, this would not excuse the state from its obligation to adopt such a measure: "States may not casually deprive a class of

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identifying their residents for taxation purposes. A new resident is certainly not granted a one year grace period before being compelled to pay taxes to his new sovereign.

MacLeod & Wilberding, *supra* note 62, at 114.

66. The dissent in Hall v. Beals stated:

the nonresident seeking to vote, can as easily swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn-the duration of residency-adds no discernible protection against "dual voting" or "colonization" by voters willing to lie.

396 U.S. at 54 (dissenting opinion of Marshall).

67. 394 U.S. at 637.

68. 394 U.S. at 636.

69. "The Court may also apply the principal of the least onerous alternative and hold a rational classification to be impermissible because . . . less harsh means are available." Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 SUP. CT. REV. 39, 58.

individuals of the vote because of some remote administrative benefit to the state."[70] Consequently, the state may not use the durational residency requirement as a standard of determining bona fide residence. With a less restrictive but equally effective alternative available at only a remote administrative cost, the *Blumstein* court was justified in finding that the durational residency requirement was "not necessary" to promote a "compelling state interest."

III. Conclusion

The *Blumstein* court was justified in requiring the state to show that its durational residency requirements were necessary to meet a compelling state interest. Election restrictions fall under either of the two exceptions to the general "rational relation" rule for judging legislative classifications for purposes of fourteenth amendment equal protection. The court correctly dismissed the state's fraud justification as being unnecessary in light of available alternatives for dealing with election fraud. For prevention of fraud as well as for other justifications the requirements are both unnecessary and ineffective.

IV. Related Cases

Two related cases recently decided by lower courts may indicate a judicial current opposing virtually all durational residency requirements. Using language similar to *Shapiro,* a three-judge United States District Court in North Carolina held North Carolina's one-year residency requirement for taking the bar examination unconstitutional.[71] The court based its holding on a right to travel argument. Apparently wary of relying too heavily on the *Shapiro* precedent, the court specifically found that the state's interests in such a requirement did not measure up even to the "rational basis" test of validity. The court rejected the justification of allowing the lawyer time to learn local customs as being irrelevant to the competent practice of law. A second argument, that the requirement permitted observation by the community of the lawyer's moral standards, was rejected as well. The durational residency requirement was determined to be ineffective in allowing a valid assessment of moral character. Finally, the court rejected the argument that the requirement assures that the lawyer intends permanent residency by asserting that one year of residency means little in today's mobile society.[72]

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70. Carrington v. Rash, 380 U.S. 89, 96 (1965).

71. Keenan v. North Carolina Bd. of Law Examiners, 39 U.S.L.W. 2193 (E.D.NC Oct. 2, 1970).

72. For more information about Residency Requirements and bar examinations

A second case came from Hawaii, where a family court held Hawaii's one-year residency requirement for filing for divorce unconstitutional.[73] The right to travel argument was cited as requiring the state to show a compelling state interest in making its distinctions, but again the standard was not relied upon. The state claimed as its purpose the necessity of knowing more about the family situation than would be possible in the case of new arrivals in order to better help the children of a foundering marriage. The court rejected this claim as not even meeting the "rational basis" test, finding that the children of such a marriage are better served by allowing the court to take jurisdiction as quickly as possible in order to have an opportunity to take appropriate steps for their welfare.

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see Note. *Residence Requirements After Shapiro v. Thompson,* 70 COLUM. L. REV., 150-52 (1970).

73. Whitehead v. Whitehead, 38 U.S.L.W. 2577 (Hawaii Family Ct. 3rd Cir. Mar. 30, 1970).