Florida State University Law Review

Volume 1 | Issue 1 Article 6

1973

Dunn v. Blumstein, 405 U.S. 330 (1972)

devise restrictions were designed to afford. Previous homestead provisions were characterized as insuring for dependent family members a shelter and refuge from want.[22] The increased mobility of individuals, however, has had a scattering effect on the household[23] with the consequence that fewer persons look to the homestead for subsistence. Moreover, a number of developments have taken place which lessen the need for the economic security homestead devise restraints guaranteed in the past. Social security and other welfare laws, life insurance, and enhanced employment opportunities have all contributed to the declining importance of homestead laws. Given these developments, it is doubtful today that anyone other than the spouse or minor child requires homestead protection.

Constitutional Law — EQUAL PROTECTION OF THE LAWS — DURATIONAL RESIDENCE REQUIREMENTS FOR VOTING ABRIDGE RIGHT TO VOTE AND PENALIZE RIGHT TO TRAVEL.—*Dunn v. Blumstein*, 405 U.S. 330 (1972).

Three weeks after moving to Tennessee, James F. Blumstein was refused registration as a voter on the ground that state law[1] required a year's residence in the state and three months' residence in the county as prerequisites to voting. After exhausting his state remedies, Blumstein brought an action in federal district court challenging the constitutionality of these provisions. A three-judge court held that the durational residence requirements were unnecessary to further any compelling interest of Tennessee's and, so tested, were unconstitutional under the equal protection clause of the fourteenth amendment.[2] On appeal, the Supreme Court affirmed on substantially similar grounds.

In an opinion by Mr. Justice Marshall,[3] the Court first held that

---

22. *See, e.g.*, Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945); Collins v. Collins, 150 Fla. 374, 7 So. 2d 443 (1942).

23. As of 1960 less than 3% of the rural farm households had a grandchild present; 40.6% had a child present, 83% of the children being under the age of 18. Among the urban households, 34.7% had children present, 89% of these children being under the age of 18. U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, VOL. 1, CHARACTERISTICS OF THE POPULATION pt. 11, at 353-57.

1. *See* TENN. CONST. art. IV, § 1; TENN. CODE ANN. § 2-201 (1971).

2. Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn. 1970).

3. Mr. Justice Marshall wrote for himself and four other members of the Court. Mr. Justice Blackmun concurred in the result, and the Chief Justice dissented. Justices Rehnquist and Powell took no part in the consideration or decision of the case.

the appropriate standard for review under the equal protection clause was whether the requirements were necessary to promote a compelling state interest.[4] This stricter test was proper because two fundamental constitutional rights were involved: durational residence requirements not only denied some residents the right to vote,[5] but did so based solely upon the fact of recent interstate travel.[6]

The Court then examined in detail Tennessee's claimed justifications for its durational residence requirements. The state first asserted that the waiting periods tended to maintain the integrity of the electoral process, serving as a fraud preventative by distinguishing bona fide residents from nonresidents. This contention the Court found unconvincing in light of the fact that Tennessee allowed voters to register until thirty days before an election and, in so doing, to establish their compliance with residence and other requirements by simply swearing an oath to that effect:[7]

> As long as the State relies on the oath-swearing system to establish qualifications, a durational residence requirement adds nothing to a simple residence requirement in the effort to stop fraud. The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident.

Nor could the three-month and one-year periods be justified in terms of the time required to investigate a voter's sworn claims since Tennessee, in permitting registration up to thirty days before an election, gave itself no more than that period of time in which to conduct an investigation.[8] The Court also rejected the arguments that durational

---

4. 405 U.S. at 335.

5. *Id.* at 336-37. In a memorandum opinion, Drueding v. Devlin, 380 U.S. 125 (1965), *aff'g mem.* 234 F. Supp. 721 (D. Md. 1964), the Court had earlier affirmed a district court decision upholding Maryland's one-year durational residence requirement for voting. The equal protection test applied by the district court was whether the requirement was reasonably related to a permissible state interest. 234 F. Supp. at 724-25. The *Dunn* Court disposed of *Drueding* by stating that "if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that 'place[s] a condition on the exercise of the right to vote.'" 405 U.S. at 337.

6. 405 U.S. at 338-42.

7. *Id.* at 346.

8. The Court noted that the record did not reflect any effort on Tennessee's part routinely to go "behind the would-be voter's oath to determine his qualifications." 405 U.S. at 346. Moreover, even if durational residence periods were used for investigative purposes, Tennessee had failed to demonstrate that its three-month and one-year periods were "necessary." The Court conceded that "[f]ixing a constitutionally acceptable period is surely a matter of degree," but concluded that "30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much." *Id.* at 348.

residence requirements were permissible as an administrative device for distinguishing residents from nonresidents and that they reduced the likelihood of fraud by forcing the nonresident intent on voting fraudulently to remain in a false locale for three months or a year. While in operation this device might exclude all nonresidents from voting, it also excluded by conclusive presumption many persons who were unquestionably bona fide residents, at least as Tennessee defined that term in other contexts.[9] Classification in this fashion, the Court concluded, was "all too imprecise."[10] Finally, the Court adverted to a variety of other provisions of Tennessee law dealing with voter fraud, noting that "[w]here a State has available such remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud."[11]

Tennessee's second major contention—that the waiting periods helped to insure knowledgeable voters—comprised three subsidiary arguments, all of which the Court rejected. The claim that the requirements offered some assurance that the voter was a "member of the community" confused, in the Court's view, a bona fide residence requirement with a durational residence requirement. The state's interest "in limiting the franchise to bona fide members of the community . . . does not justify or explain the exclusion from the franchise of persons . . . because they are recent rather than long-time residents."[12] Similarly, Tennessee's "common interest in the community's government" argument failed. This the Court took to mean a desire on the state's part to impress upon voters the "local viewpoint," a clearly impermissible purpose.[13] Finally, the Court rejected Tennessee's claim that a year's residence in the state and three months' residence in the county were likely to insure that voters exercised their franchise in an intelligent fashion.[14]

---

9. The Court stressed the fact that there was no dispute as to Blumstein's status as a bona fide resident. The state's basic test for bona fide residence was "(1) an intention to stay indefinitely in a place . . . joined with (2) some objective indication consistent with that intent . . . ." 405 U.S. at 351 n.22. *But see* Newburger v. Peterson, 344 F. Supp. 559 (D.N.H. 1972) (indefinite intention test held violative of equal protection clause as overly restrictive).

10. 405 U.S. at 351.

11. *Id.* at 353-54.

12. *Id.* at 354.

13. *Id.* at 354-56, citing Evans v. Cornman, 398 U.S. 419, 423 (1970); Hall v. Beals, 396 U.S. 45, 53-54 (1969) (dissenting opinion of Marshall, J.); Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969); and Carrington v. Rash, 380 U.S. 89, 94 (1965).

14. Assuming without deciding the permissibility of this purpose, the Court found that durational residence requirements were too imprecise to achieve it. To reach this conclusion, the Court took judicial notice of several "facts": such requirements in prac-

Virtually every state now imposes durational residence requirements for voting—typically of six months or more[15]—and the most obvious effect of the *Dunn* decision is to lay them all open to invalidation.[16] Beyond stating that thirty days was enough and three months too much, the Court declined to say what exact period of effective durational residence a state may impose through the device of closing its voter registration books prior to an election. But it was plainly impressed by the fact that Congress, in enacting the Voting Rights Act Amendments of 1970, had prohibited the closing of voter registration books more than thirty days prior to presidential and vice-presidential elections.[17] Presumably a state could cut off registration for as long a period in excess of thirty days as it could show was necessary to further some compelling state interest—such as the prevention of fraud in the electoral process, for example.[18] But the Court evidently has a low opinion of the likelihood that this could be done, for it noted specifically that the various administrative tasks which a state might perform in checking voters' qualifications were relatively simple and easy to accomplish.[19] After *Dunn,* it is difficult to avoid the conclusion that any period in excess of thirty days will probably be invalidated[20] and that for all practical purposes the Court has merged

---

tice obviously exclude many fully informed voters while permitting long-time residents with no knowledge of election issues to vote; recent arrivals who take the trouble to register to vote are likely to be well informed politically; and exposure to candidates and issues is greatest during the last thirty days before an election. 405 U.S. at 358. Finally, the Court reasoned that the knowledge-promoting character of waiting periods applied in discriminatory fashion to new arrivals only. This surely ignores the fact that long-time residents by definition have had whatever benefits may accrue through exposure over time to local issues and concerns.

15. *See* 19 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1972-73, at 36-37 (1972); MacLeod & Wilberding, *State Voting Residency Requirements and Civil Rights,* 38 GEO. WASH. L. REV. 93, 95-98 (1969).

16. *See* Hinnant v. Sebesta, 346 F. Supp. 913 (M.D. Fla. 1972) (invalidating Florida's sixty-day durational residence requirement).

17. *See* 405 U.S. at 344, 348 & n.19. *Cf.* 84 Stat. 316, 317, 42 U.S.C. §§ 1973aa-1 (b), (d) (1970). Congress concluded that any period in excess of thirty days did not bear a reasonable relationship to any compelling state interest. 84 Stat. 316, 42 U.S.C. § 1973aa-1 (a) (6) (1970). The Court said: "There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the context of other elections." 405 U.S. at 348-49 n.19.

18. The Court characterized the prevention of fraud as "a legitimate and compelling government goal." 405 U.S. at 345.

19. *See* 405 U.S. at 348.

20. In Hinnant v. Sebesta, 346 F. Supp. 913 (M.D. Fla. 1972), a district court struck down, on the authority of *Dunn,* Florida's sixty-day durational residence requirement, despite the argument that "Florida is virtually unique among the states in that it attracts a huge number of part-time winter residents, tourists and other transients so that the likelihood of fraudulent registration is enhanced." *Id.* at 915. The court stated:

If the state actually closed its registration books sixty days prior to state and

the voter registration cutoff period for state and local elections with the thirty-day period fixed by Congress for presidential elections.

Of greater significance may be the impact of the constitutional right to travel discussed in *Dunn* on other forms of durational residence requirements.[21] In *Shapiro v. Thompson*,[22] the Court invalidated a durational requirement for state welfare assistance, holding that the statutory waiting period abridged the freedom of travel. In *Dunn*, the Court made clear that *Shapiro* could not be read, as some lower courts had done, to require a showing of actual deterrence of travel or even of an intent to achieve that effect.[23] Rather, a claimant need only show that the exercise of the right to travel has been conditioned or penalized by the challenged classification.[24] Virtually all durational

---

> local elections and, in addition, could forcefully demonstrate that this period of time was necessary to verify the eligibility of electors and otherwise accomplish the many administrative tasks preparatory to conducting the election itself, then its argument in support of a sixty day period *might* have weight. But just as Tennessee did in *Blumstein*, Florida has elected to permit registration until thirty days before the election, and in so doing has already demonstrated that the thirty day period is sufficient for administrative preparation.

Id. The probability of invalidation becomes a virtual certainty in states like Florida and Tennessee which have already adopted a thirty-day closing period and which permit qualifications to be established by oath or affirmation. As of 1970, forty states kept their voting rolls open for registration for some purposes until at least thirty days prior to presidential elections. *See* 116 Cong. Rec. 6995 (1970).

21. In addition to voting, other areas in which durational residence requirements have been used are admittance to public housing, *e.g.*, Cole v. Housing Authority, 312 F. Supp. 692 (D.R.I.), *aff'd* 435 F.2d 807 (1st Cir. 1970); veterans preference statutes, *e.g.*, Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971); professional licensing, *e.g.*, Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); divorce, *e.g.*, Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971); and sporting licenses, *e.g.*, FLA. STAT. § 370.01(1) (1971). For a discussion of durational residence requirements in some nonvoting areas, see Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 140-46, 148-55 (1970); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 1003-04, 1008-12 (1969).

22. 394 U.S. 618 (1969).

23. 405 U.S. at 339-40. *See, e.g.*, Fontham v. McKeithan, 336 F. Supp. 153 (E.D. La. 1971) (voting requirements) (lack of intent and actual deterrence); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (out-of-state tuition differentials) (no "specific objective" to deter or deterrence of "any appreciable number"); Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970) (admittance to public housing) ("insubstantiality of the impact . . . on the right").

24. 405 U.S. at 341. Of course it must also appear that the condition or penalty is not imposed by a requirement necessary to further a compelling state interest. Moreover, what constitutes a penalty or condition on the right to travel is far from clear. In Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, 405 U.S. 707 (1972), the Court sustained a one-dollar service charge imposed on each departing commercial airline passenger by the state airport authority. The levy was there characterized as an "aid" rather than a "penalty" on interstate travel. The Court reached this conclusion with the explanation that the funds thus generated were used to develop and maintain the publicly financed airport which made air travel possible.

residence requirements[25] condition or penalize free movement by placing the new resident in a state at a disadvantage in comparison with the long-time resident. The right-to-travel standard which has emerged from *Shapiro* and *Dunn* would now seem to make use of these devices for any purpose highly suspect.[26]

Consumer Protection— TRUTH IN LENDING — DISCLOSURE AT REAL ESTATE CLOSING IS NOT TIMELY AND FRUSTRATES THE PURPOSE OF THE FEDERAL TRUTH IN LENDING ACT.—*Bissette v. Colonial Mortgage Corp.*, 340 F. Supp. 1191 (D.D.C. 1972).

The Calvin Bissettes entered into an agreement with a builder-developer for the purchase of a one-family home, the agreement con-

---

25. Waiting periods applicable to new arrivals in a state may not in terms be "durational" residence requirements. They may rather purport to distinguish residents from nonresidents, creating an irrebuttable presumption of nonresidence so far as entitlement to some particular benefit is concerned. The Court has thus far dealt only with durational residence requirements and has been careful to emphasize that fact. In *Dunn*, for example, the Court stated that "[n]othing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." 405 U.S. at 342 n.13. The question arises whether a state can distinguish residents from nonresidents in terms of presence within the state for a period of time without in effect creating a durational residence requirement that would then be subject to testing by the compelling state interest standard. Certainly states which have a less burdensome test of bona fide residence—like Tennessee's "intention to stay indefinitely in a place" coupled with "some objective indication consistent with that intent"— will experience logical difficulty in explaining why a resident-nonresident classification in terms of time within the state is anything other than a durational residence requirement by another name.

26. Out-of-state tuition differentials represent one of the most widely used and economically significant forms of durational residence requirement. *See generally* Note, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139 (1971). Attacks on tuition differentials have generally been unsuccessful. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (Cal. 1st Dist. Ct. App. 1969), *appeal dismissed*, 396 U.S. 554 (1970); Bryan v. Regents, 188 Cal. 559, 205 Pac. 107 (1922); Commentary, 24 ALA. L. REV. 147 (1971); *But see* Kline v. Vlandis, 346 F. Supp. 526 (D. Conn. 1972). In the *Starns* case, the Court in a memorandum opinion affirmed a district court's application of the traditional "rational relation" equal protection test to uphold a Minnesota statute which created "an irrebuttable presumption that any person who has not continuously resided in Minnesota for one year immediately before his entrance to the University is a nonresident for tuition purposes." 326 F. Supp. at 237. *Shapiro* was distinguished by the district court in two respects: the court found no significant evidence that the claimants' right to travel had actually been deterred, and *Shapiro* was said to involve immediate and pressing needs relating to the preservation of life and health. *Id.* at 237-38. But the *Starns* affirmance came before *Dunn*. Given the Court's rejection in *Dunn* of an actual deterrence requirement and its careful elaboration of the right to travel as an independent basis necessitating application of the compelling state interest test, it seems improbable that the *Starns* rationale will be adequate to dispose of this issue should it again come before the Court.