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Revisiting Hooper

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In *Hooper v. Bernalillo County Assessor,* the Supreme Court invalidated the New Mexico state property tax exemption for Vietnam veterans residing in New Mexico. My mother wrote the lower court opinion reversed by the U.S. Supreme Court. I was eleven when the case came down, and it was the first Supreme Court case of which I was ever aware. I barely understood what had happened, but I knew the U.S. Supreme Court had concluded that my mother made a mistake in one of her earliest decisions as a judge on the New Mexico Court of Appeals. That frustrated me. *Hooper* was the first case I looked up when I learned how to use a law library. It frustrated me even more once I read it. On the face of the opinion, it appeared that my mother had approved of a state law that was both irrational and illegitimate. That hardly sounded like the kind of judge I believed her to be. I watched her put a tremendous amount of time and effort into her decisions, and I knew how careful and conscientious she was about her work. The Supreme Court’s decision in *Hooper* seemed like it had to be wrong.

*Hooper* is an exceptional case in many ways. First, the case is infused with the right to travel—a constitutional right with a long pedigree but little textual support. Additionally, it is one of the few opinions in which the Supreme Court struck down a statute on rational basis review. Finally, the New Mexico Court of Appeals upheld the statute unanimously and the New Mexico Supreme Court denied certiorari; yet the U.S. Supreme Court took the case and reversed. I am aware of only one other case since New Mexico established an intermediate appellate court where the U.S. Supreme Court reversed a decision that the New Mexico Supreme Court declined to hear.

For this Special Issue of the *New Mexico Law Review,* I thought I would return to *Hooper* and try to determine whether my frustration with the Supreme Court was justified. Was this a case my mother and her colleagues could have gotten right? Could she have prevented reversal? In the end, based on the case law presented to her, I believe that reversal was inevitable. The Court’s process in *Hooper* was very unusual. While it claimed to be applying rational basis review, it was in fact engaging in a form of heightened scrutiny, holding provisions like the one in *Hooper* to a higher standard. At the time of *Hooper,* the Court was in the process

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7. See Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982), rev’g 95 N.M. 708, 625 P.2d 1225 (Ct. App. 1980); see also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (affirming a decision of the New Mexico intermediate appellate court after the New Mexico Supreme Court initially granted, and then quashed, a writ of certiorari).
8. Other authors have also noted that *Hooper,* and its predecessor, *Zobel v. Williams,* 457 U.S. 55 (1982), are, at best, a very strange application of rational basis review. See, e.g., Laurence H. Tribe, *Saenz Sans Prophecy:*
of reinvigorating the right to travel in a way impossible to predict when the New Mexico Court of Appeals heard the case.

Part I of this article provides the background to the New Mexico Court of Appeals’ and U.S. Supreme Court’s decisions in Hooper. The case law prior to Hooper clearly indicated that rational basis review applied to this type of right-to-travel challenge. The New Mexico Court of Appeals found the statute constitutional on a rational basis standard. Even though the Supreme Court had previously approved of veterans’ benefits of the type provided by the State of New Mexico on the theory that states could reward veterans for past service, it abandoned this precedent and reversed in Hooper. The Court applied the reasoning from Zobel v. Williams, a new case barring states from rewarding residents for their prior service to the state.

Part II analyzes the reasoning in Hooper and Zobel. While the Court purported to apply rational basis review in both cases, I argue that the reasoning of both opinions is more consistent with strict scrutiny. Additionally, sources in the Blackmun Archives support this conclusion by revealing the drafting history of Zobel. Zobel was initially written as a heightened scrutiny case and the logic of heightened scrutiny persisted into the opinion eventually issued by the Court.

Part III considers the post-Hooper right-to-travel landscape. The Supreme Court no longer claims that rational basis review applies to these types of challenges and has adopted explicitly the implicit holding of Hooper and Zobel that strict scrutiny is appropriate in these cases. The New Mexico Court of Appeals’ decision in Hooper, while correct at the time, fell victim to a shift in the law that the Supreme Court only acknowledged much later.

I.

At the time Hooper was decided, New Mexico had a long history of providing property tax exemptions for veterans.9 Veterans of each major conflict were eligible if they established residency within a fixed period of time after the conflict ended.10

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9. The New Mexico Constitution authorizes a property tax exemption for veterans without regard to the date the veteran acquired state citizenship or regard to service in time of war. See, e.g., N.M CONST., art. VIII, § 5. However, the exemption requires an implementing statute and, as a result, the benefit is limited to those veterans identified in the authorizing legislation. See Hooper, 101 N.M. at 175, 679 P.2d at 843.

10. The 1923 statute initially passed by the New Mexico legislature simply required residency, see id. (citing NMSA 1941, § 76-111), but a 1933 amendment to the statute imposed a residency cutoff date—only veterans obtaining residency prior to January 1934 were eligible for the exemption. See Flaska v. New Mexico, 51 N.M. 13, 19, 177 P.2d 174, 177 (1946) (“By amendment in 1933 [the legislature] provided that the claimant’s residence must be acquired prior to January 1, 1934.”). Subsequent versions of the tax exemptions contained similar restrictions. For veterans of the First World War, the legislature retained the Jan. 1, 1934, date. Veterans of World War II were eligible if they were residents prior to Jan. 1, 1947, and Korean War veterans must have been
For veterans of the Vietnam War, the New Mexico Legislature initially authorized an exemption for individuals who were residents when they enlisted in the military. In 1981, the legislature expanded the benefit to include veterans who were residents prior to May 8, 1975, whether or not they were residents at the time of enlistment. As had been the case with the residency requirements set for earlier wars, this date reflected the federal government’s definition of the end of the Vietnam era. The eligibility date was moved back a year in 1983 so that by the time of Hooper, veterans who were residents before May 8, 1976, were eligible for the property tax exemption.

Alvin Hooper was a Vietnam veteran who was denied the exemption because he became a New Mexico resident in August 1981, after the statutory deadline. Since the statute divided veterans into two classes, Hooper sought to invalidate the law on equal protection grounds. Equal protection analysis requires, as an initial matter, that courts determine the appropriate level of scrutiny to apply to the legislation. If the distinction discriminates based on a suspect classification or impairs a fundamental right, courts must apply strict scrutiny and invalidate the statute unless it is narrowly tailored to further a compelling state interest. If the statute touches on neither a suspect class nor a fundamental right, courts apply rational basis review and the statute must merely rationally relate to a legitimate state interest.

Hooper argued in favor of heightened scrutiny on the theory that the New Mexico statute burdened his constitutional right to travel. The right to travel has only a limited textual basis in the Constitution but has a long history in the Supreme Court extending prior to the Civil War. In the 1849 Passenger Cases, the Supreme Court struck down state taxes on immigrants arriving from other states with Chief Justice Taney (in dissent) identifying a constitutional right to travel: “We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through

residents before Feb. 1, 1955. See Hooper, 472 U.S. at 614 n.1. For both of these conflicts, the dates were set to track federal law which, for purposes of eligibility for veterans’ benefits, set the end of World War II at Dec. 31, 1946, and the end of the Korean Conflict at Jan. 31, 1955. See 38 U.S.C. § 101(8)-(9) (2006).

11. See Act of March 30, 1973, ch. 258, 1973 N.M. Laws 1052. The statute originally also required that the veteran have earned a medal. See Hooper, 472 U.S. at 614 n.2.


19. In 1999, the Court held that the right to travel is one of the Privileges and Immunities guaranteed to citizens of the United States by Section I of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1; Saenz v. Roe, 526 U.S. 489, 502-03 (1999). Before Saenz, some Justices had relied on the Fourteenth Amendment, see Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring), while others had found that the right to travel resided in the Privileges and Immunities Clause of Article IV, see Zobel v. Williams, 457 U.S. 55, 74 (1982) (O’Connor, J., concurring), or as an adjunct of the Commerce Clause, see Crandall v. Nevada 73 U.S. 35, 48-49 (1867).

20. 48 U.S. 283 (1849).
every part of it without interruption, as freely as in our own States."21 The Court later adopted this language from Chief Justice Taney's dissent in Crandall v. Nevada22 and United States v. Guest.23 Despite the lack of textual support, these cases viewed the right as well established.24

In the context of the Equal Protection Clause and durational residence requirements like the one at issue in Hooper, the Court's right-to-travel jurisprudence begins with Shapiro v. Thompson.25 In Shapiro, the Court invalidated the welfare laws of several states that denied benefits to residents who had lived in the jurisdiction less than one year.26 Shapiro is a mixed opinion, using both strict scrutiny and rational basis review. Section III of the opinion applied strict scrutiny,27 while Section II of the opinion concluded that some of the purported interests justifying the laws failed to meet even a rational basis standard. In Section II, the Court indicated that "the specific objective of these provisions" appeared to be deterring welfare recipients from entering the state in order to seek benefits.28 The Court rejected this purpose as "constitutionally impermissible" regardless of the level of scrutiny applied.29 The states then argued they could provide benefits only to those who have contributed to the public treasury in the past.30 The Supreme Court also rejected this justification as constitutionally impermissible but provided only a slippery slope argument in support:

Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.31

The Court then applied strict scrutiny to the remainder of the justifications provided by the states on the theory that the classification in the case "penalize[d] the exercise of" the fundamental right to travel32 and concluded that none of them

21. Id. at 492 (Taney, C.J., dissenting).
22. 73 U.S. 35, 48 (1867).
24. Guest even viewed the non-textual nature of the right to travel as evidence of its importance.
26. Id. at 621–22.
27. Id. at 638.
28. Id. at 628.
29. Id. at 631.
30. Id. at 632.
31. Id. at 632–33.
32. Id. at 634.
constituted a compelling governmental interest. The Court left open the possibility that some durational residence requirements might survive, indicating that restrictions on voting, free education at state schools, and licenses to hunt, fish, or practice a trade “may promote compelling state interest on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.”

Shapiro, then, sets up two rules. First, residency requirements penalizing the exercise of the right to travel receive strict scrutiny. Second, some goals, including discouraging interstate travel and providing benefits based on past tax contributions, are not permissible under any standard of review. The Court clarified the first rule in a series of cases following soon after Shapiro. In Dunn v. Blumstein, the Court applied strict scrutiny to strike down a durational residency requirement on the right to vote, while in Memorial Hospital v. Maricopa County, the Court rejected a statute limiting non-emergency, state-funded medical care to those who had been residents for at least a year. Memorial Hospital reaffirmed that “some waiting periods may not be penalties,” including, for instance, “state statutes requiring one year of residence as a condition to lower tuition at state institutions of higher education.” However, restrictions on “a fundamental political right,” like the right to vote in Dunn or “the basic necessities of life,” like the right to welfare in Shapiro, or the right to medical care in Memorial Hospital, were penalties subject to strict scrutiny.

Along these lines, the Court upheld Iowa’s one-year residency requirement to obtain a divorce in Sosna v. Iowa. While the Court did not explicitly indicate the tier of scrutiny used in Sosna, it did not apply the aggressive analysis of strict scrutiny. The Court concluded that the “residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative

33. Id. at 638.
34. Id. at 638 n.21.
35. 405 U.S. 330 (1972). Some of the language in Dunn suggests that all durational residency requirements penalize the right to travel and are analyzed under strict scrutiny. Id. at 342 (“Durational residence laws impossibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right, ... In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are “necessary to promote a compelling government interest.” (quoting Shapiro, 394 U.S. at 634)). The Court’s opinion in Memorial Hospital v. Maricopa County, though, makes clear that the doctrine is not so broad and only those classifications operating as a penalty are subject to strict scrutiny. 415 U.S. 250, 258–59 (1973).
36. Id.
37. Id. at 261–62. In the interim, the Supreme Court also decided Vlandis v. Kline, 412 U.S. 441 (1973), in which it struck down a Connecticut law which presumed that any student who moved to the state in the prior year was a nonresident for tuition purposes. Rather than apply equal protection analysis, the Court concluded that such an irrebuttable presumption was a due process violation. Id. at 453–54.
39. Memorial Hospital, 415 U.S. at 259.
40. 419 U.S. 393 (1975).
41. Id. at 407. The Court avoided identifying a standard of review by noting that the rule here did not prevent the new immigrant to the state from obtaining the benefit of divorce, it simply delayed it. Id.
convenience," suggesting that the state might be interested in protecting its divorce decrees from collateral attack, avoiding meddling in disputes in which other states had a greater interest, or may simply and "quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a period of time as appellant." Not only are these interests far from the compelling state interests the Court has recognized in other cases, the Supreme Court has made clear that when applying strict scrutiny, only the actual justification behind the state law can qualify as a compelling state interest. The Court’s willingness in Sosna to consider hypothetical interests to justify the law implies that the Court was engaged in rational basis review.

Given this case law at the time of Hooper, the first step for the New Mexico Court of Appeals in the equal protection analysis was clear. Since strict scrutiny only applies to residency requirements penalizing the right to travel, i.e., those implicating a "fundamental political right" or the "basic necessities of life," apportioning veterans' benefits based on the date of arrival in the state was subject to rational basis review. While the tax benefits in Hooper may be worth more to a new arrival than in-state tuition, they are certainly less important than the right to divorce in Sosna, let alone the right to welfare in Shapiro, the right to vote in Dunn, and the right to medical care in Memorial Hospital. The New Mexico Court of Appeals reached precisely this conclusion and declined to apply strict scrutiny. As a result, the court held that the distinction drawn in the New Mexico statute only needed to pass rational basis review—as long as the goal of the statute was rationally related to a legitimate state interest, it should survive the constitutional analysis.

The New Mexico Court of Appeals identified two interests supporting the statute: "expressing gratitude and rewarding its own citizens for honorable military service" and "encourag[ing] veterans to settle in New Mexico." Hooper argued that these interests were insufficient to support the classification, relying primarily on Zobel v. Williams, a case decided shortly before Hooper. In Zobel, the Supreme Court applied rational basis review, as it did in Sosna, to an equal protection challenge that implicated the right to travel and rejected some classes of rewards to

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42. Id. at 406.
43. Id. at 407.
45. See Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature’s 'actual purpose' for the discriminatory classification.") (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 & n.16 (1982)).
46. Unlike strict scrutiny, the Court has repeatedly made clear that statutes can survive rational basis review even if there is no evidence that the legitimate state interest supporting the statute actually motivated the legislature. See Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 809 (1969).
47. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1973) (citations omitted).
48. “[The veteran’s exemption] does not unconstitutionally penalize an exercise of the right to travel.”
49. Id.
50. Id. at 176, 679 P.2d at 844.
current residents. Zobel, a new arrival to the State of Alaska, challenged the State’s scheme for distributing the proceeds flowing to the State as a result of the discovery of oil. In 1980, the State authorized dividend payments to residents that increased with the number of years of residency. As a result, the checks to new arrivals were smaller than those sent to more established citizens. The Supreme Court struck down the scheme on rational basis review. Although Alaska suggested that the apportionment scheme was designed to recognize residents’ past contributions to the State, the Court believed that this was identical to the interest rejected in Shapiro and declared it illegitimate. The majority opinion, though, provided no additional clarity as to why the interest was not legitimate. It simply repeated the slippery slope argument from Shapiro, arguing that if the dividend benefits can be apportioned by length of residence, any state benefits or obligations could discriminate against new arrivals.

While Zobel might seem to establish a rule that prior contributions to the state cannot justify discriminating in the provision of state benefits, the Supreme Court had historically taken a very different view in the context of veterans’ benefits. States traditionally justify veterans’ benefits by claiming that the benefits are a reward for past military service. “Our country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has always been deemed to be legitimate.” As a result, the Supreme Court upheld programs providing benefits to veterans in employment and education against equal protection challenges on rational basis review. While Zobel prohibited giving additional benefits solely on the basis of past contributions to the state, these veterans’ benefits cases justify treating veterans differently precisely because they have provided prior service to the state.

More significantly, shortly after Shapiro, the Supreme Court approved a durational residence requirement for veterans’ benefits similar to the one at issue in Hooper. In August v. Bronstein, a three-judge panel of the Southern District of New York considered a challenge to the New York civil service veterans’ preference which provided benefits only to those veterans enlisting from New York. The court viewed the preference as “a token of gratitude conferred by New York

52. Id. at 57.
53. Id. at 55.
54. Id.
55. Id. at 61. As was also true in Hooper, the Court declined to reach the question of whether strict scrutiny applied, since the statute was unconstitutional even on a rational basis standard. Id.
56. Id. at 61.
57. Id. at 63.
58. See id. at 64. Specifically, the Court held:

If states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence?

Id.
upon its sons who enter their country’s service in time of war, and perhaps an encouragement to return to the service of the State thereafter.” The U.S. Supreme Court summarily affirmed.

August, then, suggests that states may condition veterans’ benefits on the timing of residency while Zobel held that length of residency was not a permissible consideration. Given these conflicting precedents, the New Mexico Court of Appeals had to decide whether Zobel had quietly overruled August and rejected the long-standing notion that states could provide veterans’ benefits in order to reward past contributions. The court tried to read the cases together by halting the descent down the slippery slope and drawing a line between generally available benefits and those provided to a limited group. Because the New Mexico statute “extends a tax benefit not to all bona fide residents, but to a small class of New Mexico veteran residents,” affirming it would not provide a basis for discriminating between new and old residents when providing benefits more broadly. Since the statute did not benefit all long-term residents, but simply a narrowly drawn class, it was not a blanket preference in favor of residents over nonresidents and survived on rational basis review where the Zobel statute did not.

The Supreme Court, of course, disagreed and struck down the statute. The easy path to rejecting the statute would have been to apply strict scrutiny. Chief Justice Burger, though, writing for the five-judge majority, followed the Zobel approach and declined to decide whether strict scrutiny was appropriate, since the Court believed that the law could not even survive the minimal scrutiny of rational basis review. The Court rejected both of the reasons provided. First, the Court concluded that the legislature could not encourage veterans to move to New Mexico by passing a statute in 1983 that required residence by 1976. Second, while the Court recognized that the state had a legitimate interest in rewarding veterans for their service, the statute was not rationally related to that goal since it did not require veterans’ military service to coincide with in-state residence. Put another way, the benefit was not rationally related to the goal of rewarding their service because veterans could obtain the benefit by moving to the state after leaving the service. Since the benefit was disconnected from the veterans’ service, the Court believed that the statute fell within the Shapiro/Zobel prohibition on rewarding citizens for their past contributions to the state and was therefore unconstitutional.

II.

Gerald Gunther coined the famous phrase in 1971 that heightened scrutiny “is ‘strict’ in theory, fatal in fact” while rational basis review involves “minimal

62. Id. at 193.
66. Id. at 618.
67. Id. at 619-20.
68. Id. at 622.
69. Id. at 622-23.
scrutiny in theory and virtually none in fact.” Since 1971, *Hooper* finds itself on a short list of cases where the Court invalidated a statute on rational basis review. In fact, the Court engaged in a burst of aggressive rational basis review in the spring and early summer of 1985. *Hooper* was decided just two months after the Court’s March 1985 decision invalidating the zoning requirements of a Texas community discriminating against group homes for individuals with mental retardation in *City of Cleburne v. Cleburne Living Center.* In that same term the Court handed down *Metropolitan Life Insurance Co. v. Ward* and *Williams v. Vermont,* both of which invalidated state statutes discriminating in favor of residents against non-residents using rational basis review. Four successful rational basis challenges in one term was (to say the least) exceptional. In the twenty-five years between the time of Gunther’s article and the Supreme Court’s landmark decision in *Romer v. Evans,* the Supreme Court struck down only ten statutes on rational basis challenges. Four of these were handed down between March and June 1985.

The relative rarity of successful rational basis challenges in the Supreme Court suggests that something is amiss in *Hooper.* The logic of the opinion confirms it. First, *Hooper,* along with *Zobel,* deems the state interest of rewarding citizens as not legitimate. The list of illegitimate state interests in other equal protection claims that have failed rational basis review is short, and those interests are inauspicious. They include a “bare...desire to harm a politically unpopular group” and “an irrational prejudice against the mentally retarded.” Compensating residents for past contributions to the state may be a candidate for this list, but it is hardly a prime contender for inclusion. Rewarding past service is far less invidious a motive than the naked discrimination objectives of the statutes in those cases.

More importantly, the careful consideration in the *Hooper* and *Zobel* opinions of the link between the statutory classifications and goals strongly suggests that the Court used some form of heightened scrutiny. Both *Hooper* and *Zobel* closely

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70. In *Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). Gunther’s article has been used to mark the start of the modern era of rational basis scrutiny. See also Goldberg, supra note 3, at 513; Farrell, supra note 3, at 370.


74. In *Metropolitan Life Insurance*, the Court struck down an Alabama statute that imposed a lower premium tax rate on domestic insurance companies than on out-of-state companies. 470 U.S. at 871. In *Williams* the Court struck down a Vermont statute which required people who bought and registered vehicles outside of the state before becoming residents to pay a full use tax in order to register a vehicle in Vermont. 472 U.S. at 15.


76. See supra note 3.


78. *Romer*, 517 U.S. at 635 (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

analyze the fit between the statutory classification and the stated goal. In general, the Supreme Court declines to invalidate classifications on rational basis review even where the class drawn is underinclusive or overinclusive. The Supreme Court has also made clear that classifications need not actually promote the goal of the statute so long as the legislature "rationally could have believed" the statute would promote the desired objective. Zobel and Hooper, though, rejected the allocation of benefits in those cases in part due to a lack of fit. Zobel, for instance, concluded that the state had two legitimate interests in its distribution scheme. First, Alaska could legitimately seek to encourage residents to stay in the state, and second, Alaska might wish to deter risky investments. If current residents were required to share revenues on a per capita basis with future residents, they might choose to favor current income over future returns. The Court rejected both of these goals as insufficiently related to the classification, because the goals would be equally well served by operating the dividend scheme prospectively, distributing the funds evenly among all current residents and only providing reduced benefits to future new arrivals. This "least restrictive means" analysis typically only applies on strict scrutiny.

Hooper took the same approach and struck down the statute because it was both under- and over-inclusive. Because the State could better serve the goals of easing veterans' reintegration into society both by extending the benefit to all resident veterans, not simply established residents, and by providing a benefit only limited in time rather than a lifetime property tax exemption, the classification was irrational. Additionally, the Court assumed that states "may legitimately grant benefits on the basis of a coincidence between military service and past residence," but concluded that the State had drawn the line in the wrong place to serve that interest because the statute was overinclusive. Chief Justice Burger believed that the statute would provide benefits to a hypothetical "veteran who resided in New Mexico as an infant long ago...regardless of where he resided before, during, or after military service." As a result, the statute provided benefits to those who did not provide their military service to the State. The Court was almost certainly correct that the classification could have fit the goal more closely,
but this analysis is far from the generous reading usually applied on rational basis review.

How did the Court end up applying this heightened scrutiny? In both *Hooper* and *Zobel*, the majority opinion applied rational basis review, but Justices who believed that the state statute implicated the right to travel cast deciding votes in both cases. In *Zobel*, Justice Brennan, joined by Justices Marshall, Blackmun, and Powell, concluded that the right to travel provided a separate basis for striking down the Alaska statute. Justice O’Connor concurred in judgment in *Zobel* and explicitly grounded her analysis in a right to travel found in the Privileges and Immunities Clause of Article IV. In *Hooper*, Justice Brennan was the fifth vote in the majority and concurred, referencing his opinion in *Zobel*.

The face of the opinion in *Zobel* understates the Court’s desire to invoke a right to travel. Justice Blackmun’s papers contain the first draft of the Chief Justice’s opinion in *Zobel v. Williams* and it is substantially different from the Court’s eventual opinion. This draft would have created a new constitutional rule that “an American citizen entering a State and establishing bona fide residence therein can be accorded no less rights or lesser treatment than those who preceded” and grounded this rule in the right to travel. The draft opinion reviews the history of the right-to-travel cases from *The Passenger Cases* through *Edwards v. California* up to *Shapiro v. Thompson* and *Sosna v. Iowa*, discussing the Commerce Clause and the Privileges and Immunities Clauses as potential sources of the right to travel. The draft finds all of these clauses insufficient and concludes that the right to travel “has both a more fundamental yet a less explicit source than any of those sources discussed above.” The draft holds that the right to migrate and take up residence in a new state “has much in common with the right of new States to join the union on an equal footing with the older States.” While there is no textual statement that newly admitted states enter the Union on an equal footing with older states, the draft reflects the belief that it is “inherent in the very idea of statehood in a federal union.” The Chief Justice then explicitly compares the rights of new states to the rights of new citizens:

89. 457 U.S. 55, 66 (1982) (Brennan, J., concurring) (noting that the right to travel gives “an independent rationale for holding [the distribution scheme] unconstitutional”). Justice Brennan did not find explicit textual support for the right to travel, but looked instead to the inherent structure of the Constitution. Id. at 67. (“I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation.”). See also Tribe, supra note 8, at 146–47.
90. 457 U.S. at 74 (O’Connor, J., concurring).
91. See *Hooper*, 472 U.S. at 624 (Brennan, J., concurring). Only eight justices voted as a result of Justice Powell’s recusal, and had Justice Brennan joined the dissent, the Court would have been equally divided and affirmed the New Mexico Court of Appeals. See id.
93. 48 U.S. 283 (1849).
94. 314 U.S. 160 (1941).
96. 419 U.S. 393 (1975).
98. Id. at 8.
99. Id.
100. Id.
We see, thus, that it is firmly settled, although nowhere mentioned in the Constitution, that a new State coming into the Union has no more, no less and no different rights than States of longer membership in the Union. Is it not similarly inherent in the very concept of state or federal citizenship that once citizenship is attained, the citizen stands on the same or equal footing with all other citizens?  

The draft finally analyzes the distribution scheme using the language of strict scrutiny, concluding that “the State must show that the distinctions it seeks to make are warranted by the highest and most pressing of state interests” and that the states’ interests “are simply not sufficiently compelling to outweigh the infringement of the fundamental individual rights of those bona fide citizens who settled in the State after 1959.”

The Chief Justice’s opinion was not popular among his colleagues on the Court, especially the notion of grounding the right to travel on an “equal footing” theory. In a memorandum to the conference, the Chief Justice expressed the view that “both Equal Protection and the right to travel aspects of Shapiro and other cases bear to some extent on this case, but it fits neatly into neither category” and agreed to rewrite the opinion on an equal protection theory. Significantly, though, the analysis in Zobel with respect to the prior-contributions justification hardly changed from the initial, strict scrutiny version to the final, rational basis analysis. Both opinions rejected the prior-contribution justification for the classification on the same slippery slope theory that permitting the Alaska scheme would allow states to distribute any benefits and burden on the basis of the length of residence. The Court simply repurposed the logic that originally supported striking down the State’s interest on a strict scrutiny standard, applied it on rational basis review, and reached the same conclusion.

The shift in analysis in Zobel, Hooper, and other contemporaneous successful rational basis challenges received immediate attention (and criticism) in both the academic literature and in the courts. Less than a year after Hooper, a plurality of the Court revisited Hooper and came close to reinterpreting it explicitly as a strict scrutiny case. Hooper left open the question of whether states could limit...
preferences to those veterans who were residents at the time of enlistment. Attorney General of the State of New York v. Soto-Lopez presented the Court with precisely this question. New York provided a civil service preference for veterans who entered the service as state residents. The three-justice plurality opinion authored by Justice Brennan applied strict scrutiny in striking down the preference and used Zobel and Hooper as examples of opinions where the Court had previously applied strict scrutiny. The plurality compared Zobel and Hooper to Memorial Hospital, Shapiro, and Dunn and identified all five cases as ones in which "we have held that even temporary deprivations of very important benefits and rights can operate to penalize migration." The plurality noted that Zobel and Hooper purported to apply rational basis review in striking down the statutes in those cases but "[n]onetheless, the conclusion that they did penalize migration may be inferred from our determination that 'the Constitution will not tolerate a state benefit program that creates fixed permanent distinctions...between...classes of concededly bona fide residents.'"

The state in Soto-Lopez offered four justifications for the benefit: (1) encouraging residents to enlist, (2) compensating veteran residents, (3) encouraging residents to return to the state, and (4) increasing veteran employment in government. Since these goals could be met equally well by extending the benefit to all resident veterans, once strict scrutiny applies, the decision to strike down the statute was clear. Strict scrutiny requires the classification to fit the goal as closely as possible, and the New York statute failed to meet that standard.

Applied to Hooper and Zobel, the plurality's reasoning certainly would have led to strict scrutiny in those cases. Soto-Lopez identified two features of the veterans' preference making it significant enough to apply strict scrutiny: it could determine eligibility for civil service employment, and the benefit was permanent. Both of these features were present in both Zobel and Hooper. The dollar value of both the Alaska and New Mexico benefits were considerable, and both were permanent. New arrivals, regardless of how long they stayed in the state, could never achieve the same level of benefits available to more established residents.

Since Soto-Lopez, the right-to-travel doctrine has found its constitutional moorings. In Saenz v. Roe, the Court faced a challenge to a California welfare provision limiting new immigrants to the benefits they would have received in their state of origin for their first year in California. Saenz identified three components

109. Id. at 900.
110. Id. at 904–05.
111. Id. at 907.
112. Id. at 908 (quoting Hooper, 472 U.S. at 623) (internal quotation marks and citation omitted).
113. Id. at 909.
114. Id. at 910.
115. Id.
116. Chief Justice Burger's concurring opinion in Soto-Lopez argued in favor of continuing the modified version of rational basis scrutiny applied in Hooper and Zobel, again arguing that the fit between the goals of the statute and the classification was inadequate. Id. at 913–14 (Burger, C.J., concurring).
118. Id. at 493.
of the right to travel: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien"; and (3) for those who decide to change their residence to another State, "the right to be treated like other citizens of that State." The Court found the latter two rights, respectively, to be rooted in the two Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment respectively. The California welfare provision ran afoul of the third right. The Court explicitly expanded the strict scrutiny analysis of *Shapiro* to all provisions dividing state citizens based on their length of residence. [*][122] Since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty [*][122] and the Court no longer needed to determine whether the statute implicated a fundamental political right or affected the basic necessities of life.

Once the classification was deemed inherently impermissible, the Court’s conclusion that the California provision was unconstitutional was straightforward. Under the logic of *Saenz—Hooper* and *Zobel* are also easy cases. If the right to travel categorically prohibits distinctions based on length of citizenship, provisions providing more established residents greater benefits cannot survive. The new constitutional rule has much in common with Chief Justice Burger’s original proposal in his draft opinion in *Zobel*. Even though the *Saenz* majority rested on the Privileges and Immunities Clause while the Chief Justice relied on the far more tenuous analogy of new states entering the union on an “equal footing” with the original thirteen colonies, the end result of the analysis is the same. Both apply strict scrutiny when states refuse to treat new arrivals as equal citizens.

III.

After *Soto-Lopez* and *Saenz*, what does *Hooper* now stand for? Not much. The *Saenz* dissent identified *Hooper*, along with *Zobel*, as the target of the *Saenz* majority and concluded that the majority opinion cleared “much of the underbrush created by these prior right-to-travel cases.” [*][123] Since this reference in the *Saenz* dissent about ten years ago, the Supreme Court’s only other citation of *Hooper* suggests that the Court realizes that it applied strict scrutiny. [*][124] *Zobel* has suffered

119. *Id.* at 500.
120. *Id.* at 501, 502–03.
121. *Id.* at 504 (“Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, but it is surely no less strict.”).
122. *Id.* at 505. *Saenz* does leave open the possibility that durational residency requirements may be acceptable in order to determine whether the new arrival is a bona fide resident. *Id.*
123. *Id.* at 515 (Rehnquist, C.J., dissenting).
a similar fate. The Supreme Court has not cited Zobel since Saenz.\textsuperscript{125} Lower courts have also largely abandoned Zobel and Hooper since Saenz was handed down.\textsuperscript{126}

So given this history, could the New Mexico Court of Appeals have avoided reversal in Hooper? The court would have needed to decide that the Supreme Court in Zobel had taken two very surprising steps. First, they would have had to conclude that Zobel overruled the Supreme Court’s own decision in August v. Bronstein\textsuperscript{127} without comment. Second, and more important, they would have had to conclude that the Supreme Court in Zobel was silently moving from rational basis review to strict scrutiny in the right-to-travel cases. Such an opinion would have been a very aggressive act of judicial interpretation.

That approach would have been very much outside my mother’s judicial temperament. I was always proud of my mother as a judge. Closely reading her Hooper opinion made me prouder still. In the New Mexico Court of Appeals opinion, I can see her struggle to reconcile Zobel with the rest of the Supreme Court’s right-to-travel doctrine. Indeed, I think she viewed the reconciliation of apparently conflicting cases as a core judicial task. My sense is that she believed that the law is knowable and that courts should be taken at their word. I cannot imagine her writing the decision in Hooper that would have avoided reversal, because she would have had to suggest that the Supreme Court said one thing in Zobel but meant something entirely different. I think she would have viewed it as the Supreme Court’s job to make the transition in the doctrine and not hers. As a result, while she was reversed in Hooper, I do not think she was wrong.

\textsuperscript{125} WESTLAW search for “457 U.S. 55” and DA(AFr 5/17/1999) in SCT database performed Dec. 6, 2008.

\textsuperscript{126} After Saenz, Hooper has only been cited by fourteen federal court cases and fourteen state court cases. WESTLAW search for “472 U.S. 612” and DA(AFT 5/17/1999) in ALLCASES database performed Dec. 6, 2008. Forty-one federal and seventeen state cases have relied on Zobel. WESTLAW search for “457 U.S. 55” and DA(AFT 5/17/1999) in ALLCASES database performed Dec. 6, 2008. Compare these citation rates to those for Plyler and Cleburne, cases decided at exactly the same time and also applying heightened scrutiny in the guise of rational basis review. Since Saenz, Plyler has been cited in 561 federal cases, including four Supreme Court opinions, and 135 state cases—over ten times the number of citations to Zobel. WESTLAW search for “457 U.S. 202” and DA(AFT 5/17/1999) in ALLCASES database performed Dec. 6, 2008. Since Saenz, Cleburne has been cited in 315 states cases and 2082 federal cases, including thirteen in the Supreme Court—over eighty times as often as Hooper. WESTLAW search for “473 U.S. 432” and DA(AFT 5/17/1999) in ALLCASES database performed Dec. 6, 2008.