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Constitutional Law - Taxation - New Mexico Vietnam Veterans' Property Tax Exemption and Judicial Review in Equal Protection Analysis: Hooper v. Bernalillo County Assessor

Geraldine E. Rivera

CONSTITUTIONAL LAW—TAXATION—New Mexico Vietnam Veterans' Property Tax Exemption and Judicial Review in Equal Protection Analysis: *Hooper v. Bernalillo County Assessor*

I. INTRODUCTION

Alvin D. Hooper, a Vietnam veteran and resident of New Mexico, was denied a veterans' property tax exemption in Bernalillo County because of his failure to meet the residency requirement set forth by the New Mexico veterans' tax exemption statute.[1] Hooper challenged the statute on the ground that the classification denying him a tax exemption for failing to arrive in New Mexico before the fixed-date residency requirement was a violation of equal protection under both the federal and state constitutions.[2] Hooper argued that he had been unduly penalized for having exercised his fundamental right to travel.[3] In *Hooper v. Bernalillo*

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1. N.M. Stat. Ann. § 7-37-5(C)(3)(d) (Repl. Pamp. 1983) exempts $2,000 of the taxable value of a veteran's property if he or she: (1) was an honorably discharged Vietnam veteran; (2) served at least 90 days on active duty; and (3) was a New Mexico resident prior to May 8, 1976.

The veterans' tax exemption statute was enacted pursuant to a 1921 amendment to the state constitution which reads in relevant part:

> The legislature may exempt from taxation property of each head of the family to the amount of two hundred dollars ($200) and the property . . . of every honorably discharged member of the armed forces of the United States who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the president of the United States . . . in the sum of two thousand dollars ($2,000).

N.M. Const. art VIII, § 5.

The New Mexico Legislature first implemented the provision in 1923 by enacting the "Soldiers Tax Exemption Law," which extended a $2,000 exemption "to every honorably discharged soldier . . . resident of New Mexico for thirty days or more at any time in which the United States was officially engaged in any way." 1923 N.M. Laws 130. This enactment was intended to give the tax benefit to New Mexico veterans of World War I and all prior wars in which United States soldiers were actively engaged. Flaska v. State, 51 N.M. 13, 20, 177 P.2d 174, 180 (1946).

In 1933, the legislature narrowed the scope of the statute by requiring claimants to have acquired residency prior to January 1, 1934. *Id.* at 26, 177 P.2d at 182. In 1946, the legislature awarded veterans benefits to soldiers of World War II, provided that they acquire New Mexico residency prior to January 1, 1947. 1947 N.M. Laws 79. Since then, the statute has been amended to award benefits to veterans of every official United States conflict, provided the veterans acquire New Mexico residency prior to a cutoff date. The cutoff date for the Korean conflict is February 1, 1955. 1957 N.M. Laws 169. The cutoff date for the Vietnam conflict is May 8, 1976. 1983 N.M. Laws 330.

2. Hooper v. Bernalillo County Assessor, 101 N.M. 172, 174, 679 P.2d 840, 842 (Ct. App.), *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984), *prob. juris. noted*, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984) (84-231).

3. *Id.* at 174, 679 P.2d at 842. Hooper also claimed the residency requirement violated his due process rights under N.M. Const. art II, § 18 and the fourteenth amendment of the United States Constitution. He claimed that the wording of the statute made it unclear whether it was necessary

County Assessor,[4] the New Mexico Court of Appeals held that the residency requirement contained in the statute was rationally related to the legislative purpose of rewarding veterans for wartime service and that there had been no unconstitutional burden on Hooper's right to travel.[5]

This Note focuses on three aspects affecting the outcome in *Hooper*. First, it discusses the rationale of the court and the court's confusion as to the appropriate standards of judicial review required whenever challenges to classifications are made on equal protection grounds. Second, this Note discusses the traditional two-tiered method of judicial review and the more modern intermediate level of scrutiny used by the United States Supreme Court since the early 1970's. Finally, the Note discusses the cursory treatment the court gave to *Zobel v. Williams*[6] in rejecting the argument of *Zobel*'s applicability to *Hooper*.

II. STATEMENT OF THE CASE

Alvin Hooper served in the United States Armed Forces during the time of the Vietnam conflict.[7] After being honorably discharged from the service, Hooper moved his family to New Mexico, where he had accepted a job, on August 17, 1981.[8] He purchased real property in Bernalillo County and applied to the Bernalillo County Assessor for a Vietnam veterans' tax exemption under the applicable veterans' tax exemption statute.[9] The Assessor denied the claim for the tax exemption based on Hooper's failure to meet the May 8, 1976 residency requirement contained in the statute.[10] The denial was upheld by the Bernalillo County Valuation Protests Board.[11]

Hooper appealed the denial to the New Mexico Court of Appeals,[12]

for a veteran to have continuous New Mexico residency or if a veteran with only one day's residency prior to May 8, 1976 immediately followed by an extended period of absence would nonetheless qualify for the exemption while appellant did not. The court concluded that appellant did not have standing to raise this issue because the exemption had not been denied on either of those grounds. 101 N.M. at 177, 679 P.2d at 845.

Additionally, Hooper claimed that, if invalid, the residency requirement could be severed from the remainder of the statute, thus preserving the exemption. The court found it unnecessary to consider that issue, because it upheld the validity of the residency cutoff date. *Id.*

4. 101 N.M. 172, 679 P.2d 840 (Ct. App.), *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984), *prob. juris. noted*, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984) (84-231).

5. *Id.* at 174, 679 P.2d at 842.

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

7. *Hooper*, 101 N.M. at 174, 679 P.2d at 842.

8. *Id.*

9. *Id. See supra* note 1 for a discussion of the statute.

10. *Hooper*, 101 N.M. at 174, 679 P.2d at 842.

11. *Id.*

12. The appeal was taken pursuant to N.M. Stat. Ann. § 7-38-28(A) (Repl. Pamp. 1983), which provides in pertinent part:

> A property owner may appeal an order made by the director or a county valuation protests board by filing with the court of appeals a notice of appeal. . . . The appeal must be on the record made at the hearing or upon a stipulation submitted by both the valuation authority and the property owner.

challenging the constitutionality of the statute on the ground, *inter alia*, that the residency requirement for qualification for a veterans' exemption violates equal protection.[13] He claimed that Vietnam veterans are penalized for migrating to New Mexico subsequent to the May 8, 1976 cutoff date established by statute. He urged that the exercise of his fundamental right to travel had been burdened, thus denying him equal protection of the laws.[14]

The court of appeals affirmed the decisions of the Bernalillo County Assessor and the Valuation Protests Board denying Hooper a veterans' tax exemption.[15] The court, finding that there was a rational relation between the legislative classification and the object of the legislation, held that the residency requirement did not constitute a violation of equal protection.[16]

III. RATIONALE OF THE COURT

The court of appeals began its equal protection analysis by focusing on the applicable standard of review.[17] The court recognized that it must strictly scrutinize a statute when the statute contains classifications which impinge on fundamental rights[18] or when the statute works a discrimi-

13. *Hooper*, 101 N.M. at 174, 679 P.2d at 842. *See supra* note 3.

14. *Hooper*, 101 N.M. at 174, 679 P.2d at 842.

15. *Id.* at 177, 679 P.2d at 845.

16. *Id.*

17. The *Hooper* court followed the established New Mexico judicial policy of construing the state equal protection clause as being coextensive with the equal protection clause of the United States Constitution. *See, e.g.*, Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

18. The United States Supreme Court applies a strict standard of review to governmental actions affecting fundamental constitutional rights. These rights are recognized as "having a value so essential to individual liberty in our society that they justify the [Court] reviewing the acts of other branches of government in a manner quite similar to the substantive due process approach of . . . pre-1937." J. Nowak, Constitutional Law § V, at 457 (1983).

A fundamental rights analysis harkens back to the natural law concepts prevailing in seventeenth and eighteenth century political theory that certain immutable rights emanating from the social compact or divine right exist for all men in every society. *See generally* E.K. Bauer, Commentaries on the Constitution 1790-1860 (1965). The very nature of such rights limits the restrictions which government can impose on them. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (authors of federal and state constitutions intended that natural law restrict and regulate governmental power). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (recognizing judicial necessity to review strictly those laws which affect individual civil rights).

In modern times, fundamental rights include: first amendment rights, Cantwell v. Connecticut, 310 U.S. 296 (1940); the right to engage in interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to privacy (which includes some rights to freedom of choice in sexual matters); Skinner v. Oklahoma, 316 U.S. 535 (1942); and the right to freedom of choice in marriage, Loving v. Virginia, 388 U.S. 1 (1967). *See generally* Pellecchio, *Memorial Hospital v. Maricopa County: The Present Status of the Right to Travel*, 6 Colum. Hum. Rts. L. Rev. 551 (1974); Note, *Equal Protection of the Laws—Durational Residence Requirements for Voting Abridge Right to Vote and Penalize Right to Travel*—Dunn v. Blumstein, 1 Fla. St. U.L. Rev. 159 (1973).

nation which disfavors a suspect class.[19] In such cases, the law will be upheld only if it promotes a compelling state interest.[20] In other cases, however, a less stringent standard of review applies; in such cases, courts generally allow the law to stand as long as there is a rational relationship between the statute and the object of the legislation.[21]

Hooper claimed that the veteran's tax exemption statute burdened his fundamental right to travel.[22] He contended that any statutory classification which *penalizes* or *touches upon* that fundamental right must be subjected to strict judicial scrutiny.[23] Hooper maintained that the veterans' tax exemption statute could not pass muster under the required compelling state interest test of the strict scrutiny standard.[24]

The court refused to adopt Hooper's proffered standard of review. The *Hooper* court, relying on the authority of *Memorial Hospital v. Maricopa County,*[25] reasoned that an unconstitutional penalty on the right to travel exists only if the underlying interest with which the statute deals is fundamental.[26] The court defined "fundamental interests" as those "aspects

19. Laws which classify persons on the basis of race or national origin are deemed suspect and are also subject to a strict standard of review. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976). In San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973), Justice Powell defined those groups entitled to the added protection of strict scrutiny as "class[es] . . . saddled with . . . disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

20. The Supreme Court has upheld state statutes impinging on fundamental rights which restrict individual liberties where the state's interest is compelling and there is no less intrusive means to accomplish the goal. *See, e.g.*, Marston v. Lewis, 410 U.S. 679 (1973) (50-day durational residency requirement for voters upheld as necessary to verify voter records and prevent fraud). However, other similar state voting statutes have been invalidated as an infringement on the right to travel. In Dunn v. Blumstein, 405 U.S. 330 (1972), a Tennessee one-year residency requirement for voting was found unconstitutional because it impaired both voting rights and the right to travel. The Court concluded that there were other, less-intrusive ways in which a state could determine bona fide residence. *Id.* at 349-60.

21. Classifications which burden economic or social interests typically will be upheld unless the legislation bears no rational relationship to a legitimate state interest. *See* Zobel v. Williams, 457 U.S. 55, 60 (1982). *See also* Hodel v. Indiana, 452 U.S. 314 (1981): "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Id.* at 331.

22. 101 N.M. at 174, 679 P.2d at 842.

23. Appellant's Brief-in-Chief at 9, *Hooper:* "[I]t is clear that New Mexico courts require that classifications be founded on pertinent and real differences which justify different rules for different classes and that classifications touching fundamental interests such as the right to travel are subject to strict scrutiny." *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982); Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

24. *Hooper,* 101 N.M. at 174, 679 P.2d at 842.

25. 415 U.S. 250 (1974). The *Memorial Hospital* test considers whether the residency requirement will deter migration and the extent to which the requirement will serve to penalize the exercise of the right to travel. *Id.* at 256-57.

26. 101 N.M. at 175, 679 P.2d at 843. The court incorrectly cited fundamental rights as "voting, welfare benefits or public medical assistance." *See id.* Of the three interests cited, only voting has

of state citizenship now recognized in every state in some form. Denying such rights to new citizens even temporarily would penalize new residents and deter migration because those persons who contemplate moving interstate have reasonable expectations that such necessary, essential rights will be available."[27] Finding that a veterans' tax exemption is not either such a necessity or an aspect of state citizenship which one could reasonably expect to be available,[28] the court concluded that the strict scrutiny standard had no applicability to the case.[29]

The court then articulated the applicable standard. It stated that the legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference that has a fair and substantial relation to the object of the legislation."[30] The court reasoned that the veterans' classification did not violate the rational basis standard because the classification fulfilled the legislative intent to "express its gratitude" to honorably discharged New Mexico veterans by offering veterans' preferences.[31]

The court also rejected the appellant's argument, based on *Zobel v. Williams*,[32] that a classification which makes a benefit dependent upon

been established by the Supreme Court to be a fundamental right. *See* Dunn v. Blumstein, 405 U.S. 330 (1972), *discussed supra* note 20.

The Supreme Court has found that welfare benefits are not fundamental rights. *See* Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge*, the Court concluded that welfare benefits are not fundamental constitutional interests and upheld a Maryland statute limiting aid to families with dependent children to families not exceeding a certain size. The Court found that a state has a legitimate interest in "encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.* at 486.

In classifying welfare and public medical assistance as "fundamental interests," the *Hooper* Court seemed to be relying on Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), and Shapiro v. Thompson, 394 U.S. 618 (1969), where in each instance the Court struck down residency requirements restricting public medical assistance and welfare benefits. Although not fundamental, welfare and public medical assistance are interests which, when abridged with the right to travel, deny the necessities of life upon which may depend "the very means to subsist." *Shapiro*, 394 U.S. at 627; *see also Memorial Hospital*, 415 U.S. at 254. In the context of *Hooper*, the court's use of "fundamental interests" was not intended to denote "fundamental rights" which would automatically trigger strict scrutiny.

27. 101 N.M. at 175, 679 P.2d at 843.

28. The court reached this conclusion without any comparative analysis whatsoever. *See infra* notes 46-55 and accompanying text.

29. 101 N.M. at 174, 679 P.2d at 842.

30. *Id.* at 175, 679 P.2d at 843.

31. *Id.* at 176, 679 P.2d at 844. In the view of the *Hooper* court, the legislature may legitimately reward and encourage settlement in New Mexico, and the legislature is entitled to limit the period in which returning veterans may establish residency and thus claim the reward.

32. 457 U.S. 55 (1982). The Court in *Zobel* invalidated a 1981 plan to distribute Alaska's oil revenues to all bona fide citizens in varying amounts based upon the length of each citizen's residency in the state. Under the plan, each citizen 18 years or older received one dividend unit for each year of residency after 1959, the year Alaska was admitted to statehood. Each unit was valued at $50, so that a one-year resident would receive $50, while a resident of the state since 1959 would receive $1,050.

The effect of the statute was to discriminate between new and long-term residents. *Id.* at 59 n.5. It also favored long-term residents over young native-born residents. *Id.* A native Alaskan born in 1962 would receive $100 less than a person who moved to the state in 1960. In the view of the

the duration of residency is constitutionally impermissible where the time element chosen has no relation to any acceptable object of the legislation.[33] The court distinguished *Zobel* on three grounds: (1) the plan in *Zobel* extended a benefit to all bona fide residents, whereas the legislation before the *Hooper* court was intended to benefit only a small class of New Mexico veterans;[34] (2) *Zobel* did not involve tax legislation, where it is recognized that the legislature enjoys its greatest freedom to classify;[35] and (3) the classification scheme challenged in *Hooper* did not favor long-term residents and was not a true durational residency requirement.[36]

The court concluded that the legislature did not act arbitrarily in establishing the cutoff date for eligibility. Instead, it found that the statute provides a reasonable period between the date of the final United States troop withdrawal from Vietnam and the date by which a veteran must have established residency in New Mexico.[37]

IV. DISCUSSION AND ANALYSIS

In reaching its conclusions, the *Hooper* court glossed over several critical points of analysis. First, the court rejected the strict scrutiny standard without subjecting veterans' benefits to analysis under its articulated test. Second, the court confused the rational basis standard of equal protection analysis with the less-deferential "middle-tier" standard. It also failed to focus on whether the middle-tier approach applied and whether the law in question could withstand analysis under that approach. Finally, the *Hooper* court failed to come to grips with the applicability of *Zobel v. Williams* to the facts and circumstances of the case.

Court, the statute created "fixed, permanent distinctions between an ever increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the state." *Id.* at 59.

The *Zobel* Court refused to define the appropriate standard of review for right to travel cases. The majority found that "if the statutory scheme could not pass even the [rationality standard], it need not decide whether any enhanced scrutiny should be called for." *Id.* at 60-62.

33. *Id.* at 64. Because the Court could find no valid state interests to be served by Alaska's distinction between persons who were residents in 1959 and persons who became residents subsequently, it struck down the statute under the rational relationship test. *Id.* at 65.

34. 101 N.M. at 177, 679 P.2d at 845.

35. *Id.* at 175, 679 P.2d at 843. *See, e.g.*, Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969); Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. denied*, 94 N.M. 638, 614 P.2d 545 (1980).

36. 101 N.M. at 177, 679 P.2d at 845. The *Hooper* court recognized that a substantial waiting period imposed on new residents would be an unconstitutional penalty on veterans who have recently exercised their right to travel, but found that such was not the case here. The court was referring to Lambert v. Wentworth, 423 A.2d 527 (Me. 1980), where a 10-year residency requirement was invalidated as an unconstitutional penalty on veterans recently exercising their right to travel.

37. *Id.* at 176, 679 P.2d at 844. The court acknowledged that "[a]lthough *any* date chosen would be, to some extent, arbitrary, . . . [the] statute . . . allows Vietnam veterans additional time to establish or re-establish New Mexico residency." *Id.* at 176-77, 670 P.2d at 844-45 (emphasis in original).

A. The Court's Rejection of Strict Scrutiny

The court of appeals refused to apply the strict scrutiny standard of equal protection because it concluded that there had been no unconstitutional burden on the appellant's right to travel.[38] The court based its decision on *Shapiro v. Thompson*[39] and *Memorial Hospital v. Maricopa County*,[40] where indigent migrants were denied state-created benefits because of their failure to meet statutory one-year residency requirements.

In *Shapiro*, the Supreme Court established a test for determining whether an unconstitutional burden on the right to travel exists. That test requires a court to examine: (1) whether the waiting period deters migration; and (2) the extent to which the residency requirement penalizes the exercise of the right to travel.[41] In *Memorial Hospital*, however, the Court was less concerned with deterrence of travel; instead, it focused on the penalty imposed once the right to travel had been exercised. The *Memorial Hospital* Court drew a distinction between bona fide residency requirements and durational residency requirements,[42] saying that "[e]ven a bona fide residence requirement would burden the right to travel, if travel meant merely movement."[43]

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38. 101 N.M. at 174, 679 P.2d at 842.

39. 394 U.S. 618 (1969). In *Shapiro*, the United States Supreme Court applied the right to travel doctrine to state statutes depriving newly arrived residents of welfare benefits. It was the first right to travel case addressing classification schemes which denied new residents "the ability . . . to obtain the very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. The Court recognized that a state has a valid interest in preserving the fiscal integrity of its programs, *id.* at 633, but concluded that to deny welfare benefits to newly arrived residents would have the effect of deterring migration of indigents between the states, a notion contrary to the essential integrity of the national government. *Id.* at 630. *See, e.g.*, Passenger Cases, 48 U.S. (7 How.) 282 (1849):

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id. at 492.

40. 415 U.S. 250 (1974). In *Memorial Hospital*, the Supreme Court, finding that medical care was as much a "basic necessity of life" as welfare benefits, invalidated an Arizona statute requiring a one-year residence in a county as a condition to indigents' being able to receive free nonemergency medical care. *Id.* at 259. The Court found that the appellant was "effectively penalized" for exercising his right to travel when, as a new resident, he was denied certain state benefits afforded to long-time residents. *Id.* at 256-57.

Where *Shapiro* focused on interstate travel and the right to "migrate, resettle, and find a new job and start a new life," 394 U.S. at 629, it was the "effective penalty" which was the focus of attention in *Memorial Hospital*, 415 U.S. at 256. The Court in *Memorial Hospital* thus applied strict scrutiny to "a classification which operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration." *Id.* at 258 (emphasis in original).

41. 394 U.S. at 629-31.

42. 415 U.S. at 255.

43. *Id.* The Court said that *Shapiro* "was not intended to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.'" *Id. See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (invalidating a one-year residency requirement for voting). In *Shapiro*, benefits were denied to a class of bona fide residents because they had lived in the respective states

The *Memorial Hospital* Court concluded that strict scrutiny would be applied to a statute which "effectively penalizes" any individual based on his recent exercise of the right to travel when the statutory classification imposes a durational residency requirement and is not a test of bona fide residence.[44] *Memorial Hospital* weighed the rights or benefits withheld by the classification against the degree and duration of the deprivation to determine whether the waiting period requirement worked a penalty on the exercise of the right to travel.[45]

The New Mexico Court of Appeals' understanding of *Shapiro* and *Memorial Hospital* is questionable. The *Hooper* court read *Shapiro* and *Memorial Hospital* as standing for the proposition that the right to travel is not penalized unless the benefit withheld is a "basic necessity of life." The court defined those basic necessities as "aspects of state citizenship now recognized in every state in some form . . . [which migrants] have reasonable expectations . . . will be available."[46] The United States Supreme Court, however, never established a test of the basic necessities of life, nor did it suggest that only state statutes denying basic necessities would be subject to strict scrutiny.[47] Instead, the Court said it would look "to the nature of the classification and the individual interests affected."[48] The New Mexico court, however, focused on the importance of the benefit withheld instead of following the requirement of *Memorial Hospital*. The court should have balanced the importance of that interest against the degree and duration of the deprivation to determine whether the cutoff date worked a penalty on the exercise of the right to travel.[49]

Furthermore, the court of appeals justified its rejection of strict scrutiny by reference to the application of a test which it established for determining the reasonableness of the expectation of a right or benefit.[50] The

less than one year, whereas residents who had lived there a year or longer qualified for welfare benefits.

In *Hooper*, the appellant was not denied the exemption on the basis of bona fide residence. The court acknowledged that the exemption was denied solely because Hooper did not acquire New Mexico residency until August 1981. 101 N.M. at 174, 679 P.2d at 842.

44. 415 U.S. at 255-56.

45. *Id.* at 253-54. *See* Pellecchio, *supra* note 18, at 552.

46. 101 N.M. at 175, 679 P.2d at 843.

47. If basic necessities were the test, then any welfare statute denying assistance to a state's poor would be a denial of a fundamental constitutional right. That is simply not the case. *See* Dandridge v. Williams, 397 U.S. 471 (1970), *discussed supra* note 26. The *Dandridge* Court did not apply strict scrutiny in its decision. It announced that nonintervention was appropriate in the area of economic and social welfare and said that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." 397 U.S. at 487. *See also* Richardson v. Belcher, 404 U.S. 78, 80-81 (1971), *and* Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (reiterating that welfare allocations are not fundamental rights, and thus not subject to strict scrutiny).

48. 415 U.S. at 253.

49. *See supra* notes 41-45 and accompanying text.

50. *See* 101 N.M. at 175, 679 P.2d at 843. *See also supra* text accompanying note 27.

Hooper court stated that in order for a veteran to be reasonable in his expectation that a right or benefit will be available to him, the right or benefit has to be an "aspect of state citizenship now recognized in *every state* in *some form*."[51] The court concluded that a veterans' property tax exemption is not such an aspect of state citizenship. This narrow analysis, unfortunately, misses the mark. While it is true that only thirty-four states offer property tax exemptions to veterans,[52] every state and the District of Columbia offers veterans' benefits in one form or another,[53] and every state except Alaska offers tax exemptions to veterans.[54] By focusing on veterans' property tax exemptions in particular, rather than veterans' benefits or veterans' tax exemptions in general, the court too quickly drew a conclusion as to the reasonableness of veterans' expectations without focusing on the interest which all veterans have in the benefits offered in every state in the Union and in the tax exemptions offered in every state except Alaska. It can hardly be disputed that veterans who move reasonably expect that such benefits and exemptions will be available to them in their new state of residence.[55]

B. The Rational Basis Test Versus Middle-Tier Scrutiny

1. The Court's Application of the Rational Basis Test

After determining that the strict scrutiny test did not apply, the court of appeals proceeded to review the case under the traditional rational basis test. The court flatly asserted that if the former test is inapplicable, then resort to the latter must follow.[56] It then proceeded to apply what it termed the rational basis test.

51. 101 N.M. at 175, 679 P.2d at 843 (emphasis added). Since only one state, Alaska, does not offer tax exemptions to veterans, that belies the assertion by the court that veterans are not reasonable in their expectations that "some form" of tax exemption will be available to them.

52. *See* "State Veterans' Laws: Digests of State Laws Regarding Rights and Privileges of Veterans and Their Dependents (Revised to December 31, 1978)." Prepared for the Committee on Veterans' Affairs, United States Senate, January 26, 1979. U.S. Gov't Printing Office publication No. 39-3750.

53. *Id.* Forty-nine states offer a variety of tax exemptions to veterans, including business license exemptions, real and personal property tax exemptions, free motor vehicle license tags, special tax exemptions to disabled veterans, income tax exemptions, fishing and hunting license exemptions, tax exemptions to a surviving spouse and/or dependent children, and Vietnam veteran bonus exemption from personal taxation.

54. *Id.* Property tax exemptions are offered to the veteran, the disabled veteran, or widows of veterans.

55. *See supra* note 51.

56. 101 N.M. at 175, 679 P.2d at 843. *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting):

> The Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions . . . defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative

The test for a rational basis has been articulated by the United States Supreme Court in different ways.[57] In the early years of this century, the Court looked for a fair and substantial relation, stating that a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[58] In later years, the Court seemed to demand less than a "fair and substantial relation"; in *Williamson v. Lee Optical Co.*,[59] the standard was a mere reasonable relationship between the legislative means and any conceivable end sought to be achieved.[60] Since that time, equal protection analysis has engaged both criteria under the rational relationship test,[61] yet the Supreme Court has failed to apply the rational basis test consistently.[62]

The problem arises because of the different meanings of "rational relation" and "a fair and substantial relation." The difference is not mere semantics. Whenever the Court requires a substantial relationship to the object of the legislation, it is invariably applying stricter scrutiny than when "any conceivable reason" of the legislature suffices to satisfy the rational basis test. This distinction between "any conceivable reason" and "substantial relation" has led some commentators[63] and several mem-

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> of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

See also Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring) ("[I]t is clear that we employ not just one, or two, but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards.'").

57. The rational basis test originated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). In *Lindsley,* the Court announced that the rational basis test required that: (1) the legislation be reasonable and not arbitrary; (2) reasonable basis need not require "mathematical nicety"; (3) any conceivable reason that the legislature may have had would suffice; and (4) one who challenges the classification has the burden of showing its arbitrariness and lack of reasonable basis. *Id.* at 78-79.

58. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

59. 348 U.S. 483 (1955).

60. *Id.* at 487-91.

61. *See* Allied Stores v. Bowers, 358 U.S. 522 (1959). In *Allied,* the validity of an ad valorem state tax was upheld by the Court even though the Court only speculated as to the legislative purpose. Although the court applied rational basis, it cited the test using the requirement of a "fair and substantial relation." *Id.* at 527.

62. *See* Craig v. Boren, 429 U.S. 190 (1976), quoted *infra* note 64. *See also* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (requiring a "fair and substantial relation"); Nebbia v. New York, 201 U.S. 502, 525 (1934) (requiring a "real and substantial relation"). In Reed v. Reed, 404 U.S. 71 (1971), the Court, applying middle-tier scrutiny, *see infra* notes 63-67 and accompanying text, invalidated an Idaho statute based on gender. In reaching its conclusion, however, the Court required that the classification have both a "rational relationship" to a state objective and a "fair and substantial relation to the object of the legislation." 404 U.S. at 76.

63. *See, e.g.*, Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). Professor Gunther has described this heightened scrutiny as putting "bite" into the traditionally toothless rational basis standard. In cases

bers of the Court[64] to recognize a middle-tier of scrutiny.[65] This level of scrutiny, not officially recognized by the Court,[66] applies a stricter standard than the rational relationship test, but falls short of the requirements of strict scrutiny.[67]

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where it has been used, the Court has been less willing to supply justifications for legislatively drawn classifications. Instead, the Court has assessed the means in terms of actual legislative purposes. *See also* Nowak, *supra* note 18, at 592-93.

64. *See supra* note 56 and accompanying text. *See also* Craig v. Boren, 429 U.S. 190 (1976):

> As is evident from our opinions, the Court has difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach . . . now has substantial precedential support. . . . [O]ur decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization . . . candor compels the recognition that the relatively deferential "rational basis" standard of review . . . takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.

Id. at 210 n.* (Powell, J., concurring).

65. *See supra* note 63.

66. *See* Craig v. Boren, 429 U.S. at 210 n.* (Powell, J., concurring), *quoted supra* note 64. *But see Craig*, 429 U.S. at 220-21 (Rehnquist, J., dissenting):

> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language. . . . I would think we have had enough difficulty with the two standards of review . . .[,] the norm of "rational basis," and the "compelling state interest" . . .[,] so as to counsel weightily against the insertion of still another "standard" between those two.

67. Middle-tier scrutiny has been applied to classifications based on: gender, Reed v. Reed, 404 U.S. 71 (1971); illegitimacy at birth, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); and alienage, Plyler v. Doe, 457 U.S. 202 (1982). It has also been applied to invalidate a statute prohibiting distribution of contraceptives to unmarried persons, Eisenstadt v. Baird, 405 U.S. 438 (1972); and to invalidate a state recoupment statute denying indigent criminal defendants most of the exemptions afforded civil judgment debtors, James v. Strange, 407 U.S. 128 (1972).

In Sosna v. Iowa, 419 U.S. 393 (1975), the Court applied middle-tier scrutiny to an Iowa one-year durational residency requirement for obtaining a divorce. It upheld the law on the ground that the waiting period reasonably furthered the state's important interest in preserving judicial integrity and fundamental family relationships. *Id.* at 406-09. Although the durational residency requirement touched upon the fundamental right of access to the courts, and thereby may have unduly penalized the right to travel, the law was not subjected to strict scrutiny. Instead, the Court balanced the impact of the divorce statute on the right to migrate and the right of access to the courts against the state's justifications for enacting the legislation. *Id.*

Whenever the state has articulated a purpose for the legislation, the Court has required a closer fit between means and ends of the statute and has weighed the burden on the individual against the state's need to achieve its stated objective. In McGinnis v. Royster, 410 U.S. 263, 270 (1973), Justice Powell inquired whether the challenged classification furthered "some legitimate, articulated purpose." That inquiry was repeated by Justice Powell in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Powell rejected the allegation that a Texas system of financing public education operated to the disadvantage of a suspect class or impinged on a fundamental right protected by the Constitution, thereby requiring strict judicial scrutiny. Instead, Justice Powell inquired whether the classification "rationally further[ed] some legitimate, *articulated* state purpose." *Id.* at 17. It would appear that when an articulated purpose is present, that purpose must meet a fair and substantial relation to the object of the legislation. In those cases, the Court applies enhanced

While purporting to utilize the rational basis standard, the *Hooper* court, however, failed to articulate the standard clearly. Rather, the court confused that standard with the middle-tier approach without recognizing the applicability of that approach to the case before it.

The court's confusion is painfully obvious. Citing *McGeehan v. Bunch,*[68] which invalidated New Mexico's automobile guest statute on equal protection grounds, the court stated that the classification "must rest upon some ground of difference that has a *fair and substantial relation* to the object of the legislation."[69] The *McGeehan* test represents a conceptual departure from the traditional rational basis test.[70] In *McGeehan,* the New Mexico Supreme Court properly recognized that the United States Supreme Court has distinguished between minimal scrutiny and a more enhanced level of scrutiny in applying equal protection analysis to fourteenth amendment challenges.[71] The *McGeehan* court applied middle-tier scrutiny to the statute at issue to determine whether it was reasonable in light of its stated objective. The *Hooper* court, in borrowing the "fair and substantial" language of the *McGeehan* test, seemed to opt for a somewhat enhanced level of scrutiny.[72] However, by failing to see the difference between rational relation and rational relation with "bite,"[73] the *Hooper* court then retreated from the requirement of a fair and substantial relation and reverted to the extreme deference normally afforded to legislative classifications in the area of taxation.[74] The court said that "[i]n taxation, even more than in other fields, the legislature possesses

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scrutiny and balances the means by which a classification is implemented against the stated purpose for the legislation. Still again in Schlesinger v. Ballard, 419 U.S. 498 (1975), Justice Brennan, in dissent, focused on the means-ends relationship and commented: "[W]e have analyzed asserted governmental interests to determine whether they were in fact the legislative purpose . . . and have limited our inquiry to the legislature's stated purposes when these purposes are clearly set out. . . ." *Id.* at 520 (Brennan, J., dissenting).

68. 88 N.M. 308, 540 P.2d 238 (1975).

69. 101 N.M. at 175, 679 P.2d at 843 (emphasis added).

70. *See* Vandolsen v. Constructors, Inc., 101 N.M. 109, 112, 678 P.2d 1184, 1187 (Ct. App. 1984) ("If any state of facts can be reasonably conceived which will sustain the classification, there is a presumption that such facts exist."). *See, e.g.,* Aetna Finance Co. v. Gutierrez, 96 N.M. 538, 632 P.2d 1176 (1981); Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978).

71. 88 N.M. at 310, 540 P.2d at 240. The court stated:

> It seems that . . . the Supreme Court of the United States is prepared to acknowledge the existence of substantial claims under the equal protection clause on minimum rationality grounds and has, to some extent, blurred the distinction between strict and minimal scrutiny that characterized the old equal protection formulation by the courts.

Id. See, e.g., James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Gunther, *supra* note 63.

72. *See supra* notes 63-67 and accompanying text.

73. *See* Gunther, *supra* note 63.

74. 101 N.M. at 175, 679 P.2d at 843. *See, e.g.,* Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969); Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

the greatest freedom in classification."[75] Based on the reasoning of several tax cases, the court returned to the traditional rational basis test to uphold the statute.[76] The court of appeals, by first requiring a fair and substantial relation and then reverting to extreme deference to the legislature, exhibited an understandable attitude of uncertainty as to the actual requirements of the rational basis standard.

2. Applying Middle-Tier Scrutiny to *Hooper*

Since the early 1970's, the United States Supreme Court has applied middle-tier scrutiny to state statutes discriminating against certain groups burdened by "quasi-suspect" classifications.[77] There is no reason to believe that the Court would view veterans as a group to fall within the category of a "quasi-suspect" class that has been relegated to an inferior status. On the contrary, American servicemen are normally well regarded for their service to the country, and their service is rewarded in every state in the form of veterans' benefits.[78] It is at least arguable, however, that middle-tier scrutiny may be the appropriate standard to be applied to the facts in *Hooper*.

Although the court of appeals was quick to defer to the legislature by calling the veterans' statute "tax legislation," its reasoning is questionable. In focusing on the tax aspects of the veterans' exemption, the *Hooper* court characterized the legislation as a privilege given "gratuitously"[79] by the legislature and not a matter of right. However, the distinction between "rights" and "privileges" has been rejected by the Court as a method of analysis in fourteenth amendment cases.[80] There are many entitlements flowing from the government to eligible recipients which are no longer regarded as gratuities[81] but rather are regarded as modern property rights worthy of judicial protection.[82] A veterans' tax exemption is a personal benefit, not unlike welfare and public medical assistance, made possible by the state to eligible veterans. They are statutory entitlements for persons qualified to receive them, and constitutional constraints should apply as much to the denial of a tax exemption as they do to the denial of welfare benefits.[83]

75. 101 N.M. at 175, 679 P.2d at 843.

76. *Id.*

77. *See* Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting).

78. *See supra* notes 52-54 and accompanying text.

79. 101 N.M. at 176, 679 P.2d at 844.

80. *See* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See also* Thompson v. Gallagher, 489 F.2d 443, 446 (5th Cir. 1973).

81. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965). *See also* Reich, *The New Property*, 73 Yale L.J. 733 (1964).

82. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (welfare benefits are a matter of statutory entitlement for persons eligible to receive them).

83. *Id.*

The *Hooper* court failed to analyze adequately the individual interest affected by the denial of the benefit. The middle-tier approach would consider the impact of the cutoff date on the right to migrate and the importance of the personal benefit being deprived and would then weigh those considerations against the importance of the state interest being served by the statutory cutoff.[84] Had the court of appeals actually applied middle-tier scrutiny in *Hooper,* it is questionable whether the statute could have withstood that scrutiny. It is difficult to find a fair and substantial relationship between the cutoff date imposed by the legislature and the purpose articulated by the court. The cutoff date contained in the law is unrelated to the purpose of rewarding veterans, for the cutoff date serves no purpose other than to deem veterans who arrive on time more worthy than veterans who arrived after the cutoff date.[85] It is unclear whether New Mexico veterans who qualify for the exemption are rewarded for their military service during wartime or whether they are rewarded for their speediness in arriving in the state.

C. The Court's Rejection of Zobel v. Williams

Even if the *Hooper* court was correct in its application of the rational basis test, its rejection of *Zobel v. Williams*[86] is problematic. In *Zobel,* the Court struck down an Alaska dividend plan distributing state oil revenues to its citizens on the basis of years of residence.[87] The Court rejected Alaska's articulated purposes of creating financial incentives for individuals to seek and to maintain residence in Alaska and of encouraging prudent management of its permanent fund.[88] Alaska's third purpose—to reward its citizens for their past contributions to the state—was found constitutionally impermissible by the Court only in its retrospective application.[89]

84. *See* Sosna v. Iowa, 419 U.S. 393, 406-09 (1975).

85. *See* Zobel v. Williams, 457 U.S. 55, 71 (1982) (Brennan, J., concurring).

86. 457 U.S. 55 (1982).

87. The Alaska scheme was designed to give each citizen 18 years of age or older a dividend unit for each year of residency subsequent to 1959, the date of statehood. *Id.* at 57. The appellants, Alaska residents since 1978, challenged the plan on equal protection grounds, claiming an infringement on the right to migrate to Alaska and the right to establish residency and enjoy the full rights of other Alaska citizens on the same terms. *Id.* at 57-58.

88. The Court found no reasonable basis for assuming that the goal of discouraging citizens from severing their ties with the state would be advanced by giving more money to someone who arrived in the state earlier than someone else. *Id.* at 62. The Court gave some credence to the "prudent management" theory advanced by the state. *Id.* at 62-63. In that argument, the state contended that the dilution of each citizen's interest in the fund which would occur by per capita distribution to an ever-increasing population would create popular pressure for a riskier investment policy. *Id.* Assuming, *arguendo,* that such an argument might be valid, the Court nevertheless found no reasonable basis to support retrospective application of the plan. *Id.* at 61-63.

89. *Id.* at 62-63. The Court found it unnecessary to consider whether the state could enact the dividend program prospectively only and declined to speculate whether the retrospective application of the plan could be severed from the rest of the statute. However, in concurring, Justice Brennan noted that the constitutional concerns created by the Alaska scheme might well preclude even the prospective operation of the plan. *Id.* at 66 (Brennan, J., concurring).

On at least two prior occasions the Court had held that a state may not extend its resources or services to longer-term residents based on their past contributions.[90] In *Zobel,* the Court concluded that the Alaska scheme was similarly defective as it found that the scheme involved distinctions between residents based on when they arrived in the state.[91] The Court made it clear that the guarantees of equal protection protect persons from barriers to the right to travel when new state residents are treated differently and disadvantaged in favor of longer-term residents.[92]

The *Hooper* court sought to distinguish *Zobel* and denied that the retrospective aspect of the cutoff date constituted a comparable durational residency requirement.[93] The court noted that the New Mexico statute, unlike the statute involved in *Zobel,* imposes no threshold waiting period.[94] The court also distinguished *Zobel* on the basis that the Alaska statute extended the benefit to all bona fide residents, whereas the New Mexico statute extends the benefit to a small class of veteran residents.[95] Such distinctions, however, do not adequately dispose of *Zobel.*

Viewed another way, New Mexico's veterans' tax exemption statute creates a durational residency requirement which infringes on constitutional values as severely as the Alaska plan. Vietnam veterans in New Mexico are being denied a benefit given to other Vietnam veterans for no reason other than their failure to establish residency prior to a cutoff date. The statute creates a fixed-date length of residence requirement which divides the class of Vietnam veterans and forever bars those who became residents after May 8, 1976 from benefiting from the legislature's

90. In Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969), the Court said: "[Such] 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."

Later, in Vlandis v. Kline, 412 U.S. 441, 452 (1973), the Court found that reasonable durational residency requirements could be used in some circumstances "as one element in demonstrating bona fide residence," but that "a challenged classification [cannot] be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes." *Id.* at 450 n.6. ***But see Zobel,*** 457 U.S. at 72 (O'Connor, J., concurring): "A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. . . . [E]ven a generalized desire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper."

91. 457 U.S. at 60 n.6: "This case also involves distinctions between residents based on when they arrived in the State and is therefore also subject to equal protection analysis."

92. *Id.* at 73-74 (O'Connor, J., concurring). Justice O'Connor noted that Zobel's exercise of his right to travel had been violated and that the case should be viewed from the aspect of the privileges and immunities clause of article IV of the United States Constitution. The majority of Justices rejected that approach, clinging to the notion that the privileges and immunities clause applies only to distinctions between residents and non-residents. In their view, because Zobel was a citizen of Alaska, article IV could not apply to him. *See* 457 U.S. at 59 n.5; *id.* at 66-67 (Brennan, J., concurring); *id.* at 84 n.3 (Rehnquist, J., dissenting).

93. 101 N.M. at 177, 679 P.2d at 845.

94. *Id.* at 175, 679 P.2d at 843.

95. *Id.* at 177, 679 P.2d at 845.

bounty.[96] The New Mexico statute, therefore, creates a durational residency requirement in retrospective fashion based on length of residency in the same manner as the Alaska statute did in *Zobel*. It creates an exclusive class that is to receive special benefits due to the individual's length of residence in New Mexico and it "creates fixed, permanent distinctions between . . . concededly bona fide residents, based on how long they have been in the State."[97] This is constitutionally impermissible under *Zobel*.

V. CONCLUSION

New Mexico's laudable desire to reward its veterans becomes a troublesome matter when the means chosen to accomplish that end make distinctions between classes of veterans based on when they arrived in the state. The retrospective application of the statute clearly fails under *Zobel v. Williams*. A problem might still exist if the legislature were to sever the cutoff date from the statute and give the benefit only to veterans who were residents of New Mexico at the time of induction. Such a classification might be viewed as awarding benefits to certain veterans, in a retrospective manner, based on length of residence. On the other hand, giving the benefit to every war veteran, regardless of the date he became a New Mexico resident, would place a burden on state coffers which New Mexico citizens may be unwilling to bear. And if the legislature were to apply the benefit from now on, in a prospective manner, that would still exclude veterans who arrived before today.

The equal protection analysis done by the court of appeals in *Hooper* was inadequate. The court's rejection of strict scrutiny was based on a misreading of United States Supreme Court decisions in right to travel cases. In addition, its conclusion that the appropriate standard in *Hooper* was the rational basis test is dubious. Furthermore, the court's articulations of that standard were inappropriate insofar as the *Hooper* court confused middle-tier scrutiny with the less rigid rational basis standard. Finally, the court's rejection of the argument that *Zobel v. Williams* had relevance to *Hooper* further reflects a misunderstanding of equal protec-

96. *See* Shafer v. Vest, 680 P.2d 1169 (Alaska 1984). In *Shafer*, the Alaska Supreme Court invalidated Alaska's Longevity Bonus Program. The court held that the 25-year residency requirement and pre-January 3, 1959 domicile requirement were violations of equal protection. The court determined that its decision was controlled by *Zobel:* "It is clear that the federal Constitution will not tolerate a state benefit program which 'creates fixed, permanent distinctions between . . . concededly bona fide residents, based on how long they have been in the State.'" *Id.* at 1170-71.

97. *Zobel*, 457 U.S. at 59.

tion analysis done by the United States Supreme Court. Unless the New Mexico courts reexamine the appropriate standards of review required by equal protection analysis, cases such as *Hooper* will continue to haunt the courts and the legal community.

GERALDINE E. RIVERA