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NOTES

Constitutional Law—Residence Requirements for Divorce

Changing residence is now a routine practice in the United States. Statistics reveal that almost one in every five Americans changes his or her home each year.¹ Divorce has similarly become a common phenomenon. Estimates based on 1972 statistics reveal that the divorce rate for that year was four per thousand persons.² This combination of mobility and high divorce rates prompts a new look at state statutes that require definite periods of in-state residence before a person can petition for divorce.³

The need for re-examination of divorce residence requirements is intensified by recent Supreme Court cases that have challenged the constitutionality of other residence requirements. For example, in *Shapiro v. Thompson*⁴ the Court declared that several statutes requiring residence of one year before a citizen could receive state welfare aid were unconstitutional because they infringed on the right to travel. While the Court had previously held unconstitutional state laws or actions that directly interfered with travel between states,⁵ *Shapiro* was the first Supreme Court decision to declare a state statute unconstitutional because it constituted a denial of the right to travel even though the statute did not directly restrict travel as such. Not only was this feature of *Shapiro* unique, but in holding that the right to travel was a fundamental right, *Shapiro* was also the first Supreme Court decision to assert that a classification scheme based on old and new residents should be examined by the strict equal protection test.⁶ This test requires

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES table no. 41 at 34 (92d ed. 1971).

2. THE WORLD ALAMANAC AND BOOK OF FACTS (1974). These figures indicate an 82% increase in rate since 1962.

3. Forty-nine states have residence requirements, ranging from 60 days to 2 years, that must be met before a party can file for divorce. California has no requirement for filing but requires 6 months residence before granting a divorce. See AM. JUR. 2D DESK BOOK, Doc. No. 125 (Supp. 1973).

4. 394 U.S. 618 (1969).

5. E.g., *United States v. Guest*, 383 U.S. 745 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

6. 394 U.S. at 634. See Note, *Shapiro v. Thompson: Travel, Welfare and The Constitution*, 44 N.Y.U.L. REV. 989 (1969).

that a compelling state interest is needed to justify the statutory classification.⁷

While *Shapiro* gave the right to travel new constitutional importance by requiring a compelling state interest to justify its restriction, the Court explicitly made no attempt to extend the holding beyond the specific facts of the case.⁸ This fact, combined with the Court's emphasis that the statutory denial of benefits in *Shapiro* was purposely designed to deter movement of indigents into the state,⁹ led some courts and commentators to believe that the Court had condemned only those requirements that actually had deterred travel and, further, that "deterrence" was limited to situations where residence requirements denied essentials of life to recent immigrants into the state.¹⁰

*Dunn v. Blumstein*¹¹ involved a state statute that required one year's residence before voting. In this case the Court concluded that *either* the denial of the right to vote to some citizens *or* the fact that the denial was based on recent interstate travel would require the state to show "substantial" and "compelling" reasons for having imposed residency requirements.¹² Furthermore, even a substantial state interest would not justify the requirement "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activit[ies]. . . ."¹³

The Court concluded that the voting statute in *Blumstein* did not pass the above mentioned tests. However, it did not limit its holding to this particular statute but instead discussed residency requirements in general in an attempt to clarify some of the confusion that had accompanied its holding in *Shapiro*:

It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that a denial of welfare actually deterred travel

7. The strict equal protection or compelling state interest test must be met when a suspect category (*e.g.*, race, alienage) or a fundamental right (*e.g.*, voting) is involved in a statutory classification. The traditional equal protection test is used in testing other classifications. Under the traditional test, the state's reasons for the classification need not be "compelling" but only "rational." See *McGowan v. Maryland*, 366 U.S. 420 (1961).

8. 394 U.S. at 638 n.21.

9. *Id.* at 629.

10. See Note, 44 N.Y.U.L. REV., *supra* note 6. *Whitehead v. Whitehead*, 492 P.2d 939 (Hawaii 1972), which dealt with residence requirements for divorce, relied on this interpretation of *Shapiro*. *Id.* at 944-45.

11. 405 U.S. 330 (1972).

12. *Id.* at 335.

13. *Id.* at 343.

. . . . In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to penalize the exercise of that right [to travel]. . . ." ¹⁴

While this language in *Blumstein* attempted to define the scope of deterrence, it did not solve the basic problem. Rather, the Court's opinion merely served to shift questions concerning what constituted "deterrents" to travel to what constituted "penalties" on travel. Later in the opinion, the Court stated that "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 governmental interest.'" ¹⁵ However, many lower courts and commentators are still unwilling to read *Blumstein* as categorically requiring that all residence laws classifying persons solely on the basis of travel should be judged by a strict compelling state interest test.

Recent cases dealing with durational residency requirements for divorce are examples of this confusion. In *Larsen v. Gallogly* ¹⁶ plaintiff, who was denied a hearing for divorce because he failed to qualify as a resident, brought an action challenging the constitutionality of a Rhode Island statute that required one party to reside in the state for two years before Rhode Island courts would hear a petition for divorce. ¹⁷ Larsen contended, among other things, that the residence requirement unconstitutionally penalized his right of interstate travel. ¹⁸

While accepting the *Blumstein* statement that all residence statutes must be measured by a strict standard, the district court questioned whether the law "penalized" the exercise of the right to travel:

A "penalty" in this context means the suffering of "disadvantage, loss or hardship due to some action." As a result of the residency requirement for divorce, new citizens of Rhode Island must endure a hiatus of two years before they become entitled to a judicial adjustment of a "fundamental human relationship." Without doubt this statute "penaliz[es] persons because they have recently migrated. . . ." Therefore, we find that the defendants must demonstrate a compelling state interest in order for us to sustain the statute as constitutional. ¹⁹

14. *Id.* at 339-340, quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

15. *Id.* at 342, quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

16. 361 F. Supp. 305 (D.R.I. 1973).

17. R.I. GEN. LAWS ANN. § 15-5-12 (1969).

18. The court held the law unconstitutional on both equal protection and due process grounds but directed most of its discussion to the equal protection aspects of the case.

19. 361 F. Supp. at 307 (citations omitted).

In advancing justifications to support the classification, the state had argued primarily that the requirement was necessary to ensure that one of the parties was a bona fide domiciliary of the state.²⁰ Since domicile²¹ in the forum state is necessary before a state can grant a divorce that will be recognized in other states,²² the court conceded that the assurance of domicile was unquestionably an important state interest and that the two-year requirement furthered this interest since it was an objective and efficient standard by which to judge claims of domiciliary intent. However, the court felt that the state's argument failed since "administrative convenience cannot serve as justification for the abridgement of constitutional guarantees where less restrictive means are available."²³ The other justifications made to support the two-year requirement were summarily rejected by the court because they were unrelated to the two-year requirement.²⁴

In *Davis v. Davis*²⁵ the Minnesota Supreme Court upheld a one-year residency requirement for divorce²⁶ against a challenge similar to the one in *Larsen*. While the *Davis* court considered the possibility

20. *Id.* at 309.

21. Domicile indicates present habitation plus present intention to remain. Residence is merely the current living place. See BLACK'S LAW DICTIONARY 572, 1473 (4th rev. ed. 1968).

22. In *Williams v. North Carolina*, 317 U.S. 287 (1942) the Supreme Court ruled that each state must give full faith and credit to divorce decrees obtained in other states if one of the divorced parties was a bona fide domiciliary of the state granting the decree. In *Williams v. North Carolina*, 325 U.S. 226 (1945), however, the Court qualified its earlier decision, holding that, if asked to recognize a divorce decree from another forum, a state court may re-examine the evidence originally given on domicile and make an independent finding whether one of the parties was indeed domiciled in the divorcing state. According to *Williams II*, if the re-examining state finds the evidence insufficient, it does not have to recognize the divorce.

Requiring extended residence or other indicia of domicile, however, will not always ensure that bona fide domicile will be found by the inquiring state. See cases collected in Annot., 28 A.L.R.2d 1303, 1313-15 (1953); Annot., 1 A.L.R.2d 1385, 1393-94 (1948).

23. 361 F. Supp. at 309. The court went on to point out other ways in which domicile might be assured. It suggested that inquiry into domicile might be made part of the divorce proceeding. Alternatively, existing perjury sanctions might be used or a statute passed punishing abuse of process. *Id.*

The suggestion that a shorter period of residency might be constitutional has been tried in Wisconsin. After the two-year residence requirement for divorce was held unconstitutional in *Wymelenberg v. Syman*, 328 F. Supp. 1353 (E.D. Wis. 1971), the state legislature amended the statute to require only a six-month period of residence. See WIS. STAT. ANN. § 247.05(3) (Spec. Pamphlet 1973), formerly, ch. 90, § 5 [1959] Wis. Sess. Laws.

24. These arguments were that the law served to promote marital stability, to prevent use of courts by outsiders, and to prevent the state from becoming a divorce mill. 361 F. Supp. at 310.

25. 297 Minn. —, 210 N.W.2d 221 (1973).

26. MINN. STAT. ANN. § 518.07 (1969).

that *Blumstein* could be read as requiring the strict equal protection test every time the right to travel was restricted by a residence statute,²⁷ the court rejected this interpretation and chose to interpret *Blumstein* in the light of a more recent Supreme Court case, *Vlandis v. Kline*.²⁸ Although *Kline* itself held a residence requirement²⁹ unconstitutional on due process grounds, it approved the earlier case of *Starns v. Malkerson*,³⁰ which upheld against the traditional equal protection standard a statute requiring a one year period of residence in the state before a student could get in-state tuition privileges.³¹ Using *Starns* as a guide, the Minnesota court held that

since a durational-residency requirement for resident tuition can be said to constitute a penalty on interstate travel, and since it is difficult to find any compelling state interest in requiring a 1-year wait for resident tuition, it seems clear that the court is implying that *not every penalty* on interstate travel triggers the compelling-state-interest test. In other words, it appears that we may weigh the harshness of the penalty in determining whether there has been a denial of equal protection.³²

The court then concluded that the penalty inherent in the residence statute in *Blumstein* was a harsh one, involving "a fundamental political right, . . . preservative of all rights,"³³ but that the "penalty" involved in the divorce cases caused little hardship because divorce was neither a basic right nor an urgent need.³⁴ The court did not feel the need to apply the compelling interest test to the statute. Instead, relying on the traditional equal protection test, the court upheld the requirement as rationally related to ensuring the state's interest in having only bona fide domiciliaries before its courts as divorce applicants.³⁵

Yet another view of the status of residence requirements for divorce was taken in *Coleman v. Coleman*,³⁶ which decided a challenge

27. 297 Minn. at —, 210 N.W.2d at 224.

28. 412 U.S. 441 (1973).

29. CONN. GEN. STAT. ANN. § 10-329b (Supp. 1973). This statute established an irrebuttable presumption of non-residency for tuition purposes during a student's entire university career. In the case of a single student, the presumption attached if his or her legal address had been outside of Connecticut anytime in the year before application to the university. If the student were married, he or she was considered a non-resident if his or her address was out of state at the time of application.

30. 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

31. 412 U.S. at 452-53 & n.9.

32. 297 Minn. at —, 210 N.W.2d at 225 (emphasis added).

33. *Id.*, quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

34. 297 Minn. at —, 210 N.W.2d at 226.

35. *Id.* at —, 210 N.W.2d at 226-27.

36. 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972).

to the one-year residence requirement of an Ohio statute.³⁷ The *Coleman* court at first approached the issue in the same manner as the *Davis* court, questioning whether a residence law postponing divorce was a "penalty" on travel. However, even after deciding that it was not a "penalty,"³⁸ the Ohio court did not apply the traditional equal protection test to the law as the *Davis* court did but proceeded to question whether the residency requirement met the strict test of fulfilling a compelling state interest.³⁹ As in *Larsen* and *Davis*, the major interest asserted by the state was the need for the year's residence to assure domicile and jurisdiction. While this same argument failed the strict test in *Larsen* because the court felt there were less restrictive means of finding domicile, the *Coleman* court held,

In view of the numerous possible combinations of objective expressions, and the fact that those who do lead a transitory life might never accumulate that assortment of objective manifestations that would convince an individual judge to exercise jurisdiction, we conclude that the state has used the *least restrictive* manner of insuring that its divorce laws are not utilized by nonresidents of Ohio⁴⁰

The court held further that the other state justification for the requirement, the need for a time period for newcomers to re-examine their marriage in light of the move, was "reasonable" and therefore acceptable.⁴¹ This result seems to call into question whether the court had really committed itself to applying the compelling state interest test.

While it is true that *Blumstein* does not label specific time periods constitutional or unconstitutional,⁴² it is also true that merely because a restriction is found reasonable does not mean that the compelling state interest test is met if a lesser restriction will serve the same purpose.⁴³ In *Coleman* the court did not consider whether a shorter period would serve the same purpose.⁴⁴

In apparently deviating from the strict equal protection test, *Coleman* may be implicitly applying a theory announced explicitly in *Shiff-*

37. OHIO REV. CODE ANN. § 3105.03 (Page 1971).

38. 32 Ohio St. 2d at 159, 291 N.E.2d at 534.

39. *Id.* at 162-63, 291 N.E.2d at 536.

40. *Id.* at 162, 291 N.E.2d at 535. The court went on to note that there were no effective checks to false testimony regarding intent to remain in the state in divorce litigation. *Id.* at 162 n.10, 291 N.W.2d 535 n.10. Compare this statement with the solutions presented in *Larsen v. Gallogly*, 361 F. Supp. 305, 309 (D.R.I. 1973).

41. 32 Ohio St. 2d at 161, 291 N.E.2d at 535.

42. 405 U.S. at 348.

43. *Id.* at 343.

44. 32 Ohio St. 2d at 161 n.9, 291 N.E.2d at 535 n.9.

man v. Askew.⁴⁵ The *Shiffman* court reasoned that although *Blumstein* required a "compelling" state interest to uphold residency requirements, each travel restriction must be weighed against the right it penalizes.⁴⁶ As a result of this balancing process, the more essential the right affected and the greater the restriction on travel, the more compelling the state interest needed to allow restriction. If, as both the *Coleman* and *Shiffman* courts agree, divorce rights are less fundamental than voting rights, the test, although still termed a "compelling state interest test" will be less stringent than that applied in voting cases.

In analyzing the divergent approaches taken by the courts one can make an independent questioning of the Supreme Court's intention in *Blumstein*. The interpretation that *all* residency requirements must be measured by the compelling state interest test is supported by the Court's seemingly categorical language.⁴⁷ In addition, the Court did not have to emphasize the right to travel since the same decision could have been made on grounds that the classification of residents abridged the fundamental right to vote. This alone would have triggered the compelling state interest test.⁴⁸ By stressing the travel issue as it did, the Court might have been indicating that *all* residency cases should be examined strictly.⁴⁹

Further, as the Court mentions explicitly in the older direct-infringement-on-travel cases the issue was whether there would be any basis for preventing interference on a large scale if a state were allowed to hinder travel in a minor way.⁵⁰ Such reasoning can be applied to indirect infringements and used to support the theory that all residence requirements should be required to meet a compelling interest test.

Nevertheless, unless the right qualified by the residency requirement is taken into consideration, a court will have neither a method to judge whether the right to travel has been infringed nor a way of determining how strong a state interest must be in order to support the requirement. The decision whether a state interest is compelling or

45. 359 F. Supp. 1225 (M.D. Fla. 1973). In this case a three judge federal court upheld a Florida law (FLA. STAT. ANN. § 61.021 (Supp. 1973)) that required six months residence before filing for divorce.

46. 359 F. Supp. at 1233.

47. See 405 U.S. at 342.

48. *Id.* at 335.

49. See Note, *Constitutional Law—Equal Protection—Penalty on the Right to Travel—Durational Residence Requirements*, 1973 WIS. L. REV. 914, 925.

50. 405 U.S. at 340 n.9.

not can hardly be made in a "vacuum."⁵¹

In affirming *Starns v. Malkerson*,⁵² the Court approved a district court decision holding that while certain state justifications might not satisfy the court in some residence requirement cases, the same reasons might be acceptable in other instances where the requirements did not create serious hardship.⁵³ The decision in *Starns*, although made before *Blumstein*, apparently retains its validity⁵⁴ and supports the view that the penalty imposed by the requirement is important in determining by what standard the travel restriction is to be measured.

The interpretation of *Blumstein*, however, is only one aspect of the divorce cases. In each of the cases that rejected the equal protection challenge, the court summarily dismissed the contention that the final resolution of marital relations is a fundamental right equal in importance to voting or welfare assistance.⁵⁵ Even *Larsen*, which upheld the challenge, made only passing reference to an "adjustment of a 'fundamental relationship.'"⁵⁶ The failure to explore prior judicial determinations of the fundamentality of marriage relations may well be an important oversight. If the rights involved in marriage relationships are constitutionally fundamental, their restriction alone would activate the strict equal protection test⁵⁷ and forestall the necessity of having to interpret *Blumstein*. Even if these rights are not ultimately given constitutional sanction, their importance cannot be denied.

Several older landmark cases dealing with marriage and related issues can be cited for the proposition that the Supreme Court has found marriage rights to be fundamental.⁵⁸ More recently, in *Boddie*

51. 359 F. Supp. at 1233.

52. 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

53. *Id.* at 237-38.

54. The one-year requirement upheld in *Starns* was apparently approved in *Vlandis v. Kline*, 412 U.S. 441, 452-53 n.9 (1973). However, in a concurring opinion, Mr. Justice Marshall, joined by Mr. Justice Brennan, seriously questioned this approval in the light of *Blumstein*. *Id.* at 455.

55. *Shiffman v. Askew*, 359 F. Supp. 1225, 1235 (M.D. Fla. 1973); *Davis v. Davis*, 297 Minn. —, 210 N.W.2d 221, 226 (1973); *Coleman v. Coleman*, 32 Ohio St. 155, 158-59, 291 N.E.2d 530, 533 (1972).

56. 361 F. Supp. at 307.

57. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127-32 (1969).

58. See *Loving v. Virginia*, 388 U.S. 1 (1967). In this case, the Supreme Court held a Virginia anti-miscegenation law unconstitutional on due process and equal protection grounds. The Court categorized marriage as "one of the 'basic civil rights of man'" and held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12. See also *Skinner v. Oklahoma*, 316 U.S. 535 (1941). In *Skinner* the Supreme Court held

v. Connecticut,⁵⁹ dealing with the access to divorce court, the Court stressed the importance of marriage in our society as one of the bases for its holding that due process was violated when a party was denied a divorce because he lacked funds to pay a filing fee to initiate court proceedings.⁶⁰

This view was further explained in *United States v. Kras*⁶¹ and *Ortwein v. Schwab*.⁶² In both *Kras* and *Ortwein* the initial plaintiffs sought to rely on *Boddie* as precedent to find unconstitutional their denial of judicial hearings in bankruptcy and welfare proceedings due to their inability to pay filing fees. In *Kras* the Court upheld the filing fee and distinguished *Boddie*:

We are also of the opinion that the filing fee requirement does not deny *Kras* the equal protection of the laws. Bankruptcy is hardly akin to free speech or marriage or to those rights, so many of which are embedded in the First Amendment, that the court has come to regard as *fundamental* and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.⁶³

In *Ortwein* the Court reinforced this statement, "In this case appellants seek increased welfare payments. This interest, like that of *Kras*, has far less constitutional significance than the interest of the *Boddie* appellants."⁶⁴ This approach is significant also since it gives marriage relations a higher constitutional status than the need for welfare payments. In the divorce cases the lower courts consistently treated welfare as having a higher status than divorce.⁶⁵

Whether the statements of the earlier cases of *Boddie*, *Kras*, or

unconstitutional an Oklahoma statute that subjected habitual criminals to sterilization on the basis of types of crimes committed. The Court required the law to be strictly scrutinized since "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

While it might be contended that the statements of *Loving* and *Skinner* might not be applicable to divorce cases, it must be stressed that residence requirements that restrict divorce interfere not only with the rights in the existing marriage but also the rights of future marriage.

59. 401 U.S. 371 (1971).

60. *Id.* at 376.

61. 409 U.S. 434 (1973).

62. 410 U.S. 656 (1973) (per curiam).

63. 409 U.S. at 446 (emphasis added). Significantly at this point the Court refers to *Shapiro* and its holding that the right to travel is fundamental, 394 U.S. at 638, perhaps impliedly comparing marriage and travel rights.

64. 410 U.S. at 659.

65. While the question of the constitutional fundamentality of marriage rights is still unanswered, it has been decided that there is no constitutional right to welfare assistance. Hence, the compelling interest test is not automatically applied in welfare cases. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Ortwein can be relied on to support a holding that divorce rights are constitutionally fundamental is still uncertain. The recent Supreme Court decision in *San Antonio School District v. Rodriguez*⁶⁶ indicates that the vital interest of our society in the exercise of any right does not give immediate constitutional protection to it.⁶⁷ Instead the Court in *Rodriguez* reasons that to gain constitutional protection the right must be "explicitly or implicitly guaranteed by the Constitution."⁶⁸ Only the dicta in *Kras* has thus far implied a direct constitutional guarantee of the right of marriage dissolution.⁶⁹

Although the *Rodriguez* reasoning indicates that there may be no absolute certainty regarding the constitutional protection of the rights involved with marriage, the lower courts have been remiss in not pursuing the question. The lack of citation in the recent divorce cases to any of the older cases dealing with marriage rights⁷⁰ and the failure to consider *Boddie* for the proposition that marriage is an essential right⁷¹ indicate that these courts neglected to analyze the Supreme Court's views on marriage before coming to their independent decisions.

The analysis of *Blumstein* undertaken by the lower courts in the divorce cases is valuable and necessary in exploring the ramifications of the right to travel. However, as more people divorce⁷² and bring about judicial involvement in the dissolution of their marriages, there is a definite need for the courts to deal directly with the constitutional status of marriage related rights.

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66. 411 U.S. 1 (1973). *Rodriguez* dealt with a challenge to the Texas scheme of collecting and allocating money for public school use. The challenge claimed the scheme made a classification that hindered some in their pursuit of the fundamental right of education.

67. *Id.* at 29-34.

68. *Id.* at 33-34.

69. See text accompanying note 63 *supra*. Mr. Justice Marshall, in his dissent, objected to the majority's "suggestion" that divorce might be fundamental and questioned whether the Court really meant to go this far. 409 U.S. at 462 n.4.

70. The dates of decision of the cases may explain why some courts did not cite *Kras* and *Ortwein*. The latter was decided on Mar. 5, 1973; the former on Jan. 10, 1973. *Larsen v. Gallogly* was decided on July 16, 1973; *Shiffman v. Askew* on June 1, 1973; *Davis v. Davis* on Aug. 24, 1973 and *Coleman v. Coleman* on Dec. 15, 1972.

71. *Larsen*, which held the residence requirement unconstitutional, did cite *Boddie* as authority, but did not deal with it in detail in relation to the issue of marriage rights alone. 361 F. Supp. at 307-08. *Coleman* also cites *Boddie* but does not treat it as applicable in the case before it. 32 Ohio St. at 160 n.7, 291 N.E.2d at 534 n.7. *Davis* speaks of *Boddie* only in connection with the due process argument. 297 Minn. at —, 210 N.W.2d at 227. *Shiffman* refers to *Boddie* only as authority for leaving divorce regulation to the states. 359 F. Supp. at 1229.

72. See text accompanying note 2 *supra*.