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Case Comments

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CASE COMMENTS

TORTS—PRODUCT LIABILITY—DUTY TO WARN—A DRUG MANUFACTURER'S DETAIL MEN MUST WARN PHYSICIANS ON WHOM THEY REGULARLY CALL OF THE DANGERS INVOLVED IN THE USE OF THE MANUFACTURER'S DRUGS.— In January of 1958, Mrs. Irene M. Yarrow complained to her physician of increased discomfort from an arthritic condition that had been bothering her since 1950. Her doctor, unaware of any irreversible side effects which might result from its prolonged use, prescribed daily doses of chloroquine phosphate. He had been introduced to chloroquine phosphate by a detail man¹ employed by Sterling Drug, Inc. [Sterling], which manufactured it under the trade name Aralen.² The detail man, when he first acquainted the physician with the drug, had not informed the doctor of Aralen's dangerous side effects; nor was the possible connection between Aralen and chloroquine retinopathy (a disease that causes a marked degeneration of cells in the retina, resulting in central blindness) disclosed by the detail man on any of his subsequent visits.

Although Sterling disseminated information³ concerning the side effects of Aralen as these became known,⁴ the company never instructed its detail men to discuss the newly discovered dangers with the physicians they contacted. None of Sterling's warnings gained the attention of Mrs. Yarrow's physician. The Aralen treatment continued until October of 1964, when her doctor learned of the connection between Aralen and irreversible chloroquine retinopathy from an ophthalmologist who had examined Mrs. Yarrow and found substantial deterioration in her vision. Although the use of chloroquine phosphate was discontinued, the woman's eyesight continued to deteriorate; in early 1965 an eye specialist determined that the Aralen had deprived Mrs. Yarrow of eighty percent of her vision.

On August 16, 1965, Mrs. Yarrow filed suit against Sterling in the United States District Court for the District of South Dakota to recover for the damage to her eyes. The district court held that Sterling was negligent in failing to adequately warn the physician of known dangers involved in the use of Aralen and awarded Mrs. Yarrow \$180,000 in damages. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the award and *held*: a drug manufacturer's duty to warn includes instructing its detail men to warn physicians on whom they regularly call of dangerous side effects involved in the use of the manufacturer's drugs when the manufacturer knew or should have known of

1 Detail men are the sales and promotion personnel of the drug companies. They normally call on physicians in their respective territories on a regular basis. Their job is to promote the company's new drugs and encourage use of the established ones as well. Usually these men are well versed in the medical-pharmaceutical area, and have special training in the various drugs they handle. *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969).

2 Aralen was developed during and after World War II as a substitute for quinine in the fight against malaria. Other uses for the drug were found in the early 1950's including treatment for arthritis. The complete history of the drug can be found in the court's opinion. *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 980-82 (8th Cir. 1969).

3 See notes 26-28, *infra*, and accompanying text.

4 Information concerning the relationship between Aralen and chloroquine retinopathy began appearing in 1957. By 1963 the connection was well established. The condition was found to develop in a small percentage of those treated with Aralen on a daily basis for a significant length of time. *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 985-87 (8th Cir. 1969).

such side effects in the exercise of reasonable care. *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978 (8th Cir. 1969).

In recent years the duty to warn has become an increasingly significant obligation in the area of products liability.⁵ Just as a manufacturer's liability for injury resulting from its product's defects has been extended beyond the original purchaser to all who could reasonably be expected to use the product or be injured in the course of its use, its duty to warn of dangers or defects in its products has likewise been expanded. For example, in *Comstock v. General Motors Corporation*,⁶ the Supreme Court of Michigan held that not only was General Motors required to warn purchasers of the dangers in its product known at the time of sale, but that the corporation was further required to pass along any information discovered after the purchase date.⁷ The scope of both the duty to warn and the class of persons to be warned is stated in section 388 of the *Restatement (Second) of Torts*:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel . . . or to be endangered by its probable use . . . if the supplier
(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.⁸

While they are subject to liability for negligence, drug manufacturers can escape the imposition of strict liability for injuries caused by their products. Hence, although section 402A of the *Restatement* advocates the strict liability of a seller who markets defective products which are unreasonably dangerous, even though all possible care had been taken in their manufacture and sale,⁹ many prescription drugs have been exempted from this mandate. This exemption is apparently justified on the basis that while many drugs are unsafe, their extremely useful nature necessitates that strict liability not be imposed—so long as a proper warning is issued to potential users. Presumably, the inherent danger of prescription drugs is counterbalanced by the public's great need for them.¹⁰

5 See 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16 (1968); 1 R. HURSCH, *AMERICAN LAW OF PRODUCTS LIABILITY* §§ 2.28-2.29 (1961); Annot., 79 A.L.R.2d 301 (1961); Annot., 76 A.L.R.2d 9 (1961).

6 358 Mich. 163, 99 N.W.2d 627 (1959).

7 *Id.* at 176-79, 99 N.W.2d at 634-35.

8 *RESTATEMENT (SECOND) OF TORTS* § 388 (1965). As stated in *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir. 1957):

The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. . . . A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers. *Id.* at 26.

See also *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968); *Steif v. J. A. Sexauer Mfg. Co.*, 380 F.2d 453, 459 (2d Cir. 1967); *Neusus v. Sponholtz*, 369 F.2d 259, 263 (7th Cir. 1966).

9 *Id.* at § 402A.

10 *Id.* at comment *k*. Comment *k* reads in pertinent part:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably*

Although a prescription drug manufacturer is able to avoid strict liability by giving a warning that describes a drug's dangerous side effects, its burden in issuing a proper warning is more onerous than that of other manufacturers. While a manufacturer of other products is generally not required to warn of dangers that would affect a small group of idiosyncratic or allergic users,¹¹ this rule has a stricter application in the prescription drug industry. The application of this more stringent rule is demonstrated by *Sterling Products, Inc. v. Cornish*,¹² where the Eighth Circuit refused to relieve the drug manufacturer of liability for a failure to warn, notwithstanding that only a small percentage of the drug's users could have been adversely affected.¹³ The court felt that although an injury might be unforeseeable — and a warning futile — for a product retailed over-the-counter, a doctor is a learned intermediary who can prevent a *prescription* drug from reaching a hypersensitive patient if reasonably warned of known dangers.

It is the degree of danger involved, rather than the number of people affected, that is the determining factor. In *Davis v. Wyeth Laboratories, Inc.*,¹⁴ the Ninth Circuit refused to accept a straight statistical approach and noted:

When, in particular case, the risk qualitatively (*e.g.*, of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, medical or personal, the warning must be given.¹⁵

Another difference between the prescription drug industry and other manufacturers revolves around the means of transmitting the warning. In the area of prescription drugs, the manufacturer must channel its warning through physicians rather than directly to the consumer as is required in most other situations.¹⁶ This requirement is based on the feeling that the physician, rather than the patient, is best qualified to evaluate any warnings and make an intelligent decision as to the proper use of the drug.¹⁷

dangerous. . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

11 *Wright v. Carter*, 244 F.2d 53, 57 (2d Cir. 1957); *Merrill v. Beauté Vues Corp.*, 235 F.2d 893, 897 (10th Cir. 1956).

12 370 F.2d 82 (8th Cir. 1966).

13 *Id.* at 85. See *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963); *Wright v. Carter Products*, 244 F.2d 53 (2d Cir. 1957).

14 399 F.2d 121 (9th Cir. 1968).

15 *Id.* at 129-30. California has been more explicit: "In the case of a drug it has been held there is a duty to exercise reasonable care to warn of potential dangers from use even though the percentage of users who will be injured is not large." *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183, 193 (Dist. Ct. App. 1964).

16 RESTATEMENT (SECOND) OF TORTS § 388, comment *n* (1965). See *Sterling Products, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966); *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Dist. Ct. App. 1964). But see *Marcus v. Specific Pharmaceuticals, Inc.*, 191 Misc. 285, 77 N.Y.S.2d 508 (Sup. Ct. 1948).

17 *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Dist. Ct. App. 1963).

Although the court in *Yarrow* did not explore in depth the problem of the physician's negligence severing the chain of causation between the manufacturer and the user of the prescription drug, this has been an important issue in similar cases and perhaps deserved more attention in *Yarrow* as well. Should the intervening failure of the physician to learn of the

Once the duty is recognized, and the method of disseminating the alert defined, the question naturally arises as to what constitutes a reasonable warning. The proper standard was articulated in *Sterling Products, Inc. v. Cornish*,¹⁸ where the Eighth Circuit noted that the warning must reasonably be expected to apprise the prescribing doctor of the dangerous side effects connected with a drug:

If the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided.¹⁹

Drug manufacturers usually adhere to standard, industry-wide methods of communicating the necessary warnings to practitioners. These include the use of the *Physician's Desk Reference*, an annual advertising publication which lists information on drugs; "product cards" distributed to physicians; and other special warnings relayed to the medical profession. The use of standard industry-wide practices to discharge the manufacturer's obligation to warn has not always satisfied the courts, however. In *Blohm v. Cardwell Manufacturing Co.*,²⁰ the Tenth Circuit pointed out that although accepted industry-wide practices would be admissible into evidence to show that the manufacturer's warning had been

danger relieve the drug company of liability? Two different theories have been advanced in answer to this question.

The minority view is represented by a New York case, *Marcus v. Specific Pharmaceuticals*, 191 Misc. 285, 77 N.Y.S.2d 508 (Sup. Ct. 1948), holding that

[t]here is no reason to believe that a physician would care to disregard his own knowledge of the effects of drugs and hence the quantity to be administered, and substitute for his own judgment that of a drug manufacturer. Nor is there any reason to expect that if a doctor did choose to rely on the information given by the manufacturer he would prescribe without knowing what that information was. In the absence of any such grounds for belief there would be no negligence [on the part of the manufacturer]. *Id.* at 287, 77 N.Y.S.2d 509-10.

Hence the expertise of the doctor breaks the chain of causation making the physician's judgment an intervening factor and relieving the manufacturer of liability.

The majority and better view is reflected in *Sterling Products, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966), which held that the activities of the doctor were not pertinent. If the proper warning had been issued, the drug company would not be liable, regardless of the doctor's failure to pass the warning on to the patient.

There seems to be a split of authority as to whether a physician who had actual knowledge of the danger from a source other than the manufacturer, and failed to act on this knowledge, would negate the negligence of the manufacturer. A California appellate court found the doctor to be an intervening cause. *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Dist. Ct. App. 1963). But in a more recent case, *Schenebeck v. Sterling Drug, Inc.*, 291 F. Supp. 368 (E.D. Ark. 1968), the court reasoned from *Cornish* and held that it make no difference whether or not the physician had information from an independent source. If an adequate warning is not communicated by the drug manufacturer, the company is liable. The doctor is not an intervening cause merely because he did not utilize the knowledge he had from a different source.

18 370 F.2d 82 (8th Cir. 1966). There have been at least nine reported cases involving the drug Aralen. In addition to *Yarrow* and *Cornish* these include: *Basko v. Sterling Drug, Inc.*, No. 32669 (2d Cir., Oct. 7, 1969); *Kershaw v. Sterling Drug, Inc.*, No. 26394 (5th Cir., Aug. 15, 1969); *Schenebeck v. Sterling Drug, Inc.*, 291 F. Supp. 368 (E.D. Ark. 1968); *Bine v. Sterling Drug, Inc.*, 422 S.W.2d 623 (Mo. 1968); *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143 (Mo. 1967); *Oppenheimer v. Sterling Drug, Inc.*, 7 Ohio App. 2d 103, 219 N.E.2d 54 (1964); and *Cochran v. Brooke*, 243 Ore. 89, 409 P.2d 904 (1966).

19 *Sterling Products, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966).

20 380 F.2d 341 (10th Cir. 1967).

reasonable, they were in no way conclusive.²¹ In the words of one author: "It should be remembered . . . that occasionally an entire industry has been found lacking in ordinary care"²²

Similarly, although drug manufacturers are required by the Food and Drug Administration [FDA] to relay specific warnings for certain drugs, those warnings have also been considered minimal guidelines rather than conclusive evidence that the manufacturer exercised reasonable care in warning physicians about its products. In *Love v. Wolf*,²³ defendant Parke-Davis had issued a specific warning authorized by the FDA for the drug in question, but the California appellate court held the warning inadequate since it did not properly convey the seriousness of the drug's hazards. Parke-Davis had advertised and promoted the drug on a large scale after the dangers had been discovered, thus undermining the effect of the warnings that had been given. Hence, although the warnings had been widely distributed, they were inadequate because the gravity of the danger had been de-emphasized. In short, mere compliance with the FDA's warning requirement is not a complete defense. As the district court which decided *Stromsodt v. Parke-Davis & Co.*²⁴ held in approving a \$500,000 recovery in favor of a brain-damaged infant:

Although all of the Government regulations and requirements had been satisfactorily met in the production and marketing of Quadrigen, the standards promulgated were minimal. *The Defendant still owes a duty to warn* of dangers of which it knew or should have known in the exercise of reasonable care.²⁵ (Emphasis added.)

In the instant case, the Eighth Circuit reexamined the sufficiency of the industry's warning practices in determining whether Sterling had made a reasonable effort to alert Mrs. Yarrow's doctor of Aralen's dangerous side effects. Sterling had issued its warnings in three different ways: through the *Physician's Desk Reference [PDR]*;²⁶ through product cards;²⁷ and by use of a "Dear Doctor" letter, which it had mailed to every physician in the United States.²⁸ These methods had been approved, either expressly or impliedly,

21 *Id.* at 343. See *Colorado Milling & Elevator Co. v. Terminal R.R. Ass'n*, 350 F.2d 273, 278 (8th Cir. 1965); 2 J. WIGMORE, EVIDENCE § 461 (3rd ed. 1940).

22 Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 Sw. L.J. 43, 52 (1965). See Annot., 50 A.L.R.2d 898 (1955).

23 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Dist. Ct. App. 1964).

24 257 F. Supp. 991 (D.N.D. 1966), *aff'd*, 37 U.S.L.W. 2024 (8th Cir. June 9, 1969).

25 *Id.* at 997. See *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567 (E.D.S.C. 1965).

26 The warnings published in the *PDR* from 1958 until 1961 concerning the side effects of Aralen refer to "visual disturbances." There was no listing of Aralen in the *PDR* in 1962. In 1963, the warning included blurring of vision, corneal changes, and retinal changes that were rare and irreversible. In 1964, the warning was substantially the same, though containing more specifics regarding retinal change, which was still regarded as rare and irreversible. *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 163 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969).

27 The product card on Aralen in 1957 warned of blurring of vision as a side effect of Aralen. In 1959, the card warned of temporary blurring of vision and corneal changes, advising periodic eye examinations. In 1960, it warned of temporary blurring of vision, retinal vascular response, macular lesions, and again advised periodic eye examinations. The same warning was given in 1961, and in 1962 the card suggested trimonthly eye examinations. *Id.* at 163.

28 The "Dear Doctor" letter was headed "IMPORTANT DRUG PRECAUTIONS" and read as follows:

Dear Doctor:

in earlier suits against Sterling for injuries caused by Aralen. In 1964, an Ohio court of appeals held, in *Oppenheimer v. Sterling Drug, Inc.*,²⁹ that Sterling's use of the *PDR* and product cards to advise physicians of Aralen's side effects satisfied its duty to warn. In *Cornish*,³⁰ though the Eighth Circuit held that Sterling's use of the *PDR* and product cards was inadequate, the court did imply that the "Dear Doctor" letter may have constituted a sufficient warning had it been issued earlier. (The injury in *Cornish* was sustained before the letter was circulated.)³¹ In *Yarrow*, Sterling relied heavily on the "Dear Doctor" letter as evidence that it had made a reasonable effort to warn, but neither the district court nor the court of appeals accepted this. In the words of the district court:

Where the doctor is inundated with the literature and product cards of the various drug manufacturers, as shown here by the facts, a change in the literature or an additional letter intended to present new information on drugs to the doctor is insufficient. The most effective method employed by the drug company in the promotion of new drugs is shown to be the use of detail men; thus, the Court feels that this would also present the most effective method of warning the doctor about recent developments in drugs already employed by the doctor, at no great additional expense.³²

The recent experience of various investigators has shown that Aralen® (brand of chloroquine), used alone or as an adjunct to other drugs and therapeutic measures, may be very helpful in the management of patients with lupus erythematosus or rheumatoid arthritis. Although many physicians have found that the incidence of serious side effects is lower than that encountered with other potent agents that are often employed in such patients, certain ocular complications have sometimes been reported during prolonged daily administration of chloroquine. Therefore, when chloroquine or any other antimalarial compound is to be given for long periods, it is essential that measures be taken to avoid or minimize these complications.

Thus initial and periodic (trimonthly) ophthalmologic examinations (including expert slit-lamp, fundus and visual field studies) should be performed. The initial examination will reveal if any visual abnormalities, either coincidental or due to the disease, are present and will establish a base line for further assessment of the patient's vision. Should corneal changes occur (which are thought to be reversible and which sometimes even fade on continuance of treatment), the advantages of withdrawing the drug must be weighed in each case against the therapeutic benefits that may accrue from continuation of treatment (sometimes a severe relapse follows withdrawal). If visual disturbances occur—which are not fully explainable by difficulties of accommodation or corneal opacities—and particularly if there is any suggestion of visual field restriction or retinal change, administration of the drug should be stopped immediately and the patient closely observed for possible progression.

We should like to request your cooperation in reporting to Winthrop Laboratories or to the Food and Drug Administration any patients in your own practice who have developed impairment of vision or retinal change during or subsequent to the administration of chloroquine.

A reference card of a convenient size for filing is enclosed. It contains information on the various indications for Aralen (including lupus erythematosus, rheumatoid arthritis, malaria and amebiasis), dosage, side effects and precautions.

Very truly yours,
 WINTHROP LABORATORIES
 [signed] E. J. Foley, M.D.
 Vice President
 Medical Director

Letter from E. J. Foley to American physicians, undated, reprinted in *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 988 (8th Cir. 1969).

²⁹ 7 Ohio App. 2d 103, 219 N.E.2d 54 (1964).

³⁰ *Sterling Products, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966).

³¹ *Id.* at 84.

³² *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 163 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969).

Although affirming on appeal, the Eighth Circuit presented a somewhat different approach to the problem, deleting the proposition that the manufacturer was required to warn by the "most effective method":

Under the circumstances of this case, when the dangers of the prolonged use of this drug, mass produced and sold in large quantities, became reasonably apparent, it was not unreasonable to find that appellant should have employed all its usual means of communication, including detail men, to warn the prescribing physician of these dangers. In this connection, it is noted that no extraordinary means of giving a warning of high intensity was employed.³³

Though it attempted, the reviewing court never quite reconciled its holding with that of the trial court. Rather than being concerned with the "most effective method" of warning, the Eighth Circuit held that detail men must be used to relay information on a drug's potentially hazardous side effects to the physicians on whom they regularly call.³⁴ Because the circuit court refused to say that the lower court had erred, and nevertheless proceeded to make a different statement of the applicable law, there remains confusion as to what the courts will demand in the future.

In requiring that Sterling make use of its detail men in discharging its duty to warn, the Eighth Circuit appeared to be concerned with protecting the drug user from the sometimes lackadaisical posture of the powerful drug industry. If so, this would not be the first time that the drug industry's seeming lack of concern for its consumers had vexed the judiciary. For example, in *Love v. Wolf*³⁵ the California appellate court refused to hold that a manufacturer had made a reasonable effort to warn when the warning's effect had been diluted by widespread advertising and a somewhat blasé attitude on the part of the manufacturer toward the great dangers of the drug.³⁶ The court in *Yarrow* appeared to be similarly disturbed by Sterling's attitude and the lack of a serious effort on its part to make known the dangers in Aralen.

In essence, *Yarrow* demands that detail men be used as advisors to the physicians with whom they regularly meet, rather than merely as fast-talking salesmen. The question therefore arises as to how far the courts can go in trying to achieve this type of arrangement; how far they can go to require a manufacturer to seemingly discourage the use of his product.

33 *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 992 (8th Cir. 1969).

34 *Id.* It is interesting to query as to whether or not these warnings would be considered a reasonable effort to warn a physician who was not regularly called upon by a detail man. If so, are they then a sufficient warning in themselves? If not, is the court really holding that the drug company must personally contact each physician to issue these warnings? It seems difficult to hold that the same efforts are in one case reasonable, and in another unreasonable, merely because the physician is or is not regularly called upon by a detail man. Reply Brief for Appellant at 3-4, *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978 (8th Cir. 1969).

35 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Dist. Ct. App. 1964).

36 *Id.* at —, 38 Cal. Rptr. at 195. The court was concerned over the large volume of business that Parke-Davis did with this drug. Sales totalled \$68 million in 1961, which was about one-third of Parke-Davis's total volume at that time. The possible connection between the importance of the drug to the company's financial status and its failure to communicate the real danger involved with the drug deserves notice. *Id.*

Both legal and extralegal sources are focusing on this question. In a district court decision involving the dangers of Enovid, a birth control drug, the jury recommended that in the future information released by the drug manufacturer concerning the dangers involved with the drug should be communicated to the patients as well as to the physicians.³⁷ A similar suggestion has been made to physicians in California by a malpractice insurer,³⁸ and, of course, the imposition of strict liability is being urged.³⁹ By providing that a manufacturer's detail men must inform physicians of a drug's risks as well as its benefits, *Yarrow* has enabled the physician to make a more informed decision. For this reason the case may deservedly be pointed to as a major step along the path to better protection for the drug user.

Thomas L. Dueber

CONSTITUTIONAL LAW — ELECTIONS — COLORADO SIX-MONTH RESIDENCY REQUIREMENT FOR VOTING IN PRESIDENTIAL ELECTION IS NOT A DENIAL OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT. — In June of 1968, Richard Hall and his wife and children moved from California to Colorado Springs, Colorado, where Hall had become permanently employed.¹ The Halls purchased a home in the city, registered their car in Colorado, and obtained Colorado driver's licenses, intending to reside permanently within the state.

Near the beginning of August, Hall went to the office of the County Clerk and Recorder for El Paso County (the county in which Colorado Springs is located) in order to register for the November election. The clerk informed him that Colorado law required voters to reside in the state for six months prior to an election,² and that although the Halls were both citizens of the United States and over twenty-one years of age, they would not be permitted to register. The clerk suggested that Hall might obtain an absentee ballot from California.

Hall, following the clerk's advice, wrote the County Clerk of Contra Costa County, California, where he had been registered to vote before moving to Colorado, and requested absentee ballots for himself and his wife. Hall was informed

³⁷ BUS. WEEK, May 24, 1969, at 44.

³⁸ 10 MEDICAL WORLD NEWS, June 20, 1969, at 4.

³⁹ The Ninth Circuit declined to take the "great leap" as recently as 1968. *See Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 126 (9th Cir. 1968).

¹ This statement of facts is taken from the court's opinion and from Brief for Plaintiff at iii-iv, *Hall v. Beals*, 292 F. Supp. 610 (D. Colo. 1968).

² COLO. REV. STAT. ANN. § 49-24-1 (1963) reads:

Eligibility of new resident to vote.—Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors.

This statute provides an exception to COLO. REV. STAT. ANN. § 49-3-1 (1963), which requires one year of residency in order to vote in any state election.

COLO. REV. STAT. ANN. § 49-24-1 (1963) was amended on April 23, 1969. The six-month requirement was reduced to two months.

by the clerk, however, that he and his wife could not vote in California since they were no longer residents of that state.³

Hall then sent a letter to the Secretary of State of California on August 13, 1968, explaining that he and his wife would not be allowed to vote in Colorado because of that state's residency requirement. He conveyed his request that he and his wife be allowed to vote for President and Vice-President of the United States on the California ballot. On August 28, the Secretary replied to Hall's letter and advised that the request could not be granted since neither Hall nor his wife were California residents.

Persevering, Hall wrote a letter to the Secretary of State of Colorado asking that he and his wife be allowed to vote in the November election despite the residency requirement. The letter stated that the Halls desired only to vote for the President and Vice-President of the United States and that they need not be given ballots to vote for any other candidates or issues. On September 6, the Colorado State Election Office denied the Halls' request.

Having fruitlessly pursued all available administrative remedies, the Halls brought suit on October 4, 1968, in the United States District Court for the District of Colorado, seeking to have section 49-24-1 of the Colorado Code declared unconstitutional insofar as it imposes a six-month residency requirement as a condition of voting in a presidential election. A three-judge court, relying on *Drueding v. Devlin*,⁴ held: residency requirements for elections are not so unreasonable as to amount to an irrational discrimination and thus are not prohibited by the equal protection clause of the fourteenth amendment. *Hall v. Beals*, 292 F. Supp. 610 (D. Colo. 1968), *prob. juris. noted*, 394 U.S. 1011 (1969).

Article II, section 1 of the Constitution provides that the President and Vice-President of the United States shall be chosen by electors from each state, who shall be appointed "in such Manner as the Legislature thereof may direct." This clause gives the states broad power to choose the method by which they appoint their electors.⁵ But if a state decides to choose its electors by popular vote, any alleged infringements of a citizen's right to vote are subject to careful and meticulous scrutiny by the courts.⁶ As the Supreme Court pointed out in *Reynolds v. Sims*,⁷ "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of

3 29A CAL. ELECTIONS CODE § 14286 (West 1961) provides: "If a person removes to another state with the intention of making it his residence, he loses his residence in this State." With this loss of residence one cannot be registered as a voter in California. 29 CAL. ELECTIONS CODE § 321 (West 1961).

4 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

5 Mr. Chief Justice Fuller, in his opinion for a unanimous court in *McPherson v. Blacker* wrote:

The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

The opinion also discusses various methods which the states have used in the past to select electors.

6 *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969).

7 377 U.S. 533 (1964).

representative government."⁸ And also in *Wesberry v. Sanders*,⁹ the Court noted that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."¹⁰

Though the courts will review a state's election procedures in order to safeguard the integrity of the franchise, this has never been held to forbid states from imposing reasonable and nondiscriminatory qualifications upon a citizen's right to vote.¹¹ Obvious examples of such legitimate qualifications are age and United States citizenship; and historically, the courts have always considered residency requirements to be reasonable qualifications which a state may place upon the right to vote.¹² This attitude was clearly demonstrated in *Drueding v. Devlin*.¹³ In that case, the plaintiffs sought to have declared unconstitutional a Maryland statute which prohibited a resident of the state from voting in the presidential election or any other election unless he had resided within the state for one year. A three-judge district court, referring to several Supreme Court decisions,¹⁴ held:

The several states may impose age, *residence* and other requirements, so long as such requirements do not discriminate against any class of citizens by reason of race, color or other invidious ground and are not so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵ (Emphasis added.)

The court went on to state that Maryland's one-year requirement was not so unreasonable as to amount to an irrational discrimination against new residents because (1) the requirement protected the state against fraud by assisting in the identification of the voter, and (2) a year's residence assured that the voter would be a member of the community with a personal interest in its affairs.¹⁶ Since "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,"¹⁷ the court felt compelled to dismiss the plaintiffs' complaint. The Supreme Court affirmed the decision *per curiam* in 1965.¹⁸

It has been suggested by one author that the authoritative value of the

⁸ *Id.* at 555.

⁹ 376 U.S. 1 (1964).

¹⁰ *Id.* at 17.

¹¹ *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

¹² *Carrington v. Rash*, 380 U.S. 89 (1965); *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

¹³ 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

¹⁴ *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 734-39 (1964); *Davis v. Mann*, 377 U.S. 678, 690-93 (1964); *Reynolds v. Sims*, 377 U.S. 533, 554-68 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186, 207-09 (1962); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959).

¹⁵ *Drueding v. Devlin*, 234 F. Supp. 721, 723 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

¹⁶ *Id.* at 724.

¹⁷ *Id.*, quoting from *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

¹⁸ 380 U.S. 125 (1965). Three cases in state courts have defined a "per curiam" opinion. All describe it as an opinion of the court in a case in which the judges are all of one mind, and the question involved is so clear that it is not considered necessary to elaborate on it by an extended discussion. Lack of discussion does not detract from the authoritative value of the decision. See *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49, 50 (Fla. 1956); *Minor v. Fike*, 77 Kan. 806, 808, 93 P. 264 (1907) (Smith, J., dissenting); *Clarke v. Western Assurance Co.*, 146 Pa. 561, 570, 23 A. 248, 249 (1892).

Supreme Court's action in the case is weakened because the Court knew that Congress was then considering legislation in the area of voting rights (i.e., the resulting Voting Rights Act of 1965).¹⁹ The same author explains that the Court may have simply considered a thorough review of the entire area inappropriate at that date.²⁰ Interesting and plausible though this speculation may be, *Drueding* carries no less weight as authority in the lower federal courts.²¹ Therefore, when the plaintiffs in *Hall* sought to have the Colorado residency requirement declared unconstitutional, the district court felt bound to deny relief on the basis of *Drueding*.

Residency requirements have been in existence since shortly after our nation was founded. They were created in order to protect against fraud, as no adequate means of voter identification were then available, and they served to ensure that the voter would be familiar with the issues on which the community was voting.²² Today, though the reasons for applying these requirements in presidential elections have vanished, and though they are openly criticized by legal scholars,²³ the states uniformly retain them. The very courts which continue to sustain the validity of such legal anachronisms have occasionally joined the mounting chorus of dissent. Consider, for example, the district court's closing remarks in *Drueding*, after the decision upholding the Maryland statute was announced: "Plaintiffs herein may take some comfort, however, in the fact that they have set in motion the procedures for what appears to be a desirable reform."²⁴ Even more remarkable is the closing footnote in the *Hall* opinion: "The members of the Court recognize the unfairness and injustice in depriving the plaintiffs of their vote. However, we are powerless to remedy this since we must follow the law."²⁵

In addition to these judicial expressions of distaste for the residency requirement, a desire for reform has been evidenced by the introduction of several bills in Congress designed to allow new state residents to vote in presidential elections.²⁶ Moreover, the American Bar Association actively encourages extension of the franchise to new residents in presidential elections,²⁷ while the National

19 42 U.S.C. § 1973 (Supp. III, 1968).

20 Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567, 623-26 (1966).

21 See note 18 *supra*.

22 For a brief history of residency requirements and their origins in this country, see Note, 1962 ILL. L.F. 101, 102 (1962).

23 See, e.g., UNIFORM VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS ACT, Commissioners' Prefatory Note, 9C U.L.A. 199 (Supp. 1967); Harvith, *supra* note 20, at 623-26; Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823 (1963); Note, 1962 ILL. L.F. 101 (1962); Note, 43 IND. L.J. 901 (1968); 77 HARV. L. REV. 574 (1964); 18 VAND. L. REV. 337 (1964).

24 *Drueding v. Devlin*, 234 F. Supp. 721, 725 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

25 *Hall v. Beals*, 292 F. Supp. 610, 615 n.8 (D. Colo. 1968), *prob. juris. noted*, 394 U.S. 1011 (1969).

26 For a summary of the bills which led the National Conference of Commissioners on Uniform State Laws to consider and finally adopt the Uniform Voting by New Residents in Presidential Elections Act, see UNIFORM VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS ACT, Commissioners' Prefatory Note, 9C U.L.A. 199 (Supp. 1967).

27 AMERICAN BAR ASSOCIATION, ELECTING THE PRESIDENT, A REPORT OF THE COMMISSION ON ELECTORAL COLLEGE REFORM 12-13 (1967). The Commission's recommendations were approved by the American Bar Association's House of Delegates on February 13, 1967. *Id.* at iv.

Conference of Commissioners on Uniform State Laws has adopted and promoted the Uniform Voting by New Residents in Presidential Elections Act.²⁸

Scholarly and popular sentiment aside, the legal arguments for the invalidity of residency requirements are (1) that such requirements may deny new residents equal protection of the laws in violation of the fourteenth amendment, and (2) that residency statutes penalize those who exercise their constitutional right of freedom to travel by taking away their presidential ballot.

Although the states have broad powers to regulate the selection of electors, the Supreme Court has continually asserted that:

[T]hese granted powers [given the states in article II] are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. . . . [W]e must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions.²⁹

Thus, if residency requirements do deprive new residents of a state of the equal protection of the laws, or do penalize new residents for exercising their right to travel, then the courts have the power to step in and restrain the states from placing such qualifications on the franchise.³⁰

In order to determine whether a state law deprives citizens of equal protection of the laws, the Supreme Court has laid down the following rule: "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."³¹ This phrase, "invidious discrimination,"³² has become the Supreme Court's constitutional catchword in the equal protection area.³³ Traditionally, the test of whether or not a statute "invidiously discriminates" has been as follows:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and

28 The Act was approved in 1962 by the Conference of Commissioners on Uniform State Laws and the American Bar Association. UNIFORM VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS ACT, 9C U.L.A. 198, 199-202 (Supp. 1967).

29 *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

30 *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. *Id.* at 347. This statement has been cited with approval in *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); and *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

31 *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

32 The Supreme Court has left the term "invidious discrimination" undefined. The Ninth Circuit has defined it as "a classification which is arbitrary, irrational, and not reasonably related to a legitimate purpose." *Sims v. Eymann*, 405 F.2d 439, 444 (9th Cir. 1969). The *Sims* court claims to have derived the definition from the Supreme Court case of *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Although a close reading of *McLaughlin* in no way limits the term to this definition, the *Sims* definition does seem in line with past holdings of the Supreme Court, and serves as a good general guideline.

33 *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 638 n.20 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Avery v. Midland County*, 390 U.S. 474 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

avoids what is done only when it is *without any reasonable basis* and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it *does not rest upon any reasonable basis*, but is essentially arbitrary.³⁴ (Emphasis added.)

Thus, a statute which discriminates between classes of individuals does not offend the Constitution as long as the classification has "any reasonable basis."

The "any reasonable basis" test, however, is eliminated in some situations by the decision in *Shapiro v. Thompson*.³⁵ According to the Court in *Shapiro*, the traditional equal protection tests do not apply when the classification (i.e., the discrimination) touches on a "fundamental right." In these instances, the "constitutionality [of the statute] must be judged by the stricter standard of whether it promotes a *compelling* state interest."³⁶ A mere showing of a "reasonable basis" for the statute will be insufficient in these instances. This particular innovation³⁷ in constitutional law is certainly salutary, for strict adherence to the traditional "any reasonable basis" test may often be inadequate to protect important rights. Logical reasons can be contrived for almost any law, no matter how unnecessary that law may be, and no matter how much it may infringe upon the constitutionally protected rights of a class of citizens.

The holding in *Shapiro* raises the question whether the alleged discrimination in *Hall* must be examined under the new "compelling interest" test. According to *Shapiro*, the new test will have to be applied if the right to vote is a "fundamental right." In the 1886 case of *Yick Wo v. Hopkins*,³⁸ the Supreme Court declared that "[voting] is regarded as a fundamental political right, because preservative of all rights."³⁹ And in *McDonald v. Board of Election Com-*

34 *Morey v. Doud*, 354 U.S. 457, 463-64 (1957), quoting from *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

35 394 U.S. 618 (1969).

36 *Id.* at 638.

37 The "compelling interest" test had been used by the Supreme Court a few months prior to *Shapiro* in *Williams v. Rhodes*, 393 U.S. 23 (1968), a case in which the Court declared unconstitutional an Ohio statute requiring a new political party to obtain petitions signed by 15% of the qualified voters in the last gubernatorial election in order to be placed on the ballot. In *Williams*, the Court rejected Ohio's argument that it had the power under article II, section 1, of the Constitution to impose such a requirement on new political parties, declaring that "[t]he State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate." *Id.* at 31. Although the "compelling interest" test had been used earlier, it was not until *Shapiro* that the Court detailed when this new test was to be applied in place of the traditional "any reasonable basis" test.

38 118 U.S. 356 (1886).

39 *Id.* at 370. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court noted:

Undoubtedly, the right of suffrage is a *fundamental matter* in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Id.* at 561-62 (emphasis added).

Accord, *Kramer v. Union Free School District No. 15*, 89 S.Ct. 1886, 1889 (1969).

missioners,⁴⁰ decided one week after *Shapiro*, the Court directly confronted the question whether the right to vote is a "fundamental right," and, if so, whether the "compelling state interest" test should be applied to alleged discriminations regarding the right.⁴¹ Dicta in the opinion clearly emphasize that the right to vote is a "fundamental right" and implies that the "exacting approach" of the "compelling interest" test would be applicable to infringements on the right.⁴² The Court did not actually apply the test in this particular case, however, because the discrimination complained of did not affect the appellant's ability to exercise his right to vote.⁴³

Any doubts which may have survived the *McDonald* case were finally laid to rest in *Kramer v. Union Free School District No. 15*,⁴⁴ decided June 16, 1969. In *Kramer*, the Court unequivocally declared:

[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a *compelling state interest*. (Emphasis added.)⁴⁵

The New York statute challenged in *Kramer* provided that only those qualified voters who owned (or leased) taxable property within the school district, or were parents of children enrolled in local public schools, would be allowed to vote in school board elections. The Court held that this discrimination was not justified by any compelling state interest.⁴⁶

It is clear that voting is a fundamental right and that the compelling interest test must be applied to determine if any alleged infringement of the right is a violation of equal protection. It is equally clear that the decisions prior to *Shapiro* applied the traditional "any reasonable basis" test in holding that residency requirements did not clash with the equal protection clause.⁴⁷ Since satisfaction of this earlier test does not at all imply satisfaction of the new compelling interest test, one must conclude that none of the earlier cases constitutes binding precedent to justify the summary dismissal of the important question presented in *Hall*.

In addition to establishing a new test in the area of equal protection, *Shapiro* set out guidelines for determining whether or not a statute unconstitutionally hinders a citizen's freedom to travel. In that case, welfare applicants challenged the constitutionality of several state statutory provisions which required welfare applicants to reside within the state. The welfare applicants, in addition to their equal protection argument, contended that the classification

40 394 U.S. 802 (1969).

41 *Id.* at 806-807.

42 *Id.* at 807.

43 *Id.*

44 89 S. Ct. 1886 (1969).

45 *Id.* at 1890.

46 *Id.* at 1892-93. In *Cipriano v. City of Houma*, 89 S. Ct. 1897 (1969), the Court held unconstitutional a Louisiana statute limiting the vote to property taxpayers in a municipal bond approval election. The state had asserted that property taxpayers had a special pecuniary interest in the issuance of bonds for improvement of public utilities. The Court held that this was not a sufficient justification for the vote limitation since all utility users in the city pay utility rates which would be affected by the bond issue. *Id.* at 1900.

47 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966); *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); *Drueding v. Devlin*, 234 F. Supp. 721, 723 (1964), *aff'd mem.*, 380 U.S. 125 (1965).

unconstitutionally restricted their right to travel freely among the states. The Supreme Court agreed:

[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.⁴⁸

Thus, in the light of the *Shapiro* guidelines, the state of Colorado would have been required to prove that its six-month residency requirement serves a *compelling* state interest.

In the district court, Colorado contended that there were two reasons for the residency requirement:⁴⁹ (1) it serves to prevent the control of state affairs by persons who have no pecuniary interest in those affairs, and (2) it preserves the purity of elections by aiding in the identification of voters, thereby preventing fraud. These reasons, however, are not *compelling* reasons for disenfranchising new residents who seek only to vote in a presidential election. The first "reason" was dispatched by the district court: "[T]he purpose mentioned [prevention of control of state affairs by disinterested voters] . . . has no application in this case since the plaintiffs want to vote only in the presidential election"⁵⁰ A presidential election is not a statewide election such that only permanent residents are sufficiently educated as to the issues or will take an interest in the outcome of the contest. Citizens of one state are as knowledgeable as citizens of other states regarding the qualifications of the presidential candidates. Each voter will have an interest in the outcome of the presidential election even if he intends to move to another state immediately after casting his ballot.

Concerning the second justification offered for the residency requirement — that of preserving the purity of election and preventing fraud — the *Hall* court approvingly commented:

[T]he State's interest in preserving the purity of its elections is very much present. Some time limit must be set for determining who is and who is not a resident of Colorado for the purposes of voting, not only to preserve the purity of the election, but also for administrative reasons.⁵¹

A similar argument was asserted in *Shapiro* in support of residency requirements for welfare applicants. There, the states involved asserted that residency requirements acted as a safeguard against fraud by serving as a check in determining who was and who was not a resident of the state.⁵² The residency requirement, they contended, greatly diminished the possibility of an applicant registering for welfare in his old as well as his new state. The Supreme Court, however, rejected this reason as not compelling. While recognizing that a state has a legitimate interest in preventing fraud, the Court observed that a residency requirement is not necessary in order to prevent such fraud in modern society:

48 *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

49 *Hall v. Beals*, 292 F. Supp. 610, 614 (D. Colo. 1968), *prob. juris. noted*, 394 U.S. 1011 (1969).

50 *Id.*

51 *Id.*

52 *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

"Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year."⁵³

The logic of the holding in *Shapiro* would apply equally well in *Hall*. Colorado certainly is not *compelled* to use the residency "blunderbuss" as a check against fraudulent voting by new residents. Other quick and economical methods of preventing such fraud are readily available and would impose no great burden upon Colorado in today's society. When first adopted, Colorado's residency requirements may have served a compelling interest in that no other effective means of preventing fraud were then available. (The telephone was nonexistent while mail service was slow and undependable.) But today the compelling nature of the residency requirement has vanished. Whether a person is registered to vote at his old residence can be quickly determined by letter or by a simple telephone call to the voter registration office in the area where the voter last resided.

Of course, Colorado could contend that checking whether new residents are registered to vote elsewhere results in extra administrative work, and indeed the district court in *Hall* pointed out that the residency requirement is useful "for administrative reasons."⁵⁴ This same contention had been raised in *Carrrington v. Rash*.⁵⁵ There the state of Texas, by a provision of its constitution, sought to prohibit any member of the armed services from voting within the state if such person had moved his home to Texas while on active duty. Texas argued that, by allowing members of the armed forces to be considered residents for purposes of voting, an extra administrative burden would be imposed upon the state. The Supreme Court rejected this argument, however, holding that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."⁵⁶ The Court also rejected a similar argument in *Shapiro*.⁵⁷

While residency requirements for voting in presidential elections may have served state interests in the horse-and-buggy era, the reasons advanced in their defense have become outdated as American life has progressed. Times have changed. In today's mobile society communications are tremendously improved. Statutes which may have been constitutional in early American society must change or yield as the reasons underlying them change. As the Supreme Court noted in *Harper v. Virginia Board of Elections*:⁵⁸

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions

53 *Id.* at 637.

54 *Hall v. Beals*, 292 F. Supp. 610, 614 (D. Colo. 1968), *prob. juris. noted*, 394 U.S. 1011 (1969).

55 380 U.S. 89 (1965).

56 *Id.* at 96.

57 *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1969).

58 383 U.S. 663 (1966).

of what constitutes equal treatment for purposes of the Equal Protection Clause *do change*.⁵⁹ (Footnotes omitted.)

The tenor of the times now requires that residency requirements for voting in presidential elections be eliminated, for compelling state interests that may have been served in the past by such requirements have vanished from the American scene.⁶⁰

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⁵⁹ *Id.* at 669.

⁶⁰ In a statement presented June 26, 1969, by Attorney General John N. Mitchell to Subcommittee No. 5 of the House Judiciary Committee, it was emphatically stated that we must have "[a] nationwide ban on state residency requirements for Presidential elections." The Attorney General pointed out that:

Our society is mobile and transient. Our citizens move freely within states and from one state to another. According to the Bureau of the Census, in reference to the 1968 Presidential election, more than 5.5 million persons were unable to vote because they could not meet local residency requirements.

A residency requirement may be reasonable for local elections to insure that the new resident has sufficient time to familiarize himself with local issues. But such requirements have no relevance to Presidential elections because the issues tend to be nationwide in scope and receive nationwide dissemination by the communications media. The President is the representative of all the people and all the people should have a reasonable opportunity to vote for him. Statement of John N. Mitchell on H.R. 4249 Before a Subcomm. of the House Comm. on the Judiciary, 91st Cong., June 26, 1969 (the hearings are as yet unpublished).