

Written Testimony of Professor James F. Blumstein

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Testimony of Professor James F. Blumstein

Vanderbilt Law School -- September 5, 2019

***Dunn v. Blumstein*: Litigation Experiences and Lessons**

I plan to discuss my experiences in successfully bringing *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the lessons I want to share from that experience. The case challenged Tennessee's one-year in-state durational residency for voter registration and Tennessee's 90-day in-county durational residency for voter registration. In 1972, the Supreme Court (on a vote of 6-1) held both durational residency requirements unconstitutional as a violation of equal protection. The system of voter registration was considered by the Court a sufficient guard against voter fraud, allowing the Court to invalidate the durational residency requirements – justified as protecting against voter fraud -- as an unnecessary restriction on the franchise.

My recollection is that Census data showed that about 3.3% of persons moved interstate each year and another 3.3% of persons moved from county to county. So, that indicates that about 6.6% of potential voters were disenfranchised each year as a result of the durational residency requirements. I believe, therefore, that *Dunn v. Blumstein* likely enfranchised more voters than any other single case.

An important take-away is that taking claims of voter fraud seriously is important. Providing credible and effective safeguards against voter fraud allows for courts and policymakers to undo unnecessary voting restrictions that are targeted at voter fraud but that can be relaxed when other, serious safeguards against voter fraud are in place.

A New York Yankee in Tennessee Court

Soon after joining Vanderbilt's Law faculty, James Blumstein brought a voting rights lawsuit against the State of Tennessee that reached the Supreme Court.

James Blumstein still becomes indignant when he recalls his first attempt to register to vote after moving to Tennessee in 1970. A newly minted Yale Law graduate and native New Yorker, Blumstein had moved to Nashville in mid-June after accepting a position on Vanderbilt's law faculty. "Vanderbilt had summer classes back then, and I taught summer school that year," he recalled.

But when Blumstein tried to register to vote on July 1 in hopes of voting in Tennessee's August 6 primary, an election official blandly rebuffed him. Under Tennessee law, people moving into the state from elsewhere in the U.S. could not register to vote until they had lived in Tennessee for one year, and there was a separate three-month residency requirement for Tennessee counties.

Blumstein took his complaint to the Davidson County Election Commission, which informed him that the durational residency requirement was mandatory.

Frustrated at being disenfranchised for a year by what he viewed as an unconstitutional law, Blumstein filed suit against the state, claiming that Tennessee's durational residency requirement violated the Equal Protection Clause of the Fourteenth Amendment. He also insisted on filing a provisional ballot in a sealed envelope—now a federal requirement when an individual's voting rights are disputed, but a process he "invented on the spot" so his vote could be counted if his suit prevailed.

Blumstein had not yet been admitted to the Tennessee Bar when he argued his case before a panel of three federal judges in late July. The panel made it clear that it would order Blumstein's vote counted in the August 6 primary. However, Judge Frank Gray noted that Blumstein's challenge to the three-month requirement would be moot by the time November elections rolled around. Blumstein countered that, as a representative of a class of voters disenfranchised by Tennessee's durational residency requirements, none of his challenges were moot, citing the doctrine of

"capable of repetition, yet evading review."

The two sparred until "Judge Gray became so irritated he threw his glasses down," Blumstein recalled. "When the judge throws his glasses down on his desk, that is not a good sign!" When Blumstein returned to his office, he detailed his argument in a 16-page memo, which he submitted to the court. "I learned much later that Judge Gray had drafted an opinion holding the three-months issue moot, but changed his mind after reading that memorandum," Blumstein said. "But in his opinion, Judge Gray chided me for even being concerned about the mootness problem, pointing out the doctrine of 'capable of repetition, yet evading review.'"

Blumstein learned he had won the case in early September from a radio

news story while driving back to Nashville after visiting family in Pennsylvania and New York. In the mail that had accumulated while he was away, he found letters informing him of his passing the Tennessee Bar and of his victory in the voting rights case. "It was my best mail day ever," he said.

The task of developing a plan to inform Tennesseans that they no longer had to satisfy a durational residency requirement to vote fell to Blumstein and the state's Attorney General, David Pack. Using census data, Blumstein had discovered that approximately 3.3 percent of Tennessee residents were disenfranchised by the one-year requirement and another 3.3 percent by the three-month requirement. Most were highly educated professionals. "After we went over the data and the communication plan, I asked David if he was going to appeal," Blumstein recalled. "He said, 'I don't know. I feel an obligation to support the law of Tennessee, but we're fencing out a lot of people who should be voting.'" Then Blumstein opened the door of Pack's office at the State Supreme Court building to leave, and the pair found themselves facing a small battalion of reporters, cameramen and flood lights.

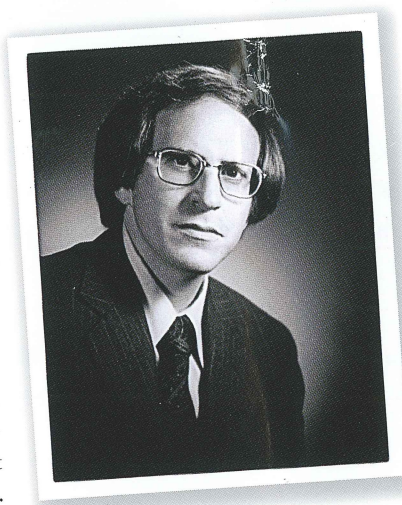
The story of the brash young Yankee law

professor filing a lawsuit against the state less than two months after moving to Nashville had made headlines in daily papers and become a staple of local television news. Blumstein even received a death threat, after which he begged the *Tennessean* reporter covering the story to stop publishing his address in every dispatch, then the paper's common practice. However, both men were caught off guard by the eager knot of correspondents outside Pack's office. "A reporter stuck a microphone in David Pack's face and asked if he was going to appeal," Blumstein recalled. "He made his decision on the spot. He said, 'I'm going to fight it all the way to the Supreme Court.'"

On November 16, 1971, Blumstein appeared before the High Court to argue *Dunn v. Blumstein*. At 26, he became the first of his Yale Law classmates to argue a case before the Supreme Court. In fact, *Dunn v. Blumstein* was his first case ever. The Court's 6-1 ruling in his favor was written by Justice Thurgood Marshall and announced on March 21, 1971. It held that Tennessee's durational residency requirements for voting violated the Equal Protection Clause "as they are not necessary to further a compelling state interest." Blumstein had not expected to get Justice Harry Blackmun's vote, but the only dissenting vote came from Chief Justice Warren Burger. However, Justice Blackmun wrote a concurring opinion in which "he needled me for launching what he disparagingly called a test case," Blumstein said.

The opening paragraph of Justice Blackmun's opinion "concurring in the result" of *Dunn v. Blumstein* read as follows: "Professor Blumstein obviously could hardly wait to register to vote in his new home State of Tennessee. He arrived in Nashville on June 12, 1970. He moved into his apartment on June 19. He presented himself to the registrar on July 1. He instigated his lawsuit on July 17. Thus, his litigation was begun 35 days after his arrival on Tennessee soil, and less than 30 days after he moved into his apartment. But a primary was coming up on August. 6. Usually, such zeal to exercise the franchise is commendable. The professor, however, encountered—and I assume, knowingly so—the barrier of the Tennessee durational residence requirement and, because he did, he instituted his test suit."

—Grace Renshaw



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Tenn. 1-year residency rule violated Constitution, March 21, 1972

By Andrew Glass
March 21, 2012 04:47 AM EDT

On this day in 1972, the U.S. Supreme Court found that Tennessee's one-year minimum residency rule for voters violated the Constitution's Equal Protection Clause. Six members of the high tribunal voted to vacate the requirement. Chief Justice Warren Burger dissented while two justices, Lewis Powell and William Rehnquist, recused themselves.

The class action suit was brought by James Blumstein, who arrived in Nashville on June 12, 1970, as a freshly minted graduate of Yale Law School. After moving into his apartment on June 19, he tried to register on July 1 in hopes of voting in Tennessee's Aug. 6 primary. Blumstein, having been hired by Vanderbilt University as an assistant law professor, filed his "test" lawsuit 35 days after arriving in Tennessee in an ultimately successful bid to knock down its yearlong voting barrier.

When the issue came before the Supreme Court on Nov. 17, 1971, Blumstein, who had edited the prestigious Yale Law Journal, appeared before the tribunal on his own behalf. The case is known in judicial annals as *Dunn v. Blumstein* because Winfield Dunn was Tennessee's governor at the time.

Thurgood Marshall, in his 6,200-word majority opinion, accompanied by 31 footnotes, did not see "a compelling state interest" in denying Blumstein the right to vote, "concluding that Tennessee has not offered an adequate justification for its durational residence laws." The problem, Marshall wrote, is that they "exclude too many people who should not, and need not, be excluded."

In a 210-word dissent, Burger wrote that "it is no more a denial of equal protection for a state to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting."

"Some lines must be drawn," Burger concluded.

SOURCE: *DUNN v. BLUMSTEIN*, 405 U.S. 330 (1972)

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