Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning

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by

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Introduction

As the cost of obtaining an education at public universities in the United States annually rises, a state school education is no longer the affordable alternative it once was. It is simply a less expensive possibility. At the graduate level especially, the costs of earning a degree have grown prohibitively large, affecting not only the career paths of many students, but also their decision to enroll in the first place. While attending a public university in one’s own state is still the most cost-effective path to graduate education, state residency requirements for reduced tuition operate as a deterrent to prospective students who wish to attend a public university in one state, but currently reside in another state.

The constitutionality of residency requirements at public universities is an issue that the United States Supreme Court has not adequately and thoroughly addressed. While the Supreme Court has examined residency requirements in a variety of other contexts, such as state laws with respect to welfare benefits,¹ revenue refunds,² medical care,³ divorce,⁴ and voting rights,⁵ it has not provided a clear framework for the scope of a constitutionally permissible tuition requirement. In fact, the last time the Supreme Court determined the constitutionality of a tuition residency requirement was almost thirty

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years ago, in *Vlandis v. Kline*, when it held that a “permanent irrebuttable presumption of nonresidence” violates the Due Process Clause. Since *Vlandis*, many states have simply modified their requirements and continue to impose residency standards on out-of-state students that, although permissible under *Vlandis*, are inequitable and arguably unconstitutional under more recent jurisprudence. The time has come for the Supreme Court to redefine its nebulous directive that a state has the right to “impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status.”

Exactly what qualifies as a “reasonable” durational residency requirement is unclear. For example, California permits college students who enroll as nonresidents to establish bona fide residency while enrolled, and if they can prove they have maintained their residency for one year, while meeting other conditions, they may qualify for lower, in-state tuition. The California Education Code (“Code”) provides that “[a] student who has been entirely self-supporting and actually present in California for more than one year immediately preceding the residence determination date, with the intention of acquiring a residence therein,” shall be classified a resident, “until he or she has resided in the state for the minimum time necessary to become a resident.” The Code also provides three additional criteria that help to determine whether a student is financially independent (or self-supporting): in the year of the reclassification or the preceding three years, the student must not have been (1) claimed as an exemption by his parents on federal or state taxes, (2) received more than seven hundred and fifty dollars in financial assistance, or (3) lived in the home of his parents.

On its face, the California requirement appears to be temporary and rebuttable, and thus would be constitutionally permissible under *Vlandis*. On the other hand, an argument can be made that the California statute is actually unconstitutional because its requirements are arbitrary and unreasonable in the sense that a student can establish bona fide residency and an intent to remain in the state after graduation without living in the state for one year. This Note will examine the constitutionality of durational residency requirements for preferred tuition like the one in California. This Note analyzes the judicial treatment of state residency requirements

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7. *Id.* at 452.
9. *Id.* § 68071.
10. *Id.* § 68044.
under the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment. Juxtaposing the California statute against those decisions, this Note will argue that, despite the generally accepted notion that such requirements are constitutionally permissible, any durational residency requirement for in-state tuition at a public university is unconstitutional.

I. Durational Residency Requirements for In-State Tuition and the Due Process Clause

A. Vlandis v. Kline

Although the Supreme Court's modern analysis of residency requirements began, chronologically, with an Equal Protection analysis, the first case addressing the specific issue of tuition residency requirements was decided on Due Process grounds.

In Vlandis v. Kline, two University of Connecticut students sued under the Civil Rights Act of 1871, contending that they were bona fide residents of Connecticut, and the State's classification of them as permanent non-residents infringed their Fourteenth Amendment Due Process and Equal Protection rights. Because their legal residence was out-of-state when they applied for admission to the University, they were permanently classified as nonresidents. The statute required non-resident students to pay a higher, out-of-state tuition. The statutory scheme did not permit either student to demonstrate that they had become bona fide Connecticut residents entitled to reclassification as in-state students.

The State attempted to justify the statute's permanent and irrebuttable presumption on three grounds. First, that permanently classifying out-of-state enrollees as non-residents guaranteed that bona fide in-state students were fully subsidized. Second, that administrative certainty and cost efficiency favored the scheme. Third, that the State could reasonably favor students from Connecticut who had, or whose parents had, paid taxes to the state.

The Court was not persuaded. Rejecting each argument, the Court pointed to inherent inconsistencies and alternative means of achieving the State's objectives. The Court found that plaintiffs

12. Id. at 445.
13. Id. at 442.
14. Id. at 448.
15. Id.
16. Id.
17. Id. at 451.
18. Id. at 449.
adequately demonstrated their intent to remain in Connecticut, even if they did apply to the University from out of state. They established year-round homes in the state, got drivers’ licenses, registered their vehicles, and registered to vote. The Court found that rather than ensuring that bona fide residents were receiving their full subsidies from the state, the statutory scheme guaranteed that these two bona fide residents did not receive their full subsidies. The Court found that locking in a student’s residential status based on when and from where she applied was wholly unrelated to the State’s objective.

Secondly, while acknowledging the value of speed and efficiency, the Court concluded that administrative ease and certainty could not, by itself, avoid invalidity on Due Process grounds. The fact that reasonable alternatives existed for determining which applicants or students were bona fide residents caused the State’s standards to be unconstitutional.

Finally, the Court dismissed the State’s argument, that it could presume that some applicants had made no tax contributions to the state based on the address from which they applied, as an arbitrary denial of Due Process. The Court described a hypothetical student from Connecticut whose parents were lifelong Connecticut residents, but the student left the state to attend college and established residency in another state. In such a scenario, the parents, at least, had never stopped paying taxes in Connecticut, yet the student would be permanently classified as an out-of-state resident when applying for graduate school. Without making any effort to ensure that an applicant was an established resident, the State’s criterion was arbitrary and unconstitutional.

The Court recognized a legitimate state interest in maintaining the quality of public universities and the right of bona fide residents to attend such institutions on a preferential basis. Accordingly, the

19. Id.
20. Id.
21. Id.
22. Id.
23. Id. at 451.
24. Id.
25. Id.
26. See id. at 450.
27. Id.
28. Id. In addition to concluding that the residency requirement violated Due Process, the Court questioned the law’s legitimacy under Equal Protection principles, citing Carrington v. Rush, 380 U.S. 89, 96 (1965), and Dunn v. Blumstein, 405 U.S. 330, 354 (1972).
29. Vlandis, 412 U.S. at 453. To illustrate, the Court alluded to a Minnesota residency standard it had summarily affirmed two years earlier, in Starns v. Malkerson, which stated
Court concluded that it would permit a state to establish a reasonable criteria for in-state status of students to be sure that those entering public universities from out of state solely for educational purposes could not take advantage of in-state tuition rates. One such reasonable standard, that had already been adopted by the Connecticut Attorney General in the midst of the appeal, was that classifications would be considered on a case by case basis, including as relevant criteria year-round residence, voter registration, place of filing of tax returns, driver’s license, vehicle registration, marital status, and employment.

Significantly, the majority’s analysis acknowledged the Equal Protection analysis that was concurrently developing. Quoting from Shapiro:

"Even if we accepted the State’s argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment... That reasoning... “would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection... [and] permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of State services.”

The Court implied that the Equal Protection analysis may be, in some circumstances, applicable to durational residency requirements for tuition. Even though access to police and fire services are arguably basic necessities, access to libraries and parks are almost certainly not. Access to public universities would fall within the general category of state services, which the Court expressly protects. However, by relegating the discussion to a footnote, the majority’s lack of clarity sent an ambiguous signal to lower courts that access to higher education might not fall within the area of fundamental rights to which the Equal Protection analysis applies.

Justice Marshall, in concurrence, doubted whether a one-year residency requirement for in-state tuition residency laws could pass
Equal Protection scrutiny, because of "well-established principles . . . which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents."\textsuperscript{36} Justice Marshall, joined by Justice Brennan, agreed that the Connecticut statute violated Due Process, but reserved his decision of what constituted a reasonable standard for a case in which the issue was "squarely presented."\textsuperscript{37}

So, after \textit{Vlandis}, a state can establish reasonable criteria for in-state status to make certain that students who are not bona fide residents of the state do not receive the benefit of preferential tuition rates.\textsuperscript{38} As long as an out-of-state applicant has the opportunity to demonstrate that she has become a bona fide resident, and that she did not come to the state solely for educational purposes, the statute \textit{will not} presumably violate Due Process.\textsuperscript{39}

\textbf{B. Due Process in California?}

Turning to the residency rules for public universities in California, there is a strong argument that the requirements provided are both arbitrary and unreasonable. First, the Code mandates that a student live in the state for one year to claim access to in-state tuition.\textsuperscript{40} Second, the Code requires students, even those who have met the one-year test, to be financially independent from their parents for three years.\textsuperscript{41}

Applying the rule from \textit{Vlandis}, the California statute appears to be unconstitutional on its face. First, the one-year durational requirement is not one of several factors considered. Rather it is the threshold requirement that must be met before other relevant criteria are even considered.\textsuperscript{42}

Second, the statute is only rebuttable in the sense that an out-of-state student can appeal his residency determination after one year. However, during the student's first year of college, the non-resident status cannot be challenged, even if the student has already established an intent to remain in the state permanently after graduation by getting his driver's license, vehicle registration, voting registration, a permanent year-round address, or even purchasing property.\textsuperscript{43} Moreover, financial independence is completely unrelated to whether a student demonstrates an intent to become and remain a

\textsuperscript{36} Id.
\textsuperscript{37} Id. at 455 (Marshall, J., concurring).
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See \textsc{Cal. Educ. Code} §§ 68071, 68017 (West 2001).
\textsuperscript{41} Id. § 68044.
\textsuperscript{42} Id. § 68017.
\textsuperscript{43} Id.
bona fide resident. The stringent demands of the California law can be, for many out-of-state students, impossible to overcome while enrolled. 44

Since reasonable alternatives are available for determining bona fide residence, apart from arbitrary durational and financial requirements, it seems that the California tuition residency requirements are a denial of Due Process under the analysis set forth by the Supreme Court in Vlandis v. Kline.

II. Durational Residency Requirements and the Equal Protection Clause

A. Shapiro and Its Progeny

Before the Supreme Court addressed durational residency requirements for tuition, it examined the constitutionality of durational residency requirements in other contexts and created an analytical framework based on Equal Protection principles. The modern analysis of durational residency requirements began in Shapiro v. Thompson, when the Supreme Court established a relationship between the right to interstate travel and the Equal Protection Clause. 45 The framework created in Shapiro would ultimately be used to gauge the constitutionality of durational residency requirements in an array of contexts. 46

In Shapiro, the Court reviewed statutes from Connecticut, Pennsylvania, and the District of Columbia that imposed one-year durational residency requirements on new citizens before they became eligible for welfare benefits. 47

The Court found that the specific objective of the statute was to keep poor people out of the state. 48 Though well suited for its purpose, inhibiting the migration of the poor was constitutionally impermissible, as an infringement on the right to travel, a fundamental right. 49 Accordingly, the Court applied strict scrutiny

44. A student who moves to California immediately after graduating from high school, with the intention of permanently residing there, will not be eligible for in-state tuition until his fourth year of enrollment, even if he resides there year round, has a driver's license, and has registered to vote.
46. Id. (The Shapiro framework was subsequently applied to voting restrictions, Dunn v. Blumstein, 405 U.S. 330 (1972); to medical care, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); and to boat mooring privileges, Hawaii Boating Ass'n v. Water Transportation Facilities Division, 651 F.2d 661 (9th Cir. 1981)).
47. Shapiro, 394 U.S. at 618.
48. Id.
49. Id. The right to travel has been grounded upon the Privileges or Immunities Clause of Article IV, Section 2, in Paul v. Virginia, 8 Wall. 168, 180 (1869), and Ward v.
analysis and struck down the residency requirements for welfare benefits.\textsuperscript{50}

Limiting the reach of its holding, the Court disclaimed the effect of its decision on cases involving voting, professional licensing, and "tuition-free education."\textsuperscript{51} Presumably, the Court was indicating that it would address those situations when presented with them directly, stating that "such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel."\textsuperscript{52}

Three years later in \textit{Dunn v. Blumenstein}, the Court addressed a statute that prohibited new residents of Tennessee from voting, in state elections until they had been residents of the state for one year, in other words, a durational residency requirement to vote.\textsuperscript{53} The Court held that the durational residency requirement classified residents based on recent travel to Tennessee, and thus, directly impinged on the right to interstate travel.\textsuperscript{54}

Citing \textit{Shapiro}, the Court made clear that even if the residency requirement was not designed to deter travel, and, in fact, does not deter travel, the crucial consideration was whether the residency requirement penalized the right to travel.\textsuperscript{55} The Court reaffirmed that any classification penalizing the right to travel triggers strict scrutiny.\textsuperscript{56}

Although \textit{Dunn} did not expressly discuss durational residency requirements for tuition at public universities, the discussion addressing the relative value of waiting periods in the context of voting is insightful.\textsuperscript{57} Specifically, the Court stated that objective information relevant to the question of bona fide residency is easily confirmed and in the context of the State's interest in preventing voting fraud, thirty days was sufficient, while three months or one year was too much.\textsuperscript{58} In other words, the Court distinguished between legitimate residency requirements, which, when appropriately defined and uniformly applied, would withstand close scrutiny, and durational


\textsuperscript{50} \textit{Shapiro}, 394 U.S. at 638.
\textsuperscript{51} Id. at 638 n.21.
\textsuperscript{52} Id.
\textsuperscript{53} \textit{Dunn}, 405 U.S. at 331.
\textsuperscript{54} Id. at 338.
\textsuperscript{55} Id. at 340.
\textsuperscript{56} Id. at 342.
\textsuperscript{57} See id. at 348.
\textsuperscript{58} Id.
residency requirements, imposed on bona fide residents, which are more suspect. 59

The Court continued to develop the right to travel/Equal Protection analysis in *Memorial Hospital v. Maricopa County.* 60 There, an Arizona statute denied county-funded, non-emergency medical care to indigent residents who had not lived in the state for at least one year. 61 Justice Marshall outlined the factors used to gauge a law's impact on the right to travel. 62 Though the degree of impact required to trigger strict scrutiny was not clear, the primary consideration was, again, whether the residency requirement penalized the right to travel. 63 Justice Marshall found that, though the right to free medical care is not a fundamental constitutional right, it was as much a "basic necessity of life" as welfare assistance. 64 Withholding free medical care from a certain group of bona fide residents, those that had been in the state for less than twelve months, was an invidious classification that penalized the right to travel. 65 Such a classification could only be justified by a compelling state interest, a burden the defendant was unable to meet. 66

*Shapiro* and its progeny indicate that statutes imposing durational residence requirements as prerequisites to the receipt of a fundamental right or a basic necessity penalize the right to travel and are, therefore, subject to strict judicial scrutiny. While the Court has not directly addressed the full scope of the right to travel/Equal Protection analysis, the distinction between "basic necessities" or fundamental rights, and merely "important interests," like higher education, may leave newly arrived university students out of the Equal Protection strict scrutiny analysis. Even if durational residency requirements for tuition deter interstate migration, such statutes do not necessarily penalize the right to travel because the Supreme Court has not recognized a fundamental right to higher education. 67

**B. Starns and Sturgis**

*Starns v. Malkerson* was a district court case decided early in the development of the *Shapiro* framework. 68 The Court had summarily

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59. *See id.* at 343.
61. *Id.* at 251.
62. *Id.* at 256.
63. *Id.* at 257.
64. *Id.* at 259.
65. *Id.* at 269.
66. *Id.*
affirmed the case prior to *Vlandis*, though Justice Marshall later expressed doubt about the affirmation.\(^6^9\)

The issue in *Starns* was whether it was constitutionally permissible for a state to create a "rebuttable" presumption that any person, who had not continuously resided in that state for one year immediately prior to becoming a student at a state university, was a non-resident for tuition purposes.\(^7^0\) The plaintiffs, two University of Minnesota students, contended that the statute created two classes of residents required to pay different tuitions based solely on the length of time they had resided in the state.\(^7^1\) They argued that such a classification was unreasonable and a violation of the Equal Protection Clause.\(^7^2\)

The plaintiffs, relying on *Shapiro*, asserted that there was a fundamental right at issue—the right to interstate movement—and thus, strict scrutiny was the proper standard.\(^7^3\) They argued that the Minnesota statute had the effect of deterring people from moving from one state to another in order to establish residency.\(^7^4\)

The court began its analysis with a discussion of the relevant standards to be applied to discriminatory statutes.\(^7^5\) When a statute infringes on an individual's fundamental rights, the appropriate test is whether such a distinction is necessary to promote a compelling state interest.\(^7^6\) However, when a fundamental right is not affected, the classification merely needs to have a rational relation to the state interest.\(^7^7\)

The three-judge district court distinguished *Shapiro* in two respects. First, the restriction in *Shapiro* was a welfare restriction that served to exclude poor people who needed relief and thus served an unjustifiable purpose.\(^7^8\) Second, the statute in *Shapiro* effectively denied a basic necessity of life to needy residents and, thus, the deterrent effect on the needy was "readily apparent."\(^7^9\) In contrast, the court held that the Minnesota statute had no asserted purpose of deterring out-of-state students.\(^8^0\) Nor did the statute have an

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71. Id. at 236.
72. Id.
73. Id. at 237.
74. Id.
75. Id. at 238.
79. Id. at 238.
80. Id. at 237.
“appreciable . . . chilling effect” on out-of-state students since more than ten-percent of the enrolled students at the University of Minnesota were nonresidents.81 Furthermore, while the court “fully recognize[d] the value of higher education,” it refused to equate that with food, shelter, and clothing.82 The court concluded that the case did not involve an infringement of a fundamental right, and therefore the statute would not be subjected to strict scrutiny analysis.83

Importantly, the court recognized that the statute was irrebuttable on a practical level, as well as economically discriminatory.84 Because the statute required an individual to reside for one year in the state for primarily non-educational purposes, unless a student could meet the exacting criteria of living in the state for a year prior to attending classes, that student would be permanently classified with an out-of-state status.85 The court’s discussion exposed the constitutional uncertainty of the statute based on its blatant imperfections and logical flaws.86

Oddly, the court seemed to accept the State’s reasoning, that it was attempting to achieve partial cost equalization between individuals who had contributed to the state’s economy through employment, tax payments, and expenditures.87 The Starns court reasoned that the State had a valid interest in providing tuition-free education to individuals whose year long residency in the state prior to enrollment would reasonably signify an intention to remain in the state after graduating from the university and make an even greater contribution to the state’s economy.88 The court then held that a distinction based on one-year of residency in the state prior to enrollment was rational, not arbitrary or unreasonable, and not a violation of Equal Protection.89

One recalls Vlandis, which was decided three years later, where the Supreme Court dismissed the same tax equalization rationale, not only because it was an arbitrary violation of Due Process, but because such an apportionment would present “grave” Equal Protection problems.90 The concurrence of Justices Marshall and Brennan cast even more doubt on the reasoning in Starns, given the further

81. Id. at 238.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id. at 239.
87. Id.
88. See id. at 240-41.
89. Id.
development of the Equal Protection analysis, which prohibited residency restrictions for voting.\textsuperscript{91}

In 1973, the Supreme Court summarily affirmed another case involving a tuition residency requirement.\textsuperscript{92} In \textit{Sturgis v. Washington}, the statute had nearly identical requirements as the statute in \textit{Starns}.\textsuperscript{93} Noting the similarity of the provisions of the statute, the district court adopted the reasoning in \textit{Starns}, which the Supreme Court had already affirmed, without opinion.\textsuperscript{94} Because there was no recognized fundamental right to higher education, strict scrutiny was not applicable.\textsuperscript{95} Accordingly, the asserted purpose of basing favorable tuition status on previous tax contributions to the state bore a sufficiently reasonable relation to the statute.\textsuperscript{96} The court also referred to \textit{Vlandis}, which in a footnote had alluded to the statute in \textit{Starns} as a possible example of a reasonable durational residency requirement.\textsuperscript{97} Ironically, the court quoted language from \textit{Vlandis}, yet still failed to recognize the specificity of its direction or the \textit{Starns} court's own finding that the statute was, in fact, irrebuttable and could rarely be met while the student was in attendance at the University.

The court's misguided analysis did not go unchecked. Judge William G. East, the sole dissenter, identified the flaws of the majority opinion. Judge East disagreed with the reasoning in \textit{Starns}, which he believed had misread precedent and had "nurtured three misconceptions into its untenable approval of the durational residency requirement."\textsuperscript{98} Judge East acknowledged that the State of Washington had no obligation to provide its residents, at public expense, with any program of higher education, but that when it chose to do so, it was obligated to provide that service to all of its residents on an equal basis.\textsuperscript{99} He stated that the proper query for the court was whether the statute granted plaintiffs "equity of legal privileges with all [residents] under non-discriminatory laws."\textsuperscript{100}

Judge East also noted the important distinction between the statute at issue, which fixed tuitional amounts to be paid by students so that the State could recoup its own expenses incurred for providing

\textsuperscript{91} \textit{Id.} at 455, \textit{see also} Dunn v. Blumstein, 405 U.S. 330, 330 (1972).


\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} at 41.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at 42 n.4.

\textsuperscript{98} \textit{Id.} at 43 (East, J., dissenting).

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}
the program, and a "reasonable durational residence requirement" used to evidence bona fide residency.\textsuperscript{101} He found that the Washington statute was "not intended nor geared to be a residence evidencing or purity measure, nor could a period of one year be logically determined to be a reasonable period of time for such a purpose."\textsuperscript{102}

Finding that the statute divided the state's higher education population into two classes, economically favoring one and discriminating against the other, as conceded by \textit{Starns}, Judge East concluded that the proper analysis was directed by \textit{Dunn} and looked to three factors.\textsuperscript{103} First, the character and the basis for the class discriminated against, i.e., residents of less than one year; second, the individual interests affected by the classification, i.e. the economic burden or penalty placed upon the new, recently arrived resident; lastly, the interests of the state asserted in support of the classifications, i.e. recouping the expenses incurred in providing the program.\textsuperscript{104} Analyzing the statute in light of these factors, he found that whether one looked at the economic discrimination against the new residents or the benefit withheld by the interference with their constitutional right of interstate travel, the heightened standard of strict scrutiny was required.\textsuperscript{105} Under strict scrutiny, the State of Washington's interest in fiscal integrity was not sufficiently compelling to support the discriminatory classification provided for by the statute.\textsuperscript{106}

After \textit{Sturgis}, despite the vigorous dissent of Judge East, it seemed that durational residency requirements for tuition purposes were unanimously slated for review under a rational basis test. Despite repeated attempts by plaintiffs to assert their Equal Protection rights in conjunction with their fundamental right to travel, the courts refused to recognize higher education as a fundamental right that merited strict scrutiny.\textsuperscript{107} Nor were the courts prepared to acknowledge the effect that durational residency requirements had on the right to travel.\textsuperscript{108} While the case for strict scrutiny found strong support from Justices Marshall and Brennan and Judge East, the

\textsuperscript{101.} \textit{Id.}
\textsuperscript{102.} \textit{Id.} at 43 n.1.
\textsuperscript{103.} \textit{Id.} at 43.
\textsuperscript{104.} \textit{Id.}
\textsuperscript{105.} \textit{Id.}
\textsuperscript{106.} \textit{Id.}
\textsuperscript{108.} \textit{Sturgis}, 368 F. Supp. at 43.
Supreme Court has never squarely addressed the issue of tuition residency requirements in relation to the Equal Protection clause.

C. Eastman v. University of Michigan

The opinions discussed above primarily focused on the reasonableness of the purpose of the legislative intent behind the residency requirements, but provided little discussion as to whether a length of time of one year was in fact reasonable. The Court's guidance in Vlandis suggested that a one-year requirement would be valid as one element of other criteria used to determine a student's domicile or residency for tuition purposes.

In 1994, addressing the constitutionality of a Michigan tuition residency requirement, the Sixth Circuit questioned the statute's legitimacy, focusing on whether a one-year requirement was reasonably related to the State's interest in restricting preferential tuition rates only to domiciliaries. Like the statutes in Starns and Sturgis, the Michigan statute required students seeking in-state tuition to be domiciled in the state and to have resided there continuously for not less than one year.

The court first offered a brief description of the distinction between the concepts of domicile and residence. A domicile is a "true, fixed and permanent home," while a residence requires both physical presence and an intention to remain for some indefinite period of time, "but not necessarily permanently." The court found that the University Residence Regulations inappropriately equated residence with domicile. The court then went on to distinguish between domicile requirements and durational requirements, the former being a legitimate use of state police power, and the latter being an infringement on one's Equal Protection rights.

The court stated that a bona fide residence requirement would simply require that a person establish residence before demanding the services that are restricted to residents, while "a durational requirement imposed on a domiciliary or bona fide resident... would run afoul of the Equal Protection Clause." The court found that

110. Id. at 672.
111. Based on the various judicial interpretations of the ambiguous "primarily for non-educational purposes", one can presume that an individual could attain domiciliary status as a student, provided she lives there for the entire year, and performs acts indicative of a resident, like getting a driver's license and voter registration changed to the new state, and signing a lease in the state.
112. Id. at 673 (quoting BLACK'S LAW DICTIONARY 484 (6th Ed. 1990)).
113. Id.
114. Id.
115. Id.
domicile can be obtained without the passage of any particular period of time and that when a durational requirement is imposed on a person who is a domiciliary, or bona fide resident of the state, it is contrary to the legitimate state interest of restricting preferential tuition rates to domiciliaries. The court ultimately remanded the case back to the district court to clarify the Regulation’s distinction between domiciliaries and bona fide residents. The court’s directive was clear: one can establish domicile, as a bona fide resident, without having stayed for an arbitrary length of time, like one year, and durational residency requirements imposed on domiciliaries or bona fide residents lack even a rational basis and thus violate the Equal Protection Clause.

D. California Educational Code and Equal Protection

As is evident from the above cases, durational residency requirements for in-state tuition have been almost universally declared constitutional. Until higher education is recognized as either a fundamental right or some form of basic necessity, durational residency statutes will never be subject to strict scrutiny. However, even without attaining the highest level of scrutiny, it seems plausible that some tuition residency requirements, particularly those that require one-year of residence before obtaining preferential tuition rates, like the California statute, may still be struck down as unconstitutional violations of Equal Protection.

When analyzed under rational basis review, the California statute’s requirements, even if presumptively valid, are unreasonable. Requiring a student to reside in the state for at least a year, before even applying for in-state classification, without offering any opportunity to demonstrate bona fide residency and an intent to remain in the state beyond graduation, is arbitrary. Adjudging applicants on an individual basis, rather than by mass classification, would adequately enable universities to balance their own objectives without violating the constitutional rights of students. Accordingly, under the authority of Shapiro, Dunn, Vlandis, and Sturgis, the California statute is susceptible to challenge under rational basis review.

116. Id.
117. Id.
118. Id.
III. Durational Residency Requirements and the Fourteenth Amendment's Privileges or Immunities Clause

The Supreme Court's decision in *Saenz v. Roe* was remarkable because it was based on the Privileges or Immunities Clause of the Fourteenth Amendment—a clause considered long dead in American jurisprudence. In *Saenz*, the issue was the constitutionality of a statute similar to the one challenged in *Shapiro* thirty years earlier. This time, the Supreme Court unpredictably relied on, and perhaps resurrected, the Privileges or Immunities Clause to strike down a statute that could have been invalidated under the well-established Equal Protection analysis. The Privilege or Immunities Clause was invoked for only the second time since its fate was sealed in the *Slaughter-House Cases*.

*Saenz v. Roe*

In 1992, California enacted a statute that limited the amount of welfare available to new residents of the state to the maximum amount they would have received in their prior state of residency. The statute prevented newly arrived residents of California from receiving the state's welfare benefits until they had been living there for one year. The original case began in 1997, when two California residents challenged the constitutionality of the durational residency requirement.

The State argued that the statute saved almost eleven million dollars per year in welfare costs. Moreover, the cost savings represented an appropriate exercise of budgetary authority as long as the durational residency requirement didn't penalize the right to travel. The district court disagreed and enjoined the implementation of the statute, finding that in the proper comparison between new and old residents, the statute served to penalize the new residents. After the Court of Appeals affirmed the case, the Supreme Court granted certiorari.

121. *Id.* at 502; Lemper, *supra* note 119, at 295.
123. *Saenz*, 526 U.S. at 492.
124. *Id.; see also* CAL. WELF. & INST. CODE § 11450.03 (West 1999).
126. *Id.* at 497.
127. *Id.*
128. *Id.* at 494.
129. *Id.* at 495.
Rather than using Shapiro and Equal Protection as the framework to determine whether the statute penalized the right to travel, the majority invoked the Privileges or Immunities Clause of the Fourteenth Amendment, which protects the right of newly arrived citizens to enjoy the same Privileges or Immunities enjoyed by other citizens of the state.130 Based on this rejuvenated constitutional clause, the majority affirmed the decisions of the lower courts.131

Given that the issue to be resolved in Saenz was much the same as Shapiro, the Court could have used the existing Equal Protection analysis. Justice Stevens justified not using Shapiro because the standard of scrutiny to be applied under the circumstances was debatable and not at all clear.132 It was apparent that the Court had been grappling with an underlying conflict of finding a more explicit source in the Constitution in which the fundamental right to travel could be grounded.133 The Court thus chose to reevaluate its jurisprudence in hopes of securing a more stable footing on which to base the right to travel.134

Justice Stevens identified three components of the right to travel. They include (1) the right of a citizen of one state to enter and leave another state, (2) the right to be treated as a welcome visitor when temporarily present in another state, and (3) the right to be treated like a citizen in a state when one chooses to permanently move there.135 Focusing on the third component, Justice Stevens held that, “despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions of the Slaughter-House Cases, it has always been common ground that this Clause protects the . . . right to travel.”136

He went on to say that a citizen’s two political capacities, federal and state, reinforced the claim that newly arrived citizens have the same rights as others who share their citizenship.137 Neither a rationality standard nor an intermediate standard of review was sufficient to judge the constitutionality of a state law that discriminated against some of its citizens because they are domiciled in the state for less than a year.138 “The appropriate standard may be

130. Id. at 502.
131. Id. at 511.
132. Id. at 498.
134. See Saenz, 526 U.S. at 493.
135. Id. at 501.
136. Id. at 503.
137. See id.
138. Id.
more categorical than that articulated in *Shapiro*, but it is surely no less strict.\footnote{139} Moreover, since the right to travel embraces a citizen's right to be treated equally in his new state of residence, a discriminatory classification is itself a penalty, regardless of the severity with which it affects the right to travel.\footnote{140}

Narrowing the reach of its holding, Justice Stevens then proceeded to create a distinction among other durational residency requirements.\footnote{141} He emphasized the relative immediacy of the welfare benefit, noting that because whatever benefits received would be consumed in California, there was no danger that they could be received and carried away to another state, as are other, more portable benefits.\footnote{142} In contrast, an individual might establish residency just long enough to obtain "readily portable" benefits, such as a divorce or a college education, and then move away to another state.\footnote{143} By expressly distinguishing college education, Justice Stevens may have quietly suffocated any hope that durational residency requirements for in-state tuition might be declared unconstitutional under a new Privileges or Immunities analysis.

Dissenting, Justice Rehnquist criticized the reasoning behind the majority's "readily portable" distinction, and argued that it provided little real guidance to lower courts that might apply the rationale in the future.\footnote{144} Specifically, he argued that tuition subsidies are "consumed" in a state as much as any welfare benefits are, and it is the benefit of the education, rather than the subsidy itself, that an individual retains.\footnote{145} Similarly, welfare benefits are consumed in a state while granting an individual the means to learn job skills or receive an education.\footnote{146} Justice Rehnquist's criticism was made in support of his belief that the state law in *Saenz* was, in fact, a legitimate use of police power.\footnote{147} However, it is his reasoning, rather than his conclusion, that lends strength to the argument that a durational residency requirement for college tuition could still be challenged under the Privileges or Immunities Clause of the Fourteenth Amendment.

The true promise of *Saenz v. Roe* for durational residency requirements for in-state tuition is unclear. While the Supreme Court's decision could conceivably breathe new life into the

\begin{footnotes}
\footnote{Id.}
\footnote{Id. at 504-05.}
\footnote{Id. at 505.}
\footnote{See id. at 505.}
\footnote{Id.}
\footnote{Id. at 511-12 (Rehnquist, J., dissenting).}
\footnote{Id. at 519.}
\footnote{Id.}
\footnote{Id. at 520.}
\end{footnotes}
Fourteenth Amendment’s Privileges or Immunities Clause, the extent of its effect on constitutional law remains untested. Scholars who have written about the implications of the case do not expect a substantial impact. One scholar, outlining both the history of the Privileges or Immunities Clause and the vision of the Rehnquist Court, predicts that the effect of the decision will be less of an expansion of recognized fundamental rights than an inauguration of the present Court’s peculiar jurisprudence. In another article, Professor Laurence Tribe discusses whether there might be a revival of the Privileges or Immunities Clause that could eventually mean a transplantation of substantive Due Process rights. He implies, however, that the decision is more emblematic of the present Court’s attention to structure rather than substance, and doubts that Saenz will bring about a significant change in the future.

The constitutionality of the California statute under a privileges or immunities analysis is premised on the Court’s understanding of the immediacy and portability of higher education. When seen as a portable benefit that can be gained in one state and later taken away to another state, presumably to the first state’s detriment, the important interest in higher education will probably not provide all the nations’ students with access to the same public universities. However, when viewed as a more immediately consumed benefit, or a basic right, access to preferential tuition rates is a privilege that, when provided by a state, should be provided to everyone equally.

Conclusion

Durational residency requirements for in-state tuition present some important constitutional questions. While the United States Supreme Court has addressed such requirements only in a limited sense, the issue has been presented before various lower courts, and twice summarily affirmed by the Supreme Court. Durational residency requirements for in-state tuition have been challenged as violative of Due Process and Equal Protection. Thus far, the only standard of review ever applied by the courts is rational basis. One district court, in the Sixth Circuit, found serious constitutional problems with a Michigan durational residency requirement. Even

148. Lemper, supra note 119, at 298-306.
150. Id. at 195.
152. Eastman, 30 F.3d at 673-74.
though the restrictions imposed on individuals by in-state tuition statutes are often unreasonable, arbitrary, and implicate the right to travel, no court has invalidated such statutes on Equal Protection or Due Process grounds. Recently, the Supreme Court used the Fourteenth Amendment's Privileges or Immunities Clause to invalidate a residency requirement for welfare benefits. That decision provides another angle from which to challenge durational residency requirements for in-state tuition, but thus far it is an angle that remains untested.

In a recent case, Markowitz v. Board of Directors Hastings College of the Law, a San Francisco Superior Court judge granted the defendant's motion for judgment on the pleadings in a former student's challenge to the Hastings residency policy—the equivalent of California Education Code. The plaintiff, despite obtaining a California identification card, getting a job, paying taxes, and being summoned to serve as a juror, was unable to gain residency status from Hastings because he refused to disclose the financial information of his parents, a requirement of the state statute for proving financial independence.

The defendant argued that the existing tuition system "is a rational and legitimate expression of California's interest in financing, operating and maintaining its publicly financed institution of higher education and providing residents of the state with a higher education at a lower tuition rate." The defendant further asserted that California has a legitimate interest in not providing a financial windfall of lowered tuition to non-residents. On a basic level, the State and Hastings' justification was a matter of allocating tax dollars.

Despite the disposition of that specific case, the State's rationale, when used broadly to classify enormous groups of out-of-state applicants, is both logically flawed and constitutionally questionable. As stated in Vlandis, a conclusive presumption of non-residence, based on a student's out-of-state address, is "wholly unrelated" to the objective of cost equalization. Furthermore, any administrative ease achieved through mass classifications of out-of-state students should not save a conclusive presumption of non-residence from invalidity on Due Process grounds.

Under Equal Protection principles, the State's designation of Markowitz as a non-resident, based on his refusal to submit his parents' tax returns, was also unreasonable. Markowitz demonstrated

155. Id.
156. Id.
157. Id.
an intent to remain in California after his graduation from Hastings when he moved to the state, got a job, got a California identification card, and paid his own taxes. Whether his parents also paid California taxes is unrelated to the State’s tax allocation concerns and an irrational manner of dealing with a new resident of the state. It also seems unlikely that in his first year of law school, the time it would take to meet the threshold durational requirement, Markowitz would have had any taxable income to contribute to the state. Therefore, California’s interest in tax allocation is wholly unrelated to the residency presumptions and thus, violates the Equal Protection clause, even under the deferential rational basis standard of review.

The only question that remains is whether the Privileges or Immunities Clause will provide students like Markowitz with any more relief from the inequities of the California Education Code. While new recognition of privileges or immunities might seem promising, the Supreme Court’s decision in Saenz appears to foreclose any opportunity for equal distribution of in-state tuition benefits. However, with that clause alive again, it is an excellent time for the courts to squarely examine the status of higher education in the constitutional spectrum and to properly address the importance of providing all post-secondary education students with equal and affordable access to the nation’s public universities.